The Transformation of EU External Economic Governance

Law, Practice, and Institutional Change in Common Commercial Policy after Lisbon

David Kleimann

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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European University Institute
Department of Law

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I confirm that chapter VI was jointly co-authored with Ms Gesa Kuebek and I contributed 60% of the work. A longer version has been published as an EUI Working Paper (EUI RSCAS; 2016/58; Global Governance Programme-238). A longer version will be published in '45(1) Legal Issues of Economic Integration (2018)'.

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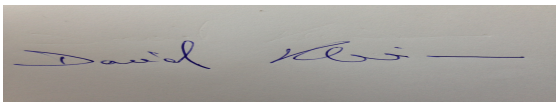

The Transformation of EU External Economic Governance:

Law, Practice, and Institutional Change in Common Commercial Policy after Lisbon

The Laeken Council Declaration of 2001 committed the European Community to a constitutional reform that aimed at enhancing the legitimacy of EU governance through "more democracy, transparency, and efficiency". In the area of Common Commercial Policy (CCP), the coming into force of the Treaty of Lisbon on December 1, 2009, responded to the Laeken Declaration with the most extensive reform in history and substantially amended applicable provisions on decision-making, scope of EU exclusive competence, objectives, and principles. Against the benchmark set out by the Laeken Council objectives, this study examines the law, practice, and quality of institutional change in CCP governance after Lisbon. To this end, the study advances a twofold comparative institutional analysis that is based on a transaction-cost approach to the understanding of legal, political, and informal institutions that govern the CCP and EU external economic relations more broadly. The study finds that the *reallocation of horizontal competences* among EU institutions through the empowerment of the European Parliament has generally decreased the process efficiency of the CCP. At the same time, it has markedly decreased the cost of political participation for public and private stakeholders and introduced increasingly effective democratic control to the now bicameral system that governs the CCP in the Lisbon era. Parliamentary involvement, moreover, has radically enhanced process and substantive transparency and opened a space for public deliberation of external economic policy. Opinion 2/15 of the Court of Justice of the European Union has, secondly, confirmed the Treaty-induced tectonic shifts in the *allocation of vertical competences*. It is argued that the Court's Opinion sets incentives for a fundamental change of the institutional practice that governs the conclusion of EU external economic agreements. Ending the tradition of 'mixed' agreements in favor of 'EU-only' treaty conclusion would further approximate the achievement of all three Laeken Council objectives and render EU external economic governance more efficient, effective, representative, and legitimate. In order to fully employ the democratic potential of 'EU-only' CCP governance, however, such practice will require the reinforcement of national parliamentary engagement in that process.

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Table of Contents

The Transformation of EU External Economic Governance

Law, Practice, and Institutional Change in Common Commercial Policy after Lisbon

"Rights do not justify themselves, nor do they possess inherent legitimacy, no matter how hard one squints at precedents or the text of the Constitution. Their value, rather, is to be judged in terms of their ability to advance underlying social purposes."

Edward L. Rubin[1]

[1] Rubin, Edward L. (1996): p1412

I. Introduction and Overview

The Declaration of the Laeken Council in 2001 committed the European Union (EU) to a constitutional reform that aimed at enhancing EU legitimacy through "more democracy, transparency, and efficiency" of its institutions.[2] In the area of EU Common Commercial Policy (CCP), the coming into force of the Treaty of Lisbon on December 1, 2009, responded to the Laeken Declaration with the most radical polity reform in its history by amending the provisions applying to decision-making procedures, competences, objectives, principles, and by mandating an overhaul of EU secondary law that would reform the rules governing the delegation and control of policy implementation. The quasi-constitutional reform of the formal CCP institutional framework set in motion a process of both formal and informal institutional change that has materialized in Brussels, Strasbourg, Luxembourg, and – albeit more slowly – in member states' capitals over the past eight years. Against this background, this study scrutinizes the law, practice, and quality of institutional change in post-Lisbon Common Commercial Policy governance. The study's focus on the phenomenon of 'institutional change', which describes a broader socio-economic process than the constitutional reform of EU external economic governance, aims at taking account of the origin and effects of primary law reform and avoids the explanatory shortcomings of a purely formalistic approach to constitutional analysis.

The amendments of the primary legal institutions of EU Common Commercial Policy have altered every single provision – and thus the formal constraints - under which the Union's political institutions operate, cooperate, and legislate. These changes *a priori* have the potential to alter the degree of process efficiency and to affect the overall efficacy of CCP governance. But the novel institutional framework does not only have implications for the process efficiency and overall effectiveness of CCP formulation. The empowerment of a 'new' political institution to the decision-making process – notably the European Parliament with its specific structural characteristics - has changed the relative cost of political participation of all public and private stakeholders involved in CCP governance, with varying cost effects for distinct actors. The tectonic shift of competences induced by the Lisbon reform towards an ever more comprehensive scope of Common Commercial Policy,

[2] European Council (2001): *Presidency Conclusions, European Council Meeting in Laeken,* 14-15 December 2001.

moreover, may yet result in practice that can deliver an even more fundamental institutional change: Litigation over the vertical allocation of competences in the area of external economic governance in Opinion 2/15 has opened a window of opportunity to give meaning to the exclusive nature of the CCP through a practice of negotiating and concluding external economic agreements as EU-only instruments. Such practice would end the tradition of 'mixed' agreements in this area and limit the presence of member states political institutions in a mode of vertical subordination to the EU institutions governing the CCP and thus radically reduce the amount of veto-players involved in that process.

If compared to the pre-Lisbon institutional framework, the change in relative costs of political participation has the potential to generate enhanced and a more evenly distributed access to EU decision-making and thus may lead to the incorporation of changing configurations of economic and social interests that shape the economic incentive and value structure inherent in CCP legislation.[3] The reform of CCP governance, in other words, is not only about the efficiency, overall efficacy, transparency and democratic legitimation of political institutions and inter-institutional cooperation in the lawmaking process. It may also result in qualitatively different policy outcomes as the reform of the institutional framework changes the relative price of interest pursuit for various private and public actors.

The question of institutional design of polities is thus significant for the process efficiency and efficacy of political institutions, their cooperation in the legislative process, as well as for the normative quality of policy outcomes. As for the last point it has been argued that "institutional choice implicates goal choice": the distinct structural, cultural, and ideological features of political institutions that hold decision-making rights in the governance process and the informal institutions that evolve among them not only imply different degrees of stakeholder access, but also implicate a distinct treatment and weighing of stakeholder preferences by the members of the respective institution and can thus result in altered policy content, if compared to alternate primary institutional choices.[4]

On a related note, the constitutional reform of horizontal and/or vertical competence for governance may also lead to perceived changes of democratic legitimacy of that process and/or its outcomes. Legitimacy of governance, however,

[3] North, Douglass C. (1990): p111
[4] Shaffer, Gregory (2012): p609

cannot exclusively be derived from an analysis of formal legal endowments but requires an assessment of how such rights and obligations are exercised in constitutional practice – the *Verfassungsrealität.* In other words, an assessment of how the constitutional reform of the Lisbon Treaty has shaped process efficiency, transparency, and democratic governance necessitates an analytical approach that allows a qualification of the primary law in its institutional environment and context.

It remains the primary purpose of this study to examine the formal legal institutions that govern the CCP. Beyond positive legal analysis, the examination and attempted explanation of the relationship between primary legal reform and the broader concept of institutional change requires an integrated analytical approach. That approach ought to complement the analysis of the reform of the formal institutional framework with a theory of political institutions involved in the lawmaking process and the informal institutions that evolve among them. In this way, it is possible to improve the appreciation of how primary law reform can change the relative cost of political participation for different private and public stakeholders. Moreover, an analysis of political institutions in context of constitutional rights and informal arrangements can help to determine their relative effectiveness in transforming a given set of preferences into secondary legal institutions. In consequence, we may be better equipped with instruments that can evaluate how the reform of primary legal institutions has affected the normative characteristics of the governance process and output and the overall effectiveness of the reformed institutional framework to produce outcomes that pursue legitimate policy objectives.

This study scrutinizes the extent and quality of institutional change that the Lisbon reform of CCP governance has brought and brings about. The necessary positive analysis and normative assessment can result in valuable insights about the intended and unintended consequences of the reform for process efficiency, efficacy, transparency, democratic legitimacy and the normative quality of outcomes. The novel institutional design has the potential to effectuate changing costs of political participation and further result in altered specifications of property rights, economic incentives, and other social values set out in CCP legislation.[5] The post-Lisbon law, practice, and broader institutional change of CCP governance may thus contribute to determining the direction of socio-economic development of the European Union and

[5] North (1990): p112

a change of its external identity in the long run. The post-Lisbon primary institutional framework applicable to CCP governance, as well as the broader institutional change that it triggers, hence deserve close and rigorous scrutiny, as well as critical appraisal.

To this end, the study advances a twofold comparative institutional analysis that is based on a transaction-cost approach to the understanding of legal, political, and informal institutions that govern the CCP and EU external economic relations more broadly. The study, first, compares the allocation of horizontal competences in the pre-Lisbon and post-Lisbon scenarios and their exercise by the mandated political institutions. It is argued that the reallocation of horizontal competences among EU institutions through the empowerment of the European Parliament has generally decreased the process efficiency of the CCP. At the same time, it has markedly decreased the cost of political participation for public and private stakeholders - with distinct relative cost effects for diffuse and special interest advocacy - and introduced increasingly effective democratic control at the EU level. Parliamentary involvement, moreover, has radically enhanced process as well as substantive transparency and generated a space for public deliberation of CCP directions.

Secondly, the study examines the pre- and post-Lisbon allocation of vertical competences and their exercise. The Treaty-induced tectonic shifts in the vertical allocation of external economic competences have now been confirmed by Opinion 2/15 of the Court of Justice of the European Union. It is argued that the legal precedent that the Court has advanced sets the conditions for a fundamental change of the institutional practice that governs the conclusion of EU external economic agreements: ending the tradition of 'mixed' agreements in favor of 'EU-only' treaty conclusion can further approximate the achievement of all three Laeken Council objectives and render EU external economic governance more efficient, effective, representative, and hence more legitimate.

1. The Lisbon Treaty Reform of EU Common Commercial Policy in a Nutshell

The Lisbon Treaty amended every single EU primary law provision that applies to the CCP. Pending detailed analysis in the subsequent chapters, the most important amendments are summarized as follows in order of their significance for the purposes of this study. First, the amendment of the Treaty on the Functioning of the European Union (TFEU), and of Article 207 TFEU in particular, significantly elevates the

European Parliament's (EP) role in the legislative process vis-à-vis the European Commission and the Council of the European Union. The application of the Ordinary Legislative Procedure (OLP) to CCP framework legislation now places the EP on equal footing with the Council as a co-legislator in a policy area, in which the EP previously had no decision-making powers whatsoever.[6] Both political institutions now hold practically equal amendment and veto rights with respect to legislative proposals adopted by the Commission. Secondly, the reform of Article 207 TFEU, read in context of Article 218 TFEU, requires the EP's formal consent for the adoption of all trade and investment agreements that the Commission negotiates with third countries on behalf of the Council.[7] Moreover, the constitutional reform significantly extends parliamentary information rights concerning the content of ongoing negotiations of respective agreements.[8] Third, the Council may now act by qualified majority[9] in all instances that do not require treaty-prescribed unanimous decision.[10] Fourth, Article 207(1) TFEU consolidates the scope of exclusive EU competences: the EU-exclusive scope of EU Common Commercial Policy now formally extends to the 'second generation' fields of international commerce including foreign direct investment, trade in services, and trade-related intellectual property rights. Fifth, the Lisbon Treaty amendments rephrase the general objectives of the CCP,[11] formally integrate the CCP into the field of EU external action,[12] and thereby render CCP governance subject to EU external action objectives and principles.[13] Finally, Articles 290 and 291 TFEU create the primary legal framework for a new system of delegated and implementing acts that governs the implementation and specification of the CCP legislative acts: the treaty allocates strong control and monitoring rights to the EP in the area of delegated acts and mandates a secondary law reform of disciplines governing policy implementation in adherence to the OLP, i.e. under equal involvement of the Council and EP as co-legislators.

6 Article 207(2) TFEU
7 Article 207(3)(1) TFEU; Article 218(6)(v) TFEU
8 Article 207(3)(3) TFEU; Article 218(10) TFEU
9 Article 207(4)1) TFEU
10 Article 207(4)(3) and (4)(4) TFEU
11 Article 206 TFEU
12 Article 205 TFEU; Article 207(1) 2nd sentence TFEU
13 Article 21 TEU

2. Input and Output Legitimacy of Common Commercial Policy

The novel rights and obligations of the European Parliament with respect of the CCP can - in combination with the expansion of the material scope of the CCP to an ever broader realm of EU exclusive competence for the governance of its external economic relations - be regarded as the most significant of the listed treaty amendments. Viewed in context of the Laeken Council's call for enhanced democratic legitimacy, the empowerment of the EP contributes to the elimination of the long-standing democratic deficit of the CCP, which has led some observers to the conclusion that EU external economic governance – within the realm of the CCP - has now entered the 'post-Lockean era'[14] and could put an end to a situation where "democratic legitimation of international treaties is essentially lower than that of domestic legislation".[15] Until the entry into force of the Lisbon treaty in December 2009, EU framework and implementing legislation were only subject to decision by the Council. Only the elements of 'mixed' EU external economic agreements that fall into the scope of competences shared with the member states, or treaty content falling to exclusive member states competences, were subject to (national) parliamentary control. Therefore, pre-Lisbon CCP was arguably largely governed *for the people* – i.e. by unelected Commission officials and member states governments represented in the Council. Hence, from a perspective of formal input-oriented legitimation of EU public decision-making, the constitutional allocation of new rights and responsibilities to the EP in the area of the CCP formally strengthens EU governance *by the people*.

The 'parliamentarisation', or, framed differently, the input-oriented legitimation of EU governance through EP participation, however, does not come without doubt and critic. 18 years ago – and eleven years before the finalization of the Lisbon Treaty - Fritz Scharpf found that "there is no question that the Union is very far from having achieved the 'thick' collective identity that we have come to take for granted in national democracies – and in its absence, institutional reforms will not greatly increase the input-oriented legitimacy of decisions taken by majority rule".[16] Adding to Scharpf's lament, other political scientists have come to the related conclusion that the European Parliament's "link to the voters is weak".[17] The re-election of Members of the European Parliament (MEPs) is not dependent on their

[14] Hilpold, Peter (2013)
[15] Krajewski, Markus (2013): p69
[16] Scharpf, Fritz (1999): p9
[17] Hix, Simon and Bjorn Hoyland (2011): p54

political activities on behalf of voters, their parliamentary performance in general, or their political groups in the EP. In contrast, the re-election of MEPs remains contingent on national party politics, enabled by member states' electoral systems, which frequently give national party leadership the right to place candidates on (un)favourable positions of election lists.[18]

Reflecting associated concerns at the national level in an assessment of the democratic legitimacy of EU Common Commercial Policy post Lisbon in 2012, Krajewski anticipates that the "broadening of the scope of the common commercial policy by the Lisbon Treaty will lead to a disempowerment of the national parliaments." In reflection of the judgement of the German Constitutional Court on the Lisbon Treaty, Krajewski notes that "this loss of competencies in the member states leads to a removal of the active participation of the parliaments of the member states. This loss is not just of a formal nature, 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."[19]

Krajewski considers, however, that that "it can instead be assumed that the common commercial policy will see a greater parliamentarisation as a result of the Lisbon Treaty" due to "the structurally different political context in which the European Parliament exercises its participation rights".[20] The functioning of the EP as a check and balance to the Council and the Commission, rather than approval of government in a parliamentary democracy, rendered the EP more autonomous from the decision-making of the executive branch and more comparable to the US Congress than EU member states' parliaments. Mirroring an until-then prevalent view, Krajewski finds that "in political practice in parliamentary systems of government, the rejection of an international treaty can practically be ruled out".[21]

A look back to more than seven years of CCP practice, however, leads to markedly different preliminary observations that transcend the conclusions offered by a rationalisation of formal participatory rights. To name just a few examples, at this point, MEPs have proved willing to defend national protectionist interests of their country of origin, advocate for market opening abroad to the benefit of its domestic

[18] ibid.: p55
[19] Krajewski (2013): pp 81-82
[20] ibid.: p82
[21] ibid.: p69

constituencies, and mirror public sentiments calling for the enforcement of labour and environmental standards in third countries. In the field of common commercial policy, MEPs thus appeared eager to showcase existing links with national and pan-European constituencies.

The scope of EU exclusive competences for external economic governance, furthermore, has remained politically and judicially contested and embattled. National parliaments have sought to enhance rather than withdraw active political participation in the field of EU trade and investment treaty-making; have (so far, successfully) advocated for a continued practice of the 'mixed' treaty-making *modus operandi*; and have hence insisted on their role as veto-players in the procedure leading to the conclusion of EU external economic agreements. Moreover, the intense politicisation of EU Common Commercial Policy, with high-profile dossiers such as the EU-Korea Free Trade Agreement (FTA), the Anti-Counterfeiting Trade Agreement (ACTA), Investor-State Dispute Settlement (ISDS), the Transatlantic Trade and Investment Partnership Agreement (TTIP), the Comprehensive Economic Trade Agreement (CETA), and the question over China's market economy status (MES), has surfaced highly effective mobilisation of both diffuse ('latent', or 'dormant') mass voter sentiment and highly efficient advocacy of concentrated special interest. Both majoritarian and minoritarian vectors of influence have sought to utilize the manifold access points to decision-making processes that post-Lisbon CCP governance has maintained until to date to shape policies according to their self-defined objectives. By maintaining dozens of veto-armed access points for political participation, post-Lisbon CCP governance has further decreased the cost of political participation that may lead to interest representation biases in the substantive content of policy outcome. Moreover, the lack of clarity over the precise delineation of EU exclusive competence has – until the CJEU rendered Opinion 2/15 in May 2017 - credibly threatened to paralyze EU multilevel governance of its external economic relations. The most prominent episode of governance failure until do date remains the Wallonian veto-threat leading to the signature of a 'mixed' CETA as well as the Wallonian government's threat of non-ratification – raising important questions over representation biases, efficiency, effectiveness, and credibility of EU Common Commercial Policy governance in the Lisbon era.

On the first sight, the effectiveness of CCP governance to respond to an aggregate policy demand that reflects the 'public interest' and external problem

pressures seems to hinge on finding the 'right' institutional design, which balances the values of efficient governance and efficient policies that are effective in achieving any given socio-economic purpose, on the one hand, and democratic legitimacy of governance as a function of low costs of political participation for both diffuse and concentrated interests, which is generated, in practice, through manifold veto-armed access points to decision-making - on the other hand. It is a commonplace, yet important, to note at this point, that the notions of perfectly efficient governance processes, perfectly efficient policy outcomes, and perfectly efficient representation of aggregate interests through public agents rest on illusory (zero-transaction-cost) assumptions and can therefore never make for a normative benchmark of real-life institutions. Institutional analysis, therefore, is inherently comparative and can – in a world of positive transaction-costs - only provide for normative guidance towards best-imperfect institutional alternatives.

In this context, I argue in this study that the 'best-imperfect institutional alternative' to the pre-Lisbon status quo of multilevel governance of EU external economic relations *can* stem from a practice of CCP governance that fully employs the space of constitutional reform for comparatively more efficient, effective, and democratically legitimate public decision-making in the area of Common Commercial Policy. In contrast to the above consideration of a potential trade-off between input, process, and output legitimacy, I argue that institutional change towards a complete vertical subordination of national political institutions – in full employment of their participatory rights and obligations under EU and national constitutional law – to the political institutions of the European Union can generate the conditions for more efficient, effective, and more democratically legitimate governance of EU external economic relations, both in terms of process and substantive content of legislative outcomes. Employing the treaty-given space to relinquish horizontal participatory rights of national governments and parliaments in their own right would significantly reduce veto points, process inefficiencies, and rent-seeking opportunities of special and diffuse interest advocacy. At the same time, such practice would channel the aggregation of existing public interests in the Commission, the (QMV-voting) Council, and the European Parliament, and incentivize national parliaments to fully employ constitutionally guaranteed participatory rights to influence the voting behaviour of their national governments in the Council throughout – and not only at the very end - of the EU legislative process. Such practice would further elevate and

strengthen the responsibilities of the European Parliament - in contrast to its current marginalization in a multi-dozen veto-player setting – and allow for it to effectively fulfil the treaty-prescribed role as a check-and-balance of the Commission and the Council.

It is true that the practice of EU external economic relations that I examine in this study provides for ample evidence of potential governance failures. Yet, the findings also show incremental change towards the development of a more efficient, effective, and legitimate institutional framework. This process was set in train by the Lisbon Treaty amendments of EU primary law and has been further driven by interests that aggregate in the respective EU institutions; through the continuous practice of their rights and responsibilities under EU primary law; as well as through the litigation of EU competences for external economic governance. This open-ended process of institutional change remains unfinished and has yet to find a sustainable and predictable balance. The seminal decision of the Court in Opinion 2/15, however, makes for an opportune moment in time to take stock of that process eight years after the entry into force of the Lisbon Treaty.

The positive legal analysis of the pertinent aspects of the Lisbon Treaty reform in this study is complemented by an examination of the effect of the primary legal reform on the change of the cost and structure of political participation for private and public stakeholders ('input'), the practice of CCP legislation by the mandated political institutions ('throughput'[22]), and, albeit to a more limited empirical degree, the normative quality of secondary legal institutions ('output').

An integrated analysis of the CCP governance process and the mandated political institutions as well of the manifestation of new interest configurations in secondary legal institutions as a result of altered costs of political participation can result in significant insights about the quality of institutional change that the Lisbon Treaty has initiated. In this manner we can, for instance, identify structural biases that may be inherent to the new framework, identify its primary beneficiaries, and discuss normatively whether and how the new CCP polity promotes governance failures or mends such failures if they previously existed. Respective findings can eventually allow for value-conscious recommendations about how identified biases or institutional weaknesses can be resolved through further reform of the primary legal

[22] Schmidt, Vivien A. (2013)

institutional framework, of the governing political institutions, or a change of the practice of governance within constitutional limits.

3. Methodological Choice: Transaction Cost Analysis of the *Verfassungsrealität*

Which analytical framework – or rather: which conceptual lens - can equip us with the instruments necessary for an examination of the relationship between primary institutional design, the characteristics of the governance process and mandated political institutions, costs of political participation, the incorporation of stakeholder preferences in secondary legal institutions, and the normative quality of such secondary legal institutions. A purely legalistic approach – understood as the positive analysis of constitutional and secondary legislative provisions – cannot deliver the analytical categories and concepts that are required for an (at least notional) analysis of how political forces respond to and act upon changing incentives and constraints inherent in primary legal institutions and how such changes manifest themselves in secondary legal institutions. The explanatory potential of a formalistic analysis of positive primary and secondary law, as central as it remains for this study, is limited to the production of findings about the constitutional allocation of formal decision-making rights, the scope of competences, procedures applying to the delegation of policy implementation, rights of information, control, and scrutiny, as well as transparency obligations. Legal positivism, however, appears to remain methodologically blind for the relationship between constitutional reform, the practice of the governance process by the mandated political institutions, the inherent costs of political participation, and the incorporation of stakeholder preferences in secondary legislation. This fact is owed to legal positivism's controversial claim concerning the political neutrality of the law. Notwithstanding the societal benefit of the aim to approximate politically neutral interpretation of law through the use of a standard set of interpretative methods, conventional legal analysis helps us little to advance a better understanding of the ubiquitous interdependence of legal, political, and economic institutions in the process of institutional change. Some argue, for this reason, that "law can no longer sustain itself as an autonomous discipline."[23] The value of a more integrated analysis of institutional change, in contrast, lies in its potential to understand rights and obligations embodied in legal institutions as "means

[23] Rubin (1996): p1394

of achieving desirable social purposes" and to enable lawyers and other social scientists to make informed recommendations concerning the design of legal institutions against the background of a systematic analysis of their context and effects.[24]

As discussed in detail in chapter II of this study, transaction cost based approaches to institutional analysis, such as post-Chicago school law and economics, the microanalysis of institutions, and new institutional economics, provide some of the necessary analytical tools that enable us to examine the relationship between legal, political, and economic institutions in general, and the institutional change triggered by the reform of the constitutional provisions governing the CCP in particular.

Transaction costs have originally been defined as the costs incurred in economic transactions, i.e. search and information costs, bargaining costs, as well as costs of monitoring compliance and enforcement of contracts. But the concepts of transaction cost economics can likewise be applied to the analysis of political exchanges between private actors and political institutions, the efficiency and efficacy of political institutions involved in the decision-making process, the economic incentives codified in the legal institutions that result from these exchanges, and the efficiency of such incentives in comparative terms.

Transaction cost analysis, first, can help to explain the functional benefit of the conferral of competences from one level of governance to another. It can, secondly, help to understand the logic and relative effectiveness of private interest representation - i.e. of the policy demand side - as one potential source of political malfunction, governance failures, and biases incorporated in legislative outcomes. Moreover, it can be employed to contemplate the efficiency of the internal organization of political institutions; the implications of the cost of information of particular political institutions for the cost of political participation of private stakeholders and institutional bargaining power; the relative efficacy of political institutions in transforming a given set of policy preferences into secondary legal institutions; and the effects of such secondary legal institutions on the efficiency of private transactions. Finally, transaction cost analysis can provide a rationale for the delegation of policy implementation to government agents, and can explain the design of monitoring and control mechanisms that apply to such delegation. Legal

[24] ibid.: p1429

institutions remain the focal point of this analysis because they constitute the formal constraints on the transacting individuals and political institutions, thereby structure the costs of these exchanges, and present us with the institutional response to any given policy demand.

The general question that underlies transaction cost based analyses of political institutions, the rules that govern them, and the rules that they create, is whether institutions are adequate to produce - or provide an adequate framework for the production - of an economic incentive structure for private actors that generates the institutional conditions for enhanced productivity and welfare. As Douglass North points out, "the high transaction costs of political markets and subjective perceptions of the actors (…) have resulted in property rights that do not induce economic growth, and the consequent organizations may have no incentive to create more productive economic rules."[25] The positive analysis of the transaction cost efficiency of institutional arrangements underpins the normative claim of law and economics scholarship that sets efficiency as the benchmark of institutional design. At the same time, as I will discuss in detail in the subsequent chapter, modern scholarship engaged in institutional analysis recognizes the ubiquitous and inevitable imperfection of institutions in terms of their efficiency, precisely because of the existence of transaction costs which are a function of imperfect information and the bounded rationality of individuals, and, in turn, proposes institutional choice and design that is functionally equivalent or better suited to achieve social purposes at, however, lower transaction costs. Institutional analysis, in order to be instrumental for institutional design, must therefore not be singular – or compared to the illusory zero transaction cost scenario – but comparative in that it considers alternative real-life institutional solutions that are frequently characterized by positive transaction costs.

While the relative efficiency of institutional arrangements leaves us with an objective analytical benchmark for evaluation, the exclusive use of efficiency as the measure of comparison is unsatisfying in normative terms. Efficient legislative outcomes can be deeply unjust in terms of their distribution of property rights, or may have other socially undesirable effects that are not compensated otherwise. As further discussed in the next chapter, the more recent economics-based institutional analysis scholarship, however, is not rigidly confined to efficiency considerations. The

[25] North (1990): p52

reconsideration of individual utility maximization and self-interest as the exclusive motivation underlying human behaviour and the eventual extension of the concept of human motivation to categories such as ideology and cultural preferences has opened the door for law and policy analysis that considers trade-offs between efficiency and social justice or other public interest categories.[26] Such a value-conscious discourse is particularly warranted in the area of trade and investment law and policy as there is now a growing concern over the effects of trade and investment flows on (trans)national public goods other than aggregate income, such as human rights and environmental protection, social equity, political stability, and sustainable development more generally.

The abandonment of self-interested utility maximization as the sole source of human motivation as well as the contemplation of positive transaction costs and their effects has not only blown a hole into neoclassical welfare economics theory, but also led scholars to focus on factors that have more explanatory value with regard to processes of institutional change, e.g. the cost of organization and information under the condition of bounded rationality of individuals and imperfect information as well as ideological predispositions of individuals and cultural characteristics of organisations. [27]

The cost and efficiency of the organization of private interest representation as well as of political institutions and their agents are strongly related to respective organisational and institutional capacities to produce, acquire, process, assess and communicate information. In context of limited mental capacity of individuals and imperfect information about the preferences of relevant actors and the policy instruments that are necessary for the realisation such preferences, information becomes the crucial resource that is required for the effective transformation of normative preferences - whatever they may be – into secondary legal institutions.

The relative costs of organization and information for particular private and political institutions are thus central to the understanding of the effects of the reform of primary legal institutions on the design of secondary legal institutions because distinct primary legal institutions give decision-making powers to different political institutions with varying organizational contingencies, such as size, structure, ideological cohesion, expertise, institutional memory, or culture, which affect their

[26] Rubin (1996): p1430 ; North (1990): pp17-25 ; Komesar, Neil K. (1994): p50
[27] The concept of 'bounded rationality' was first introduced by: Simon, Herbert (1957).

capacity to produce, acquire, process, evaluate and communicate information. I refer to this capacity hereinafter as 'informational capacity' of private and political institutions.

Next to the primary legal constraints that govern political institutions in the legislative process, as well as cultural and ideological predispositions held within political institutions, the cost of information and respective asymmetries among the private and political institutions involved is the key factor that shapes the transformation of 'input' (i.e. private interests and preferences for outcomes) into 'output' (i.e. the design of secondary legislative institutions). The analysis of distinct information costs of private and political institutions in context of a given set of primary institutional constraints and policy demands is therefore critical for an understanding of the normative quality of secondary legal institutions.

Political institutions that have comparatively little capacity to acquire, produce, process, and evaluate information about the breadth of stakeholder preferences and effects of different policy instruments on outcomes are more dependent on the provision of information through external private actors or other political institutions and are more vulnerable to regulatory capture, short-term mass voter sentiment, and the influence of institutional competitors. In this way, political institutions that are characterized by high internal information costs and are equipped with decision-making powers decrease the cost of political participation. At the same time they increase the likelihood of decision-making biases as external information and expertise are traded against political influence. In contrast, institutions with low internal information costs are relatively less prone to decision-making biases that are grounded on incomplete information as they have relatively "accurate models to guide them". [28] Similarly, the informational capacity of political institutions is of significance for the rationales underlying the delegation of policy implementation to implementing agencies, the design of monitoring and control mechanisms vis-à-vis those agents, and the efficacy of political institutions in performing implementation, monitoring, and control tasks.[29]

The implications of the cost of organization and information for institutional change cannot be captured by positive legal analysis alone. Ideally, in order to gain a comprehensive understanding of the quality of institutional change that the reform of

[28] North (1990): p52
[29] Epstein, David and Sharyn O'Halloran (1999): pp8-25

the CCP institutional framework has set in motion, we ought to engage in a more integrated analysis of the respective legal and political institutions. A law-in-context analysis of institutional change has the potential to enable us to come to conclusions about the efficiency, efficacy, and legitimacy of alternate institutional designs to achieve a given set of socio-economic objectives. It also promises, more generally, "to wean legal scholarship from its somewhat obsessive preoccupation with the judiciary."[30]

4. Caveats

As discussed above, institutional analysis of rights, legislatures, executive agencies etc. should ideally be comparative. Rather than comparing real life institutions with a transaction costless idealized world of neoclassical economics theory, institutional analysis should compare real-life institutions to each other with respect to their instrumentality in achieving desirable social objectives.[31] This task is challenging enough if we, for instance, seek to determine whether a particular regulatory design is superior to another in addressing a specific market failure or in reducing transaction costs among market participants. But the systematic comparison of the effects of one constitutionally codified institutional framework governing a particular policy area with the previous status quo unearths methodological problems that are increasingly difficult to resolve. Any such comparison, as rigorous and comprehensive as it may ideally be, applies to different periods in time, in which the political institutions involved operate under distinct external social, economic, and political contingencies other than the given primary legal institutions and respond to such specific sets of external contingencies and problem pressures in a context specific manner. Institutional analysis of the scale proposed here can hardly control for such variations in the external environment. Its results thus inevitably suffer from a lack of scientific validity as we have no control scenario at our disposal in which the reform of the formal institutional framework constitutes the only independent variable. Institutions, associated transaction costs, and institutional change are unique to a given external environment as much as the societal demand that they stem from.

Deprived of the reassurance of scientific validity, one is left to argue cases of institutional change using the available analytical instruments for the comparison of

[30] Rubin (1996): p1429
[31] Shaffer (2013): p610

institutions and their effects under relatively similar conditions. [32] Both because of the variety and complexity of factors involved in institutional analysis and the context specificity of institutional change, the analytical categories of the microanalysis of institutions and comparative institutional analysis cannot amount to a model of institutional change but only establish a framework or conceptual lens that guides the analysis of institutions and their effects.[33]

Another methodological problem of comparative institutional analysis is endogenous to the process of institutional change. It stems from the fact that "allocations of authority to a particular institution spurs reactions by other institutions that give rise to dynamic and recursive institutional interaction over time."[34] For instance, the comparison of the effects of the constitutional empowerment of the European Parliament on the normative quality of legislative outcomes to a theoretical counterfactual or past scenario without controlling for the recursive dynamics among the involved political institutions can hardly result in valuable conclusions. Identified effects may, to name one example, not be objectively attributable to the normative preferences represented by a particular political institution. Other political institutions can devise the content of their bargaining positions in anticipation of the preferences of political competitors and thus render amendments to legislative proposals unnecessary or otherwise change the bargaining space, which is determined by the range of policy outcomes that would be acceptable to each political institution that holds veto rights. More generally, comparative institutional analysis must not be static in that one could derive conclusions about outcomes from the mere analysis of primary legal institutions and the structural characteristics of political institutions. Instead, the analysis of political institutions should account for dynamic informal elements of the governance process, which, for instance, reflect how institutions react to constitutional reform in a strategic manner to retain or extend their bargaining strength vis-à-vis their institutional competitors. In other words, the "approach invites us to explore which institutions are capable of rational or public-oriented decisionmaking under particular circumstances (…) and how one institution responds to the allocation of responsibility to another."[35]

[32] Rubin (1996): p1416
[33] Shaffer (2013): p620
[34] Shaffer (2013): p618
[35] Rubin (1996): p1428

5. Structure of the Study

The remainder of this study is structured as follows. Chapter II defines the analytical concepts and details the analytical tools that I employ to examine the institutional change that was set in motion by the constitutional reform of the CCP institutional framework. Based on a transaction cost approach to the analysis of public institutions, law-making, and delegation of policy implementation, the analytical framework that I outline draws from the insights of New Institutional Economics theory, the Microanalysis of Institutions, Comparative Institutional Analysis, and Public Choice theory. The objective of this chapter is to complement the instruments of positive legal analysis with the analytical tools that allow us to examine and understand the relationship between the reform of formal legal institutions, the effectiveness of interest representation and political institutions that act under the constraints of primary law, and the normative substance of secondary legal institutions. The resulting analytical framework shall guide the positive but value-conscious analysis of this relationship in the following chapters.

Chapter III subsequently provides an overview of core concepts of international economic integration through law and outlines the path of EU Common Commercial Policy that has its origin in pre-Lisbon initiatives of the European Commission and have been inspired by 'competitive liberalization' pressures in international trade regulation. Moreover, chapter III outlines EU internal institutional and political constraints, which shape the problem pressures that EU political institutions face after the entry into force of the Lisbon Treaty. As such, the chapter pays tribute to the fact that processes of institutional change are context specific and path dependent. In doing so, it embeds the process of institutional change of EU external economic governance into the context of domestic and external developments in trade and investment policy goverance and the EU negotiators' position within these developments. The chapter closes with an illustration of EU external economic, institutional, and domestic political dynamics that characterize the negotiation and forthcoming signature of the EU – Japan Economic Partnership Agreement (JEEPA).

Chapter IV introduces and discusses the reform of EU primary law applying to CCP governance by the Treaty of Lisbon reform of 2009 in comparison to pre-Lisbon law and practice of EU external economic governance. The analysis draws particular attention to the reallocation of horizontal competences to the Union's political

institutions. Following the examination of the primary law reform of the CCP and early practice, the chapter scrutinizes the developing informal institutions as well as key structural features and capacities of EU political institutions. As a result of this comparative institutional analysis, the concluding section evaluates the evolving balance among EU institutions involved in CCP governance. The conclusions acknowledge, at the same time, that a complete assessment of CCP governance against the benchmark of the Laeken objectives of 'more democracy, transparency, and efficiency' must encompass a second comparative institutional analysis, which assesses the law and practice of 'mixed' trade and investment agreements in EU external economic governance – and thus takes account of the role of member states' political institutions in that process.

Chapter VI is devoted to the analysis of Opinion 2/15 of the Court of Justice of the European Union. In Opinion 2/15, the Commission, the European Parliament, the Council, and the Member States litigated whether the Union is exclusively competent to conclude the EU-Singapore Free Trade Agreement (EUSFTA) alone, or whether the EU ought to involve the Member States as independent parties to a 'mixed' agreement. The delineation of the scope of EU Common Commercial Policy following the Lisbon Treaty reform of 2009 is central to this proceeding. The Court's opinion, which stands in the tradition of seminal EU external competence cases such as Opinion 1/78 and Opinion 1/94, further clarifies the Union's constitutional identity in the area of EU external economic relations and has the potential to have vast implications for EU external economic governance. The chapter, first, reviews the evolution of the Union's Common Commercial Policy in context of the Court's past jurisprudence and, secondly, scrutinizes the relevant methodological approaches and standards of analysis, which the Court employs in its competence enquiry. It is argued that the Court retained ample space for discretionary judicial decision-making, which surfaces at the intersection of the competence enquiry and the necessary determination of the appropriate legal bases. The clarification and further refinement of the Court's analytical standards in its judgment as well as their transparent and consistent application have the potential to substantially reduce incentives for future litigation and inter-institutional political combat. Using the legal opinion of Advocate General Sharpston as a benchmark, this chapter, third, discusses the practical implications of the Court's judgment for EU international trade and investment treaty-making. The chapter, fourth, proposes a number of institutional alternatives that may

serve to 'save' EU external economic treaty-making from 'mixity' and the pitfalls of the associated treaty-making procedures in the EU and the member states.

Chapter V further examines and discusses the constitutional fundamentals of EU economic treaty-making in light of the Union's contemporary external economic agenda and the Lisbon Treaty reform of 2009. The chapter advances two complementary case studies, notably the process applying to the signing, provisional application, and conclusion of the Comprehensive Economic Trade and Investment Agreement (CETA) as well as an assessment of the Court Decision in the Opinion 2/15 proceeding. The chapter concludes with an outline of EU Common Commercial Policy governance in 2020 that would render external treaty-making more democratic, more effective, more efficient, and hence more legitimate. It argues in favour of adjusting the scope of future EU trade and investment agreements to the realm of EU exclusive competences as clarified by the CJEU in order to remedy the functional deficiencies of EU treaty-making that were exposed in the 'CETA-drama'. At the same time, the chapter emphasizes the need for – and outlines a path towards - a qualitative change in EU and member state institutional practice that fully employs the channels of vertical political participation in the Union's multilevel governance structures and thereby strengthens the legitimacy of EU economic treaty-making in its substance beyond formal rights of political participation.

The concluding chapter VII summarizes the main findings.

The brief 'end of history' that was famously proclaimed by Francis Fukuyama in the summer of 1989 has now been succeeded by a new quality and structure of international conflict and cooperation that partially – but more and more decisively - draws its energy from a Western relapse into identity politics and economic nationalism.[36] As a result, crucial political support for the international economic institutions and legal order that flourished in the 1990ies is fading. The European Union has not been immune to this development or remained a passive bystander. Since 2006, the EU has changed gear towards a trade negotiation strategy that prioritizes commercial over other objectives, seeks full bilateral reciprocity, and is flanked by markedly defensive – or: 'protectionist' - framework regulation. The

[36] Fukuyama, Francis (1989)

Epilogue to this study provides for a thematic illustration of the evolving defensive characteristics of EU Common Commercial Policy. It argues that the Union now runs a serious risk of making an active contribution to the erosion of the international legal and political institutions that it helped to build over the past decades.

II. Institutional Change and Comparative Institutional Analysis: A Transaction Cost Approach

This chapter defines the core concepts that I employ for the development of the analytical framework of this study. Secondly, I examine the theoretical foundations of transaction cost economics, given the central importance of its concepts for the purposes of the analysis of institutional change. The concepts of transaction cost analysis are then, third, applied to the analysis of the effects of constitutional reform on the relationship between CCP 'input', 'throughput' (or process), and 'output'. The essential purpose of this chapter, in other words, is to show that an integrated analysis of primary legal institutions and their reform in context their effects on changing costs of political participation, minoritarian and majoritarian decision-making biases, and the broader phenomenon of institutional change can result in enhanced explanatory and normative value compared to a purely formalistic positive legal analysis.

Alternate designs of laws and regulations and their implementation by political institutions, to begin with, embed and manifest specific incentive structures that imply distinct costs and benefits for private or public economic actors. The design of laws and regulations and their enforcement through courts can create an institutional environment that reduces the costs of private and public economic activity across the board or mends market failures by, for instance, internalizing the social costs of private economic activity, and thereby facilitates and incentivizes productive behaviour that increases the aggregate income of a community or society. In the same vein, laws and regulations can institutionalize the provision of inefficient rents to the constituents of special interest advocacy or hand over benefits to a majority of voters at a cost incurred by a productive minority.[37]

EU Common Commercial Policy and external economic policy in general provide for plenty of illustrations. The unilateral and reciprocal dismantlement of tariff barriers to trade, the harmonization of customs procedures, technical standards, food safety and testing requirements, the elimination of regulatory barriers to services trade and foreign direct investment, or the reduction of administrative trade impediments are some of the legislative measures that contribute to the reduction of trade costs and facilitate aggregate income gains that stem from unleashing the potential of economies' comparative advantages in the production of goods and

[37] North (1990): p107

services. The history of EU economic integration through common legal institutions and their implementation as well as EU external economic integration through its WTO membership and bilateral initiatives follow this rationale. However, the history of EU external economic policy making can similarly be told as a story of wasteful – and sometimes scandalous – protection of special interests at the expense of taxpayers, consumers, aggregate net income, economic development and poverty alleviation abroad. The nowadays somewhat banal point here is that the alternate design of legal institutions matter for the economic performance of societies.[38] Institutional environments that systematically allow for or even incentivize patronage and rent-seeking activities by unproductive and inefficient economic actors have the potential to set societies on a path of economic downturn and reduce societal welfare. The adaptive creation of enforceable institutional incentives for productive economic activity and for efficient resource allocation over time, on the other hand, can contribute to the generation of the conditions that are necessary for sustainable economic growth and development.[39]

The relationship between alternate institutional designs of polities and their relative efficacy in incentivizing productive economic activity and furthering other socially desirable objectives through the normative content of the secondary legal institutions that they produce, is, however, somewhat less obvious and straightforward. For this reason, this chapter is devoted to the development of an analytical framework that can facilitate a better understanding of the effects of the reform of primary legal institutions, i.e. of constitutional reform of governance processes and their substantive scope.

Building on the insights of the rich scholarship of transaction cost economics, law and economics, new institutional economics, the microanalysis of institutions, comparative institutional choice analysis, I base the general enquiry of this study on the argument that constitutional design involves significant trade-offs about the nature of governance processes, which affect the cost of political participation of both private and public actors in that process and can hence result in the manifestation of distinct interest configurations, economic incentives, and values inherent to secondary legal institutions. As such, institutional choice is one that reflects a normative choice about the objectives of policy.

[38] North (1993): p3
[39] North (1990): p110

In the empirical part of this study, this argument can provide an analytical lens for the examination of the reform of the formal institutional framework that governs EU Common Commercial Policy formulation, which has practical consequences for the efficiency and effectiveness of the governance process itself, but also for public and private stakeholder access to that process and, in turn, the incentive and value structure that is inherent to secondary legal institutions.

1. Origin and Facets of Comparative Institutional Analysis

The overwhelming majority of contemporary literature that features economic analyses of institutions – whether categorized as belonging to the disciplines of law, economics, or political sciences – is based on Ronald Coase's highly influential articles on the *The Nature of the Firm* and *The Problem of Social Costs*, which both feature powerful challenges of the zero transaction cost assumption that upholds the validity of neoclassical model of the competitive market.[40] Coase's analyses of the firm as an efficient institutional alternative for the coordination of industrial market activities and of the internalization of negative externalities of production through the allocation of property rights are, first, based on the recognition of the existence of transaction costs in economic exchanges. Secondly, Coase recognizes the potential of institutions to reduce such costs through the creation of comparatively efficient incentive structures that minimize the incompatibility of these incentives with the preferences of the economic actors involved.

The employment of transaction costs as a conceptual category has been seminal in that it has practically resulted in the evolution of new disciplines of scholarship in law, economics, and political sciences. Coase has spearheaded the development of law and economics as the analysis of the relative efficiency of laws and regulations in achieving specified purposes.

Oliver Williamson's transaction cost economics further applied transaction cost analysis to the efficiency of institutional design governing industrial organisations in order to provide more sophisticated explanations of the boundaries of the firm – an approach that can, as I discuss further below, similarly be applied to what is defined as political institutions for the purposes of this study.

[40] Coase, Ronald (1937): pp1–44.

Third, new institutional economics, founded by Douglass North, is primarily "an attempt to incorporate a theory of institutions into economics" in that it provides for a macro-perspective on the effects of institutional design on the economic performance of societies in economic history and the dynamics of institutional change processes.[41]

At this point, we can discern a positive and a normative orientation of the economic analysis of institutions. Positively, institutional design can be analysed as to whether it is comparatively transaction cost efficient in achieving a specified social purpose in a given context, whatever that purpose might be. Normatively, economic analysis of institutions can be applied to determine the comparative efficiency of the economic effects of alternative institutional design. In the latter case, economic efficiency is the primary objective and prevails over subordinate social purposes.

From within the legal discipline, transaction cost analysis has resulted in important scholarship produced by Edward Rubin, who seeks to synthesize the insights of law and economics, critical legal studies, and European continental social theory in a positive but value-conscious microanalysis of institutions, which in its normative prescriptions, would allow for trade-offs between efficiency and social justice considerations.[42]

An analytical framework developed by Neil Komesar, moreover, aims at guiding institutional choice through the comparative analysis of transaction costs associated with the specific institutional characteristics of market, political, and judicial decision-making and respective outcomes, which are measured against the efficiency benchmark of their distinct net aggregate income effects. Despite the normative focus on efficiency, Komesar claims that his framework can be employed to guide institutional choice irrespective of normative predispositions and objectives.[43]

What unifies the still relatively new interdisciplinary scholarship on institutional analysis – despite the distinct areas of theory development and empirical application – is not only its explicit or implicit dismissal of the neoclassical zero transaction cost assumption. Scholars similarly agree on Coase's related claim that institutional analysis must be comparative in that it should not compare outcomes of

[41] North (1993): p1
[42] Rubin (1996)
[43] Komesar (1994): p50

institutional analysis to the neoclassical efficiency standard of the perfectly competitive market model – which is based on illusory assumptions – but to real life and context specific institutional alternatives.[44]

If compared to the standard of neoclassical efficiency, every real-life law, regulation, or statute must necessarily fail the test because they frequently involve transaction costs – a finding that then provides for a Chicago School law and economics rationale for deregulation and the withdrawal of government intervention. But although institutions are always imperfect if held against the standard of neoclassical efficiency, the institutional status quo may well be preferable to alternate institutional design in terms of process and outcome efficiency. As North puts it, "there is a vast gap between better and efficient in the neoclassical sense."[45]

It is noteworthy in this respect that Rubin's attempt to synthesize the legal discourse in a method of institutional microanalysis is built on the observation that post Chicago School law and economics, critical legal studies, and continental social theory converge in one important point, notably the recognition that institutional analysis must be comparative rather than singular in the measurement of their institutional effects, irrespective of the distinct normative standards of evaluation.[46]

2. The `Institution´ - A Conceptual Clarification

Despite sharing the same point of departure, some notable terminological differences persist among scholars about how the concept of the 'institution' is defined, which results from the distinct scope of analyses rather than conceptual inconsistencies among different scholarship. They have the potential, for that matter, to result in confusion about the contextual application of the concept.

North, for instance, defines institutions as "the rules of the game in a society or, more formally (…) the humanly devised constraints that shape interaction. In consequence, they structure incentives in human exchange, whether political, social, or economic."[47] Defined in this way, 'institutions' serve as a broad category of legal and quasi-legal social phenomena. Komesar, in contrast, treats the market process, the political process, and the adjudicative process as distinct ideal-type "institutional

[44] Coase, Ronald and Ernest W. Williams (1964): pp195-196
[45] North (1990): p109
[46] Rubin (1996): 1411-1412
[47] North (1990): p1

alternatives".[48] Rubin's microanalysis of institutions, furthermore, "can be applied to an analysis of rights, but it can also be applied to legislatures, executive agencies, and private firms, all of which are potentially equal or superior mechanisms to the courts for achieving specified social purposes."[49]

The important question that results from these distinct applications of the concept is whether we define institutions purely as formal and informal rules (North), processes (Komesar), or rules and organisational entities likewise depending on the chosen object of analysis (Rubin).

Dropping Komesar's process based understanding of institutions, to achieve conceptual coherence, we essentially need to sufficiently distinguish economic, political, and judicial organisations from the external and internal formal and informal rules that govern them. There is considerable overlap, however, as organisations are frequently structured through and governed by formal and informal rules. Organisations, however, are more than just rules. They are made up of a defined membership that has distinct characteristics (cultural and ideological) and capacities (resources). In order to differentiate between the membership of organisations and their characteristics and the rules that govern and structure them - viewed from a rules-based perspective on institutions - we can distinguish between internal institutional structure of organisations and the external institutions that govern such organisations.

For the purposes of this study, this point is particularly relevant for the understanding of the concept of the 'political institution'. For North, in adherence to his rules based approach, "political institutions constitute *ex ante* agreements about cooperation among politicians. They reduce uncertainty by creating a stable structure of exchange. The result is a complicated system of committee structure, consisting of both formal rules and informal methods of organisation."[50] Rubin, on the other hand, seems to equate the term 'political institutions' with the broader concept of 'political organisations' in his discussion of 'public institutions'.[51] Rubin's employment of the concept implies the incorporation of a membership in the scope of his definition that acts under formal and informal constraints. But while North's distinction between organisations and institutions is analytically more rigorous and robust, it is both the

[48] Komesar (1994): p46
[49] Rubin (1996): p1429
[50] North (1990): p50
[51] Rubin (1996): p1393

analysis of legal institutions in North's understanding of the term and of the public institution in Rubin's more inclusive definition that are the object of inquiry here. I therefore distinguish between the two, as a matter of semantic pragmatism, in order to avoid further confusion.

As such, I shall refer to legal or formal institutions as explicit rules (constitutions, laws, regulations, property rights) that impose legal constraints on, and thereby shape, human interaction. Informal institutions are defined as implicit rules, such as social conventions, norms, practices, and habits that similarly impose constraints on human interaction but are only enforceable through social sanctions other than those imposed by an independent judiciary. While formal/legal institutions can be instantly changed, informal institutions evolve and change gradually in adaptation and response to formal institutions and other societal factors.[52] Informal institutions can take the shape of written rules that, for instance, specify the internal organisation of political institutions or conventions of inter-institutional cooperation.

I shall, furthermore, distinguish between primary and secondary legal institutions. Primary legal institutions refer to constitutionally codified rights, obligations, principles, objectives, and procedures of public decision-making, whereas secondary legal institutions refer to laws and regulations enacted by political institutions in presumed adherence to primary legal institutions. This definition appears to be sensible with a view to the application of the analytical framework that I develop below, to the law and practice of EU Common Commercial Policy, in which I employ the definition of primary and secondary legal institutions to distinguish EU primary and secondary law. For practical reasons, I equate the definition of the concept of secondary legal institutions with the substantive content of 'policy'.

The definition of 'political institutions', as noted above, encompasses the public organisations that hold constitutionally allocated legislative and adjudicative rights and obligations, their formal and informal internal rules of organisation, as well as their members, who share, to different degrees, a specific institutional culture, ideology, memory and interests, which has been described as "the way the institution itself thinks".[53] In the EU context, political institutions are, for instance, the European Commission, the Council, the European Parliament, the European External Action Service, and the European Court of Justice (ECJ) etc. Komesar makes a distinction

[52] North (1993): p3
[53] Shaffer (2013): p617

between what he calls the organisations involved in the political process, on the one hand, and the judiciary, on the other. However, there is no objective reason to do so, as Komesar admits himself.[54] Courts are hardly distinguishable from other political decision-making institutions apart from their distinct institutional characteristics and the specific formal constraints that govern their operation. The analytical categories that I employ in this study apply to courts in the same way as they do to the legislature and the executive.

Private institutions, finally, are private organisations and their members, such as organisations of the market and civil society, which hold primary formal rights, act under the constraints imposed by the legal institutions that result from authoritative decision-making of political institutions and self-imposed formal and informal governance structures.[55] Similar to political institutions in the organisational dimension of the concept, private institutions, such as firms and non-profit organizations, exhibit context specific institutional cultures, prevalent ideologies, interests, and capacities.

A preliminary note on the general purpose and inherent limitations of institutions as social constructs: according to North, "institutions are formed to reduce uncertainty in human exchange". They are, however, by no means purposefully designed to be efficient. Rather, their design is a function of the interests and ideas of those who have the power to create new rules. In a world of zero transaction costs, bargaining strength is irrelevant because all actors have perfect information and accurate models to achieve their objectives. The structure of transaction costs – as a result of information asymmetries and bounded rationality -, however, determines bargaining strength, which in turn affects the efficiency of incentives and values manifested in institutional design.[56]

In the next section, I outline the core insights of transaction cost economics and examine North's transposition of these insights into an analytical framework that can guide the analysis of how alternate primary legal institutional design, through defining the formal characteristics of the governance process, affects the costs of political participation and thereby the normative quality of secondary legal institutions.

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[54] Komesar (1994): pp9-10
[55] Williamson, Oliver E. (1998): p75
[56] North (1993): p3

3. Constitutional Reform and Institutional Change: A Transaction Cost Approach to Institutional Analysis

The purpose of this section is to render the insights of transaction cost based theory development applicable for the analysis of, first, how organized interests act upon primary legal frameworks and the political institutions that are mandated with decision-making and policy implementation and, secondly, of how, thereby, primary legal frameworks affect the value and incentive structure of the secondary legal institutions that the mandated political institutions produce. For this end, I outline the application of the zero transaction cost assumption of the neoclassical competitive market model to the political process and demonstrate examine North's scholarship on the consequences of positive transaction costs for political exchanges. This is to show that – in a world of positive transaction costs - the alternate design of primary legal institutional frameworks, of the political institutions that they mandate, and of the evolving informal institutions are of significance for value and incentive structure embedded in secondary legal institutions. Through the cost of political exchange that they implicate, they shape the incentives for and costs of political participation and determine the relative bargaining power and effectiveness of individual political institutions in transforming given sets of preferences into legally binding content of secondary legal institutions.

3.1.The Core Concepts and Application of Transaction Cost Analysis

The basic condition of the neoclassical aggregate welfare maximizing competitive market is that the costs associated with economic exchanges – other than the cost of the good or service exchanged - are zero. Transactions are costless only, however, if market participants have perfect information about their own preferences, the preferences, intentions, as well as behaviour of all other market participants, and about how they can achieve their objectives in an efficient manner. As a result, "we do not need to distinguish between the real world and the decision-maker's perception of it: he or she perceives the world as it really is. Second, we can predict the choices that will be made by a rational decision-maker entirely from our knowledge of the real world and without a knowledge of the decision-maker's perceptions or modes of

calculation."[57] Because market participants act under complete information and with instrumental rationality, institutions, the purpose of which is to reduce the uncertainty of market participants, are obsolete.

In reality, there is very few markets that approximate the zero transaction cost conditions, because individuals' ability to make efficient decisions is limited by the information that they have at their disposal and their mental capacity to process and communicate this information – an insight that is framed by the concept of 'bounded rationality'.[58] As a result, market participants have subjective rather than objective models about how their preferences can be achieved in interaction with other market participants.[59] In a world of imperfect information, limited mental capacity to process available information and the resulting uncertainty about preferences, intentions, and behaviour of others, economic exchanges become costly and necessitate institutions, which reduce the complexity of the environment and render the behaviour of other market participants more predictable.

Institutions are set up if they are worthwhile, i.e. if their benefit outweighs their cost. The basic institutional unit is the private contract. Transaction costs arise in the process of acquiring information about supply and demand, bargaining and contracting, monitoring of compliance, and enforcement through an independent judicial body in case of non-compliance of the contract partner. Information asymmetries among the transacting individuals - e.g. about the value and characteristics of a good or service or the intentions and capacities of the transaction partner - are the key source of transaction costs as well as bargaining power and shape the design of the institutions that are put in place to govern particular transactions.

As such, strong information asymmetries, which implicate high transaction costs, can result in highly detailed contracts that aim at specifying all imaginable future eventualities in order to secure the investment made by the contracting partners. However, contracts are frequently incomplete due to the limited mental capacity of transacting individuals to foresee all possible future circumstances. The failure of individuals to specify future contingencies hence results in a continuous process of interpretation and negotiation of the terms of the agreement. Information asymmetries are the source of what is called the 'principal-agent problem', which

[57] Simon, Herbert (1986): pp293-304.
[58] Simon, Herbert (1957)
[59] North (1993): p2

describes the conflicting relationship between the buyer and the seller of a good or service in long-term exchange relationships. Given the potential of 'moral hazard' on behalf of the agent, the principal has an interest in designing effective control, monitoring, and incentive mechanisms in order to reduce agency costs.

As noted above, transaction cost analysis has also been employed to explain the boundaries of firms. Here, the 'make or buy decision' depends on the relative cost of internal and external exchange. Transaction costs can be reduced through the internalization of specific tasks or production. But internal organization is not transaction costless because problems related to information flows and monitoring increase as a function of organizational size, structure, and preferences held by members that are incompatible with the objectives of the organisation. As for the last point, internal organisation also results in transaction costs related to incentives and performance evaluation. [60]

In simple terms, transaction cost analysis is the study of how market actors design their institutions with the objective of protecting their transaction specific investment. But institutional design has not been the sole focus of transaction cost economists. North, for instance, started to devote particular attention to the human cognitive process as a determinant of human decision and interaction, and how ideology – as socially established values – can complement rational choice theory's preoccupation with self-interest as the single driver of human action. North considers ideologies of decision-makers and organisational culture and norms as complements of institutions in that they reduce and structure the complexity of the environment and thereby guide human behaviour and decisions. As such, social norms – or informal institutions – ought to be considered as a determinant of how individuals and organisations act upon existing legal institutions, how institutions affect outcomes, and how individuals and organisations seek to influence the change of institutions.[61]

3.2. Transaction Cost Analysis of Political Exchanges – A Transposition

While originally applied to the analysis of exchanges among economic actors, transaction cost economics provides for an array of concepts and theory development, which can be employed for the analysis of political exchanges between private and political institutions, within and among political institutions, the primary legal

[60] Klein, Peter G. (2000): pp 456-489.
[61] North (1990): p111

institutions that govern them, and the secondary legal institutions that result from political exchanges.

The transposition of the neoclassical conditions for market efficiency and of the insights of transaction cost economics into a theory of politics has allowed for significant progress in the understanding of institutional change, as North's transaction cost theory of politics attests.[62] Transaction costs, as an analytical category, facilitate an appreciation of how distinct characteristics of political institutions and of the primary legal institutions that govern them affect the costs of political participation and hence the incentive and value structure that is embedded in the secondary legal institutions, which result from the political process that is constrained by primary law. In other words, a "transaction cost approach to politics offers the promise both of better analytical understanding of the political choices made at an instant of time and an explanation for the differential performance of polities and economies over time. It does so, because the level of transaction costs is a function of the institutions employed. And not only do institutions define the incentive structure at a moment of time; their evolution shapes the long run path of political/economic change."[63]

3.2.1. The Zero Transaction Cost Assumption: Neoclassical Efficiency of Governance and Policy Outcomes

To illustrate the reverse implications of positive transaction costs for the comparative analysis of primary legal institutions, cost of political participation, and legislative outcomes, North applies the neoclassical conditions of the competitive market model to the political process.[64] An efficient governance process, North argues, would result in legislative outcomes that maximize the net aggregate welfare of all citizens, while such legislation compensates the losers through a transfer from the beneficiaries at a cost that does not outweigh the benefits of legislation. As with the neoclassical market model, the conditions for such an ideal outcome are rigid.

First, all those who are affected by legislative outcomes must have perfect information about the benefits and costs that legislation implies for them. Secondly, the preferences that result from the calculation of a constituent's costs and benefits must be communicated to the legislator that represents them, who will vote according

[62] North, Douglass C. (1990a): pp355-367.
[63] ibid.: p366
[64] North (1990): pp108-110

to their preferences. As such, the representative must have perfect information about the preferences of the voters who elect her as well as about how legislation affects her voters. Therefore, voters must have equal political access to their representative, i.e. incur equal cost of political participation. At the same time, voters must have perfect information about the compliance of their agent (the legislator) with their preferences and their respective ability to vote their legislator out of office. In the legislative process, legislators' votes will then be weighed to identify aggregate benefits and losses, calculate the net welfare benefit, and to compensate those who lose from legislation. The institutional conditions for the efficiency of political outcomes, according to North, is a democratic society with universal suffrage that allows for vote trading and log rolling and promotes political competition between incumbents and candidates.

But while at least some economic markets approximate the neoclassical market model due to the prevalence of very low transaction costs, political markets are frequently light years away from North's illustrative zero transaction cost model of the governance process. This assertion results in the question about the specific determinants of legislative outcomes that are inefficient in the allocation of property rights, or, if we incorporate non-economic values, do not accurately reflect the preferences of constituencies. At the most general level, the answer refers to the cost of political exchanges that derives from asymmetric information and bounded rationality of political actors, and the alternate primary institutional frameworks that imply distinct levels of such costs and associated incentives for different actors.

3.2.2. Positive Transaction Cost Governance and Policies

In the following paragraphs, I briefly outline some of the ways in which the concepts of transaction cost economics can provide an analytical lens for the examination of the relationship between primary legal institutions, the relative cost and effectiveness of political participation, the effectiveness of political institutions, and the normative quality of secondary legal institutions. I start with the source of the governance process – the policy demand side – and end this overview at the policy supply side.

First, generally, we can frame the relationship between constituents and political institutions and their members as principal-agent problems and assess the degree to which legislative agents act independently of their principals' preferences. Agency (transaction) costs are then a function of the information asymmetries that

prevail between constituents and their legislators about how legislation affects the constituency: it is the difference between constituency preferences and actual performance of legislators. Agency costs can be decreased through the design of institutions that reduce information asymmetries and allow the constituency to sanction legislators in case of deviation from constituency preferences.

Second, we can explain the effectiveness of the representation of distinct private interests vis-à-vis political institutions, i.e. the relative efficacy of policy demand, as a function of the cost of organisation relative to the size of organisational membership and of information asymmetries that prevail among individual stakeholders about how legislative outcomes affect them. Respective analysis can tell us how collective action problems on the policy demand side result in unequal effectiveness of political participation.

Third, we can understand the cost of private political participation that results from the specific characteristics of polities as a function of primary legal institutions and the organizational characteristics of the political institutions that they equip with decision-making rights and responsibilities. Relevant characteristics of political institutions are external political dependencies that are implicit or explicit in primary legal institutions, relative informational capacities, as well as the ideological diversity of their membership. The determination of the relative informational capacity of institutions requires an analysis of the internal cost of information of institutions in terms of member and staff subject matter expertise, institutional memory held, overall availability of resources, internal informational efficiency, and size. Relatively low informational capacity of institutions, or high internal cost of information, increase institutional dependence on the supply of information through private or public stakeholders, can result in decision-making biases, and affects the relative in the governance process. As a result, we can scrutinize how the reform of a primary legal framework – as the conceptual substitute of the private contract - increases or decreases the cost of political participation for different preference holders by providing alternate political institutions with agenda-setting, amendment, and veto rights.

Fifth, we can analyse the development of informal institutions among political institutions against the standard of transaction cost efficiency of legislative cooperation and assess which private or political institutions benefit from these institutions.

Sixth, we can derive conclusions about relative bargaining power and effectiveness of political institutions in the governance process from the analysis of the primary legal framework, relative informational capacities and internal information costs, political dependencies, ideological cohesion within institutions, subject matter specific congruence among them, and informal institutions that apply to their cooperation.

Seventh, we can understand primary institutional frameworks as incomplete contracts that allow for distinct interpretation of rights and obligations by different political institutions in context of specific circumstances that the contract does not provide for. As such, the omission of provisions that specify future contingencies implies behavioural discretion for political institutions in the governance or policy implementation process, the need for continuous negotiation of the contractual content, and its authoritative interpretation by an independent judiciary.

Eighth, we can analyse the relationships among different political institutions as principal-agent problems, e.g. the legislative delegation of implementing or negotiation tasks to an implementing agent, and analyse the legislators' efforts to devise monitoring mechanisms in the attempt to reduce costs associated with the opportunistic behaviour of the agent in context of the prevalence of asymmetric information.

Finally, we can analyse secondary legal institutions, in terms of the transaction costs that they impose on or reduce for economic actors – among other values - and explain them in contextual analysis of the before-mentioned factors.

In summary, transaction cost economics provide a large number of concepts and analytical categories that can be employed for the comparative analysis of primary legal design, costs and effectiveness of political participation, characteristics of political institutions and the governance process, and secondary legal institutions. In the following, I provide a detailed discussion of the factors that play a role at distinct stages of the governance process. They help to explain the distinct effectiveness of interest representation, the impact of changing primary and secondary legal institutions on the cost of and incentives for political participation, the characteristics of the governance process, and the normative content of the secondary legal institutions that governance processes result in. These factors help to guide the analysis of the institutional change in EU Common Commercial Policy after Lisbon on provide for an integrated perspective on its governance process.

3.3. The Relative Effectiveness of Policy Demand

I begin with a discussion of the phenomenon of the relative effectiveness of special interest representation in extracting rents from legislative outcomes at the cost of a dormant majority that frequently lacks effectiveness in organizing representation to counter rent-seeking activities of small minorities. This phenomenon has been powerfully explained by Mancur Olson as "The Logic of Collective Action", which serves as the basic argument of much of the public choice theory development until to date.[65] It is a frequent starting point for the analysis of government failures to provide efficient public goods. Inefficient biases of public decision-making, according to this logic, are rooted in distinct incentives for individuals to organize for interest pursuit. These distinct incentives result in different degrees of effectiveness of political participation of policy demandeurs in the political process and have the potential to result in inefficient property rights structures embedded in policies and hence inefficient outcomes.

Policy demand side causes of distorted normative content of policies are important for the analysis conducted in this study as the design of primary legal institutions and political institutions can function to diminish, transpose, or reinforce the impact of collective action problems on the incentive and value structure embedded in secondary legal institutions.

Their respective effect is critical for the assessment of the performance of political institutions in context of their legal endowments. The rights that political institutions hold in the decision-making process cannot justify themselves through abstract arguments about formal legitimacy. They have to be assessed in context of an examination of the social purposes that they advance.[66]

Olson argued that the ineffectiveness of large groups – e.g. taxpayers or consumers - to provide a public good for its members, i.e. interest representation, is strongly related with factors associated with the cost of organisation. The costs of monitoring contributions to the public good that furthers the common interest are higher in larger than in smaller groups. The incentives for individual members to free-ride on the contributions of other members are therefore higher in large than in small groups, which sets *ex ante* disincentives to the contribution to the public good. Moreover, the larger the membership is, the smaller is the share of the benefit of the

[65] Olson, Mancur (1965)
[66] Rubin (1996): p1412

provision of the public good for each individual, which, again, sets disincentives for individual contributions to the cost of providing it.[67] "Accordingly, large or 'latent' groups have no incentive to act to obtain a collective good because, however valuable the collective good may be to the group as a whole, it does not offer the individual any incentive to pay dues to any organisation working in the latent group's interest, or to bear in any other way any of the costs of the necessary collective action."[68] To Olson, large groups are 'latent' "because they have the latent power or capacity for action". Such action, however, can only be mobilized by separate or selective incentives to individuals within the group.[69]

The cost of information is inherent to the cost of organisation. Members of large groups have little incentives to contribute to the cost of an organisation that systematically monitors the effects large amounts of legislation and provides legislators with accurate information about how the interest its members can be furthered through these laws and regulations. Therefore, there will be strong information asymmetries between organisations representing narrow or concentrated interests and those representing diffuse interests, which offsets one of the conditions for efficient policy outcomes. In other words, efficiently organized minorities have stronger incentives to acquire information about the effects of legal institutions and their change. They will hence hold more accurate information about how legislation affects them and how their interests can be advanced through alternative design. The majority of individuals, in contrast, is largely ignorant about being affected in the first place, unless individuals among its membership are activated through separate or selective incentives and thus strive to inform and mobilize the entire membership to unleash the potential of the power of the majority. This observation led George Stigler to conclude that the "costs of comprehensive information are higher in the political arena [than in the private market place] because information must be sought on many issues of little or no direct concern to the individual, and accordingly he will know little about most matters before the legislature."[70] But both the relative cost of organisation and information are lower for "the concentrated few with their substantial per capita stakes" who, in Komesar's words, "have the incentive to

[67] Olson (1965): p48
[68] Ibid.: p51
[69] Ibid.: p51
[70] Stigler, George (1971) pp3-21. p11

understand their interests, organize for political activity, and determine the correct channels of influence in a complex political process."[71]

But how do we distinguish between mere influence exerted by powerful minorities and distortions of outcomes in consideration of their resource allocation efficiency? In other words, how do we determine a governance failure to balance minoritarian biases in representation against the interests of the dormant majority? Komesar conceptualizes distortions of legislative outcomes as a function of minoritarian bias in the political process: "From a standpoint of resource allocation efficiency, minoritarian bias occurs when a concentrated high per capita minority prevails over the dormant low per capita majority even though the total social costs imposed on the losing majority are greater than the total social benefits gained by the successful minority."[72]

But Komesar also considers the potential of majority groups to exploit minorities by (implicitly) specifying what Olson calls the latency of otherwise dormant large groups to become mobilized in the face of 'selective' or 'separate' incentives.[73] In Komesar's view, the uneven distribution of incentives for political action within the majority may result in the formation of a subgroup that holds high stakes in a particular subject matter that affects the interests of the majority. Such 'catalytic groups' thus have high incentives to inform and otherwise mobilize dormant low stake majority group members to employ the power of numbers.[74] Resulting legislation then suffers from a 'majoritarian bias' if the cost incurred by the dominated minority outweighs the benefits that accrue to the dominating majority.

In practice, we could, for instance, imagine the hypothetical scenario of a government that seeks to sign an international intellectual property rights protection treaty, which creates benefits for a high stake minority of voters that exceed the costs incurred by the majority by far. However, two large internet companies with high stakes in non-ratification of the treaty mobilize a significant number of low-stake individuals by financing large scale public campaigns that disseminates simplified information, which overemphasizes the potential costs incurred by the general public and facilitates political participation through ready-made email petitions and the organisation of campaign events. The narrative is elevated into national media focus

[71] Komesar (1994): p72
[72] Ibid.: p76
[73] Olson (1965): p51
[74] Komesar (1994): p72

and the narrative of campaigners is reproduced. Political parties start to perceive emerging public opposition as a threat to their political survival and successfully pressure decision-makers to veto the process leading to the signature of the international agreement. In this scenario, we experience the mobilisation of Olson's latent large groups and Komesar's majority bias at work.

Both the relative effectiveness of special interest representation as well as the mobilization of dormant majorities present distinct possibilities of political malfunction. The design of primary legal and political institutions as well as governance practice can thus serve to decrease the potential for both.

Olson's core argument about the relative effectiveness of small groups has been employed to explain countless rent-seeking activities and what is called 'regulatory capture'. To present one of the most prominent areas of application, econometric studies of the effect of industrialisation on the level of external tariff protection and domestic cash support afforded to farm sectors across OECD countries demonstrates that - with fast growth of the industrial sector in a given country - decreasing amounts of farmers have increasing incentives to organise effectively to lobby political decision-makers for cash support and tariff protection, and do so highly successfully.[75] As illustrated in Chapter VII of this study, similar collective action failures apply to industries in decline, more generally, and frequently result in inefficient and consequential protectionist secondary legislation.

Quite apart from explaining real life observations, Olson's Logic of Collective Action has proven to be tremendously fruitful for successive theory development that aimed at a better and more refined understanding of "when and why an industry (or other group of like-minded people) is able to use the state for its purposes".[76] Stigler's 'Theory of Economic Regulation' is built on the assumption of the self-interested and utility maximizing political incumbent who rationally pursues his re-election to public office. In context of voter ignorance or, more formally, information asymmetries about the cost that individuals incur as a result of economic regulation, industries demand inefficient benefits from government. The price that industries pay for respective policies, according to Stigler, is political support: "The industry, which seeks regulation must be prepared to pay with the two things a party needs: votes and resources." And while campaign contributions make for the resource support of the

[75] Honma, Masayoshi and Yujiro Hayami (1986)
[76] Stigler: p4

incumbent's party, "the votes in support of the measure are rallied, and the votes in opposition are dispersed, by expensive programs to educate (or uneducate) members of the industry and of other concerned industries."[77] As a result, the incumbent government strategically disperses indirect benefits such as tariff protection or price fixing measures to a range of industries to maximize the probability of re-election.

Stigler's explanation of regulatory measures that accrue inefficient rents to powerful industries, as a function of their 'political support' to the incumbent, has been applied to model the rate of protection of a country's trade policy as a function of implicit campaign contribution offers made by competing industries. Industries bid for government favours, which, in turn offers "protection for sale".[78] As a result, Gene Grossman and Elhanan Helpman find that "rates of protection reflect the relative political strength of the various interest groups".[79] An important side-result of the Grossman - Helpman model is the identification of effects of interest group competition. Effective representation of particular concentrated interests does usually not exist in isolation but is confronted with similarly effective special interest lobby groups, which demand policies that compete for a limited amount of government resources or work in the exact opposite direction. For instance, "the users of intermediate inputs often are as politically active against import barriers as are the domestic manufacturers who favour such protection."[80] In consequence, we can expect that advocacy for the protection of the production of intermediary goods will be less successful than the representation of final good producers as the latter only faces the ineffective opposition of diffuse ordinary consumer interests.

The important point of this discussion is that we ought to read and understand the change of secondary legal institutions – i.e. policy - in context of the structure, efficiency, and efficacy of interests that are at work in each case and can thereby derive conclusions about whether respective legislation is designed to provide inefficient rents to some at a net cost incurred by the general public, or, in contrast, whether such legislation furthers the public interest by incentivizing productive activity or achieve other socially desirable objectives in a transaction cost efficient way. In turn, we can identify whether a particular primary institutional choice and

[77] Ibid.: p12
[78] Grossman, Gene M. and Elhanan Helpman (1994): pp833-850.
[79] Ibid.: p835
[80] Ibid.: p849

constitutional practice serves to diminish, transpose, or reinforce collective action problems – a notion that I further pursue in chapters IV, V, and VI of this study.

On the policy demand side, as we have seen, the cost of political participation and its effectiveness depends much on the implications of interest distribution – i.e. concentrated vs. diffuse interests – and the associated relative costs of organisation and information for small vs. large groups. Komesar notes that intervening variables, such as the complexity of the issues at stake or their coverage in the press, have an impact on such costs in that the determination of individuals' preferences, and thereby organisation for political action, becomes more costly with increasing complexity of the issues at stake.[81]

Individuals will, for instance, be generally well equipped to acquire information about the increase or decrease of national welfare benefits and process such information into preferences that can be relatively easily aggregated and transformed into political influence. The opportunity cost of understanding the effects of complex export subsidisation schemes, tariff reduction schedules at the six-digit level, or the domestic-content and transformation requirements of a set of rules of origin, however, will likely exceed the individual average benefit of acquiring such knowledge and of communicating one's preferences to public decision-makers. It is precisely for this reason, among others, that concentrated interests frequently seek government benefits in form of complex policies rather than direct cash transfers.

In the conclusions of their paper, Grossman and Helpman make an important though somewhat surprising recommendation for future research. Notably, the authors make proposals for research that would assess the impact and desirability of "alternative international rules of the game", which may "change the nature of the strategic interactions between elected officials and their constituents" and "generate predictions about what domestic policies will emerge from the political process in different institutional settings, and therefore to evaluate which rules give rise to preferred policy outcomes."[82] What is on the mind of the authors is an assessment of the impact of a two level game, in which governments tie their hands vis-à-vis domestic rent-seeking interest groups by committing to international trade rules. Assuming compliance, such a commitment would result in more efficient and possibly more equitable outcomes for the society as a whole. What the authors

[81] Komesar (1994): p73
[82] Grossman & Helpman (1994): p849

propose more generally is comparative institutional analysis of the status quo with a scenario in which constraints on political influence and participation are considerably increased by means of an external institutional and enforceable legal framework – a notion that is further examined in chapter III of this study.

It is interesting to note that the Grossman/Helpman proposal – possibly as a matter of political pragmatism – raises the option of imposing external institutional constraints rather than a reform of primary legal institutions that are – although implicit - endogenous to their model. The implicit institutional assumptions of the Grossman – Helpman model illustrate a point that is significant for the purposes of this study, which I discuss in the next section. It concerns the policy supply side constraints on political participation, which are determined by the design of primary legal institutions and political institutions that hold primary decision-making rights and responsibilities.

3.4. Institutional Design: Structuring the Cost of Political Participation

Existing and changing institutions affect the degree of political participation in two ways. First, as demonstrated above, the status quo of secondary legal institutions determines the individual benefits of and incentives for changing the status quo in absolute terms.[83] Secondly, the distinct design of primary legal institutions, of the political institutions it empowers, and of the informal institutions that evolve among governing political institutions imply varying cost of political participation for different interest groups. These policy supply side related cost of political participation, relative to the absolute individual benefits derived from changing the policy status quo, determine the overall individual incentive to organize or advocate for institutional change. In North's terms, the "agent of change is the individual entrepreneur responding to the incentives embodied in the institutional framework. The sources of change are changing relative prices or preferences."[84]

The institutional assumptions of the Grossman-Helpman model illustrate the second point well. A primary legal institutional framework that codifies *laissez-faire* disciplines on party financing sets strong incentives for efficiently organized narrow interest groups to equip the incumbent's party with resources, ask for legislative benefits in return, and bid for such benefits in competition with other groups if

[83] North (1990): p79
[84] ibid: p83

necessary. If policy demands are not responded to by the incumbent, i.e. by means of favourable secondary legislative design that directly or indirectly transfers rents, interest groups will turn to the political competitor to provide political support in form of campaign contributions. Primary institutional design, which incentivizes such political dependencies between powerful private and political actors by generating political bargaining power through rules on party financing systematically skews the distribution of benefits allocated through legislative outcomes in favour of well-organized narrow interest advocacy groups. In fact, such incentive structures for political participation reinforce the already existing advantage of narrow interest representation over diffuse or 'public' interest advocacy, which results from 'The Logic of Collective Action' on the demand side of public policy. As such, they promote government failures to the advantage of the few and at the net cost of the general public.

3.4.1. The Relative Autonomy of Political Institutions

The conscious design of primary institutional frameworks with the objective to avoid such biases can moderate and balance overrepresentation of specific groups by, for instance, eliminating the potential for political dependencies of legislators on concentrated interest representation in terms of the provision of legal campaign contributions or illegal bribes. Reforming the domestic institutional policy supply side conditions of the Grossman-Helpman model to that end would result in a relative increase of political participation costs for powerful concentrated interests and a relative decrease of such costs for inefficiently organized diffuse interests. As such, in the given context of voter ignorance (and in light of the complexity and sheer amount of legislative issues that affect low stake individuals) the creation of a higher degree of institutional autonomy is one measure that can reduce minority biases in legislative outcomes.

Granting political institutions autonomy from political dependencies is a constitutional instrument that aims at protecting certain areas of public decision-making from the influence of overrepresented groups. Institutional design that insulates public decision-makers from political dependence render the costs of political action prohibitively high for both concentrated and diffuse interests. Yet, prohibitive costs of political participation can benefit diffuse interests in relative

terms, notwithstanding the ideological predisposition prevalent in the decision-making institutions.

Such autonomy may be granted in light of the function of the respective institution vis-à-vis other political institutions and private actors. The most obvious example is the independent judiciary that is mandated with the authoritative interpretation of primary and secondary legal institutions. However, political autonomy may not only be granted on the basis of functional considerations, but with respect to the vulnerability of specific policy areas to capture by minoritarian (or majoritarian) influence that would risk the distortion of policy outcomes, whatever the normative benchmark of such an evaluation. One important example is the allocation of decision-making powers to relatively independent public institutions in the area of monetary policy, i.e. the central banks. Similarly, the relative autonomy of the government executive in conducting foreign policy in context of limited parliamentary scrutiny and executive transparency obligations is a function – at least if we follow the rationale for certain executive prerogatives – of the necessary conditions for governance in the 'public interest' that remains undistorted by the influence of special interest advocacy and/or mass sentiments. The very late parliamentarisation of EU Common Commercial Policy, more than 50 years after the entry into force of the Treaty of Rome, has arguably followed a similar rationale.

An illustrative example of a deliberate increase of political participation costs through institutional arrangements on the trade policy supply side in the US context is the Congressional granting of a Trade Promotion Authority (TPA) to the executive. The TPA is essentially a measure of Congressional self-restraint that strips Congress of its legislative amendment rights with respect to the adoption of trade agreements that the executive negotiated with third countries and tables for ratification. Without amendment rights, Congress is confronted to with a yes-or-no vote option, which considerably limits the influence of concentrated interest groups to demand trade policy benefits in return for campaign contributions through congressional channels.

The probably most significant example of building a certain degree of political independence into the institutional framework governing the EU *ex ante* – notwithstanding the institutional roles of the European Court of Justice (ECJ) and the European Central Bank (ECB) - is the equipment of the European Commission with the exclusive right to initiate legislative processes at the EU level and to set the legislative agenda through its policy proposals. While the appointment of

Commissioners by national governments is a political matter, the decision-making of the College is arguably more insulated from concentrated interest advocacy and national mass voter sentiments, in comparison to the explicitly political counterparts, i.e. the Council and the EP. The rationale for such constitutionally prescribed relative autonomy is inherent to the nature of the Commission's institutional task at hand - the promotion of European integration as the 'guardian' of the EU treaties. Positive integration of secondary legal institutions across nations – internally, and externally to the EU - requires liberalisation and harmonisation measures that strongly affect powerful vested interests. *Relative* political autonomy of the Commission as the agenda-setting political institution at the EU level thus serves the purpose of protecting the content of Commission policy proposals and decision-making from the structural overrepresentation of such interests.

In contrast, the allocation of distinct procedural rights in the legislative process - such as agenda-setting, amendment, and veto powers as well as rights of information and scrutiny – to political institutions that are susceptible to the influence of special interest representation and / or mass voter sentiment due to the political dependencies that are implicated in primary legal institutions, generally lowers the cost of political participation for private stakeholders. The degree to which the involvement of such institutions sets enhanced incentives for political action, and for whom, depends, in the first place, on factors deriving from the primary institutional framework that governs them.

For instance, the susceptibility of distinct political institutions depends on whether we are confronted with a parliamentary system in which the executive depends on continuous majority support in the legislative branch throughout its term and thereby reinforces party discipline of the governing parties in the legislature. In a separation of powers framework – which best describes the triangular checks and balance polity in the EU, the legislative branch is largely independent from the executive and therefore more inclined to serve distinct constituencies as a function of advancing the self-interest of members of Parliament or the Council through re-election.

Other institutional factors that determine the specific character of political dependencies, and therefore the relative cost of political participation for distinct constituencies, include the electorate system that shapes the composition of political institutions, the character of campaign financing laws, and the frequency of elections.

The direct election of MEPs by voters in a given district, for instance, will tie political positions of that MEP to interest configurations prevalent in that district and thereby significantly lower the cost of political action for that constituency, whereas national party lists render the fate of MEPs contingent on national party politics and her respective ability to serve the interests of those who ensure the political and economic survival of the party and thereby strengthen party cohesion rather than individual votes.[85] As we have seen in the Grossman/Helpman model, moreover, lenient national campaign financing laws render political systems highly vulnerable to systematic rent-seeking activities and regulatory capture on behalf of potent private institutions.

In sum, political dependencies and relative autonomy of elected or appointed decision-makers make for one important factor in the policy supply side analysis of political participation costs for distinct interest groups and the potential for their overrepresentation. The implicit or explicit incentives that primary institutional frameworks set for political dependencies among political institutions or between political institutions and private stakeholders decrease the access costs for respective beneficiaries and increase relative costs for those who are implicitly or explicitly excluded from such relationships. Political access, unlike in North's transposition of neoclassical market conditions into the political process, is hardly ever equal. It is the distinct design of primary legal institutions and political institutions as well as evolving practice of governance in context of a given set of problem pressures, however, which determines the degree of inequality on the policy supply side.

3.4.2. The Relative Informational Capacity of Political Institutions

The above considerations rely on the rational choice presumption of political decision-makers as self-interested re-election probability maximizers and the implications of the absence of political dependencies that underlie decision-making. It should be recalled that, in North's transposition of neoclassical market efficiency assumptions to the political process, self-interest in fact serves the 'public interest' under the condition of perfect information and instrumental rationality on the side of both voters and legislators. This transposition allowed North to illustrate the invalidity of these assumptions. In the same vein, I have outlined above how the costs of organisation, associated cost of information, and resulting distortions of

[85] Tsebelis, George (1995): p312

representation on the demand side of policy is one potential source of distorted policy content and outcomes.

The rational choice paradigm, however, has limited explanatory value for human behaviour. As North notes, "there is nothing the matter with the rational actor paradigm that could not be cured by a healthy awareness of the complexity of human motivation and the problems that arise from information processing."[86] But what if we relax the assumption of self-interested utility maximization and presume legislators and public officials that are genuinely concerned about the public rather than their own interest? In a value neutral fashion, we can consider public interest conceptions that have other ends than economic welfare maximization, but still advance socially desirable objectives. This is to assume that legislators and officials have perfect knowledge about constituency preferences, say sustainable economic growth, low consumer prices, increasing net employment, efficient expenditure of tax income, a social safety net to prevent precarious social conditions and their potential for societal frictions, the internalisation of environmental costs of production, etc.

The problem that we are confronted with in this scenario is that, even if decision-makers were concerned about the public interest in general terms, they will, in reality, frequently have imperfect information about constituency preferences, about the availability of different policy instruments, and have a limited mental capacity to assess the impact of distinct policy design on outcomes in context of complex environments. As a result, we can abandon another assumption that is conditional for efficient outcomes of the political process in terms of aggregate net income in the neoclassical market model. Imperfect information and bounded rationality of individuals do not only result in transaction costs on the demand side of policy. They imply transaction costs on the supply side of policy, too. The incentive and value structure embedded in policy content, and hence their effect on outcomes, therefore also depends on the degree to which the structural features of political institutions that are equipped with agenda-setting, amendment, and veto rights, serve to reduce uncertainties about constituency preferences, the availability of policy instruments, and effects of these instruments on outcomes.

As I argue below, the capacity of a political institution to reduce transaction costs associated with imperfect information and bounded rationality has important

[86] North (1990): p111

implications for the cost of political participation of private interest groups and for the bargaining power of that institution vis-à-vis other political institutions. The level of information costs is not only critical for the effectiveness of private collective action vis-à-vis political institutions, as we have seen above. It is a key factor for the analysis of political institutions, too, as it implies the 'power to persuade'[87] and the 'weakness to be persuaded'. At the same time, it is a key source of distorted policy content, outcomes, and thus governance failures to provide efficient public goods.

While real-life political institutions will hardly ever base their decisions on perfect information about preferences and policy effects, they frequently differ significantly in their capacity to reduce information costs I shall refer to this capacity as 'informational capacity'. Informational capacity of political institutions is their effectiveness to acquire, process, assess, communicate, and transform information about the preferences of private and public institutions as well as about the effects of distinct policy design on outcomes. Informational capacity is directly related to internal costs of information and costs of organisation. We can therefore distinguish between political institutions that are characterized by high and low internal costs of information and informational capacity. Costs of information within political institutions and their informational capacity shall be further defined as a function of technical expertise held by its membership and staff; institutional memory; the overall amount of resources available; organisational structure in terms of specialisation and division of labour; the ideological cohesion of institutions; and their size. I briefly operationalize each of these factors below.

The level and amount of technical expertise held by the membership and staff of a political institution with regard to a particular policy area is a key analytical category for an understanding of how institutions transform any given demand for outcomes into a policy solution. Technical expertise is the technology that political institutions employ to produce policy. Technical expertise is not a static array of factual knowledge but includes the capacity to process, filter, evaluate, communicate, and transform inflows of technical information.

Institutional memory, secondly, implies a degree of technical expertise. However, the scope of the concept covers more than just the sum of the individual expertise held by the members and staff of an organisation. It encompasses the degree

[87] Krehbiel, Keith (1991): p76

of collective experiences and expertise held and concepts used by the membership and staff of a political institution with regard to a particular policy area and formal and informal processes applying to its governance. Institutional memory also transcends the individual in that it is passed onto new generations of membership and staff. As such, it forms part of the culture of a political institution and may foster collective perceptions of institutional self-interest.

Overall resource endowments, third, form another important component of informational capacity as it not only determines the amounts of internal expertise an institution can afford, but also the amount of independent information it can acquire on demand externally (e.g. policy impact assessments, policy studies, technical briefings produced by think tanks, consultancies etc.), and the amount of fora it can provide to gather, share, and communicate information externally.

Organisational structure and division of labour, fourth, determines what Keith Krehbiel calls 'informational efficiency' and defines as "the amount of reduction of uncertainty in the course of the choice process".[88] In more practical terms, uncertainty about preferences and effects of policy design is reduced by a hierarchical organisational structure that provides for the division of labour and responsibilities among its members and staff along the lines of policy areas and issues in the form of organisational units, departments, committees, or working groups. Informational efficiency is measured by the degree to which members and staff of a specialized organisational unit, committee, etc., are able to share information with the entire membership of the institution and reduce uncertainty about the effects of decisions on policy design. The specific structure of the internal organisation of political institutions is, apart from their composition, largely a matter of institutional self-governance and therefore makes for what I have defined as informal institutions. Such informal institutions are significant not only for informational efficiency but also for the efficiency of decision-making as legislative committees are frequently tasked to propose a consolidated set of amendments or policies for approval to the entire legislature and/or are mandated to negotiate legislative compromises with other political institutions. The degree to which informal institutions enhance informational efficiency thus also decrease agency problems that prevail between specialized committees and the entire legislature: specialisation creates information asymmetries

[88] Krehbiel (1991): p74

and thus "gatekeeper powers" over the content of legislation that is proposed to the entire membership.[89] But informational efficiency implies that intransparencies resulting from specialisation are compensated by efficient information sharing arrangements. In this way, informal institutions can diminish or enhance trade-offs between decision-making efficiency resulting from specialisation and asymmetric information among the membership of an institution.

Ideological cohesion of the membership and staff of political institutions, moreover, reduce uncertainty about whether policy design furthers the preferences held by its members in that it creates trust in the accuracy of the information that is communicated. It is for this reason, in case of heterogeneous ideological predispositions, that specialized committees in parliaments tend to mirror the proportion of party membership within the entire institution, and thereby further decrease agency problems prevailing between the entire membership and specialized committees. Informational efficiency also decreases with increasing size of the membership of the organisation and increasing amounts of legislative dossiers, as information flows become increasingly difficult to organize.

In sum, even if we optimistically assume that public officials are driven by concern over 'the' public interest, the relative informational capacity of political institutions to reduce uncertainties about preferences and the effects of policy remains a significant variable, which affects their decisions on the design of secondary legal institutions. This point is intuitively clear if we view decision-making of individual political institutions in isolation from private interest advocacy and the political strategies pursued by other political institutions. But what are the consequences of *relatively* low informational capacity and (corresponding) high internal costs of information of political institutions in a real-life scenario? I speak in 'relative' terms here because information costs will never be zero and they always compare to the information costs of other real-life political institutions rather than neoclassical assumptions about perfect information and instrumental rationality.

The first and general consequence of relatively high internal information costs is the relatively strong dependence on information provided by external private or public sources. High information costs on the policy supply side thereby reduce the costs of political participation for private institutions *per se* and *a priori* irrespective

[89] Krehbiel (1991): p80

of the character of interests (concentrated or diffuse) that such private institutions represent.

The second consequence of high information costs and low institutional informational capacity is the proportionate increase of the importance of ideology for the acquisition and processing of information. In context of voter ignorance ideologies prevalent in political institutions matter as "they shape the subjective mental constructs that individuals use to interpret the world around them and make choices."[90] As such, they shape the individual subjective conception of what the public interest is and how it can be advanced. But it is the informational capacity of institutions that determines exactly how much ideologies matter. In high information cost environments, public officials will, in order to reduce uncertainty about policy effects, turn to those external sources that share similar ideological predispositions to acquire information. In that way, ideologies held by public decision-makers in high-information cost environments have a greater bearing on the structure of political participation costs for distinct private interest groups than in low information cost environments, as, in case of uncertainty about the relationship of preferences, policy instruments, and outcomes, ideology becomes the prevalent filter for external information acquisition and hence the predominant determinant of decision-making.

Yet, in a dormant majority scenario, this assumption says nothing about the *effectiveness* of political participation in terms of supplying the excess demand of political institutions for information as private (diffuse or concentrated) interest groups themselves differ tremendously in their informational capacity. High internal information costs of political institutions reinforce the effectiveness of special interest advocacy as it is concentrated interest groups that are qualitatively superior, compared to diffuse interest organisation, in providing public officials with the specific technical information that they require to transform preferences over outcomes into proposals and decisions over policy design. In practical terms, diffuse interest groups may be able to provide general information about their political preferences on the desirability of distinct policy outcomes but lack, compared to concentrated interest groups, the ability to provide public officials with sophisticated technical proposals on policy design. It is in that way that high internal information costs of political institutions reinforce the effectiveness of concentrated interest advocacy.

[90] North (1990): op. cit. p111

In summary, relatively low informational capacity of political institutions has three distinct effects that can steer public decision-making and institutional design into different, possibly incompatible directions. First, in context of excess demand for information, high internal information costs decrease the cost of political participation *per se* and indiscriminately. Secondly, it increases the significance of ideological predispositions that members of political institutions hold and lower political participation costs for those stakeholders and institutions that share respective convictions. Third, it decreases the cost of political participation for interest groups that are relatively effective in providing the technical expertise that is necessary for law-making in complex policy areas. In turn, we can expect, in case of high internal information costs, that policy design will be shaped by dominant ideological orientations and effective supply of external information. As such, the distortion of policy content through overrepresented interests is not only dependent on whether or not decision-makers act in self- or public interest, but also on the relative informational capacity of political institutions to relate accurate information about preferences to policy instruments that achieve the preferred ends.

It is noteworthy that, in practice, political institutions are always dependent on the receipt of information from those who are affected by policy – and particularly so in the area of external trade and investment policy. There is simply no way that political institutions could acquire all relevant information by themselves or solely through independent sources. But it is the institutional capacity to acquire, process, assess, and transform information that has a bearing on policy design and on whether proposals, amendments, and final legislative texts reflect an overrepresentation of certain interests, or not.

Relative informational capacity of institutions, however, does not only translate into their relative autonomy from information provided by advocacy groups that represent narrow or diffuse interests. Informational capacity, along with decision-making rights codified in primary legal institutions and political dependencies, is also a crucial factor that shapes the relative bargaining power of political institutions among each other. Krehbiel, for instance, notes that "informational power is perfectly analogous with (…) the notion of presidential power as the 'power to persuade'. A president gets what he wants not by commanding others to act contrary to their interests. Rather, his power comes from persuading others that, contrary to their

persuasion and beliefs, what he wants is in their interest."[91] In other words, the informational capacity of political institutions to table policy proposals or amendments that are technically sound and consistent and credibly aim at the achievement of shared preferences about outcomes; as well as the informational capacity to communicate the assertion that the proposed means result in commonly desired ends complements formal decision-making powers in the governance process, irrespective of ideological predispositions held by the actors involved. By the same token, informational capacity implies the power to convince political actors that particular ends are not achievable with the available policy instruments in a given institutional environment, or that specific policy instruments are better suited to produce desired results than others.

It is important to note, in this context, that statements about relative informational capacities do not imply a normative judgment, notwithstanding the temptation to believe that stronger informational capacities produce 'better' policy and therefore 'better' outcomes. This assumption, however, implies a hierarchy of preferences. At a positive level of analysis, the observation of a given structure of informational capacities of political institutions – and of the underlying information asymmetries – evaluates who, first, has more accurate information about the relationship between preferences, policy instruments, and their effects, and, second, is better equipped to convince other relevant political actors that her policy propositions are superior to others. Whether those are desirable or not depends on subjective normative dispositions and the respective means of achieving them (if only one knew how). In negative terms, informational capacity indicates which institution will not be able to convince others of her preferences and has the 'weakness to be persuaded'. As such, the analysis of informational capacities can result in statements about which political institutions are able to dominate and shape the political and technical discourse about policy alternatives. It is sometimes the mere reputation of institutions to wield strong informational capacities that renders them 'persuasive'. This is particularly so in technically complex policy areas.

In economic exchanges, in context of a given set of institutional constraints, information asymmetries result in an uneven distribution of bargaining power among economic actors. The contracts that are designed by these actors to govern their

[91] Krehbiel (1991): p76

exchanges reflect the distribution of bargaining powers. The same is true for political exchanges, the bargaining power of political institutions, agreements among political institutions, and the value and incentive structure embedded in secondary legal institutions that result from political exchanges.

It is clear from the above discussion that a comprehensive understanding of the effects of constitutional reform, the *Verfassungsrealität*, and the determinants of the value and incentive structure of secondary legal institutions requires an integrated analysis of formal primary and secondary institutions in context of structures of private interest representation as well as capacities and characteristics of political institutions that hold decision-making rights. To this end, I have operationalized a number of key factors that contextualize the analysis of the primary legal and political institutions of EU Common Commercial Policy. There are, however, two missing pieces to this analysis.

3.5. Informal Institutions

The first missing piece concerns the role of informal institutions that evolve among political institutions in the governance process. Such informal agreements, conventions, habits and practices among governing institutions can serve to reduce transaction costs of legislation and policy implementation and thereby enhance the efficiency of governance. It is important, in this respect, to determine "whether informal rules produce similar or different outcomes from those that would result from the adherence to formal rules."[92] The case in point are trilogue negotiations - involving Council, EP, and Commission - that have become the common practice in context of the OLP and have led to an exponential increase of first-reading agreements among Council and EP, and thereby overall resulted in faster legislation.[93] Between 2009 and 2011, 74% of OLP dossiers led to a first-reading agreement following trilogue negotiations, 96% of which were adopted by the Council and the EP. But while "the literature finds that the use of trilogues is motivated by time pressures and rising workload", scholars similarly conclude that this convention reduces time for deliberation (and thereby political participation), constrains

[92] Christiansen, Thomas and Christine Neuhold (2013): p1199
[93] Kardasheva, Raya (2012): p3

transparency, and marginalizes the work of specialized EP and Council committees to the benefit of a small number of designated negotiators.[94]

A second important case of informal institutions is the Framework Agreement on the Relations between the European Parliament and the European Commission, which specifies, details, and adds to a number of primary legal institutions that affect the legislative cooperation between the EP and the Commission.[95] Both trilogue negotiations and the Framework Agreement, among other informal institutions that have evolved in the practice of EU Common Commercial Policy since the Lisbon Treaty Reform, change the bargaining power of the political institutions involved vis-à-vis each other, but also specify the political access of private institutions (or the lack thereof), and thereby matter for the quality of policy content.

Both examples, moreover, illustrate "the increasing seclusion of democratic decision-making to a limited circle of expert actors".[96] This point is important for the discussion of the effects of constitutional reform on the quality of legislative output in context of other social purposes such as transparency, accountability, and democratic legitimacy of CCP formulation.

3.6. Institutional Effectiveness

The second missing piece concerns the concept of the relative institutional effectiveness, or efficacy, of individual political institutions, which I define, for the purposes of this study, as the relative capacity to transform a given set of preferences held within an institution into legally binding change of the policy status quo. Institutional effectiveness is contingent on a number of factors that I have examined above, notably the formal rights (agenda setting, amendment, veto, information) that political institutions hold within the legislative process vis-à-vis other institutions, their relative informational capacity, the internal ideological cohesion on a given subject matter, as well as informal institutions.

It is analytically important to distinguish between the distinct efficiency of political participation that result from the information asymmetries, which underlie the logic of collective action, on the one hand, and the effectiveness of political institutions in transforming a given set of preferences into a legally binding change of

[94] ibid.: pp7-8
[95] Framework Agreement on relations between the European Parliament and the European Commission (2.11.2010).
[96] Heritier, Adrienne (2012): p38

the secondary legal status quo. The effectiveness of political participation is a function of the cost of organisation and information of private institutions, as well as the policy supply side incentives for political participation – i.e. the institutional incentives (e.g. the veto right of a particular political institution) that determine whether it is worthwhile to take political action to change the policy status quo –, are a *necessary* but not a *sufficient* condition for the change of the policy status quo. It is the relative effectiveness of political institutions, as an integrated function of the contextual factors that I have discussed above, which determines whether a given set of policy demands can be transformed into legislative content.

George Tsebilis' 'veto player' analysis, for instance, illustrates that it is generally more advantageous, in terms of relative institutional effectiveness, to hold agenda-setting powers than veto-powers.[97] The above discussion of informational capacity has, secondly, served to explain the institutional power derived from low internal information costs. Internal ideological or issue-specific cohesion, moreover, decreases the probability of the success of 'divide and rule' strategies pursued by other political institutions. Empirical studies have demonstrated, for instance, that EP amendments have a much higher success rate "when it is united, when the two main party groups vote together."[98]

In addition to these factors, institutional effectiveness decreases with the increasing number of 'veto players' that are involved in the legislative process.[99] Demonstrating the significance of institutional choice for international economic integration in particular, scholars have applied George Tsebelis' veto player model to analyse overall institutional effectiveness across countries. This has resulted in a comparative assessment of the performance of national institutional frameworks governing external economic integration with regard to the likelihood for deeper external economic integration,[100] the likelihood of a state to sign PTAs,[101] and the likelihood to reduce tariff and non-tariff barriers.[102]

Empirical findings consistently demonstrate that domestic demand for enhanced economic integration is significantly less successful to shape policy

[97] Tsebelis, George (2002)
[98] Hix & Hoyland (2011): p72
[99] Tsebelis (1995): p313
[100] Mansfield, Edward D., Helen V. Milner, and Jon C. Pevehouse (2008): pp67-96.
[101] Mansfield, Edward D., Helen V. Milner, and Jon C. Pevehouse (2007): pp403-432.
[102] O'Reilly, Robert (2005)

outcomes commensurate to the increasing number of veto-players involved in the decision-making process.“ A series of empirical tests, based on an analysis of PTA membership from 1950 to 1999” demonstrate in “substantively as well as statistically significant” manner that “an increase in the number of domestic veto players “can cut the probability of forming a PTA by as much as 50 per cent.”[103]

In the context of EU governance of Common Commercial Policy, we can appreciate the notion that the allocation of veto powers to the EP may generally decrease the relative institutional effectiveness of the Commission and the Council in the CCP law-making process. At the same time, however, the decreasing threshold of votes required for decisions by the Council – from the pre-Nice Treaty unanimity requirement, over post-Nice QMV, to the extension of qualified majority voting in the fields of services trade and IPR post-Lisbon – can be interpreted to increase the relative institutional effectiveness of the Commission and the EP within the given domestic institutional setting. Analysis conducted in Chapter IV of this study further discusses this notion.

The veto-rights held by 28 member states governments and their national parliaments in the legislative *modus operandi* applicable to the signing and conclusion of ‘mixed’ external economic agreements, however, significantly decreases the institutional effectiveness of the Commission, the Council, and the EP in the process of CCP governance if compared to a scenario of ‘EU-only’ signature and conclusion of said agreements. The comparison of these two fundamentally distinct modes of governance of EU external economic relations and their practical consequences for the efficiency, effectiveness, and democratic legitimacy of EU external action governance in the area of trade and investment policy makes for the focal point of this study in chapter V and chapter VI. The analysis conducted in those chapters underscores the significance of institutional choice and institutional change for the pursuit of legitimate public goods through EU governance, which have the potential to affect the development path of the European political, social, and economic community in the decades to come.

[103] Mansfield, Milner & Pevehouse (2007): p432

4. Conclusions

Throughout this chapter, I have introduced a number of distinct concepts and analytical categories, which, if understood as conceptual lenses for the examination of the law and practice of EU Common Commercial Policy governance. The consideration of these factors in a positive and normative assessment of institutional change of Common Commercial Policy governance in the aftermath of the entry into force of the Lisbon Treaty can result in a nuanced understanding of the relationship between costs and effectiveness of political participation, the formal and informal characteristics and constraints of governance, and their effects on both political participation and the value and incentive structure embedded in secondary legal institutions.

The contextual analysis of the reform of primary legal institutions that govern political institutions, and the informal institutions that evolve among these political institutions can increase the explanatory value of the examination of institutional change in the field of EU Common Commercial Policy post-Lisbon. This approach builds on the arguments of "the critics of demand-side theories of trade policy who argue that institutions affect how societal demands translate into policy choices."[104]

The purpose of this study is to advance an integrated and comparative analysis of the process of institutional change that the constitutional reform of the Lisbon Treaty has set in train in the area of EU external economic governance. The question that this study seeks to answer is whether the Treaty reform – and the broader process of institutional change that it triggered – lives up to the objectives of "more democracy, transparency, and efficiency" of EU governance, which were set out by the Laeken Council in 2001.

Answering this question in an empirically and normatively valuable manner requires an integrated analysis of the reform of primary legal institutions, an analysis of the political institutions involved, an analysis of the evolving informal institutions, and the conduct of case studies, which incorporate an understanding of relationship between the input, throughput, and output of CCP governance.

With these considerations in mind, the following chapter sets a starting point for the integrated analysis of the law, practice, and institutional change of EU external economic governance in the subsequent chapters. Its essential purpose is to project a

[104] O'Reilly (2005): p668

conception of the ‘task’ that EU external economic governance performs and manages under domestic and international institutional constraints.

III. EU External Economic Integration: Core Concepts, Multi-Level Games, and the 'Global Europe' Strategy[105]

1. Introduction

The evolution of EU external economic integration through law does not only face domestic institutional constraints in the shape of constitutional law and secondary law, the structural characteristics of political institutions and policy demand. Externally, it is embedded into continuously evolving system of global economic governance, dynamic global economic and technological development, and the constant adaptation of international legal institutions to changing political, economic, and technological contingencies. In this light, it is the aim of this chapter to introduce the core concepts of EU external economic integration and to place the EU's 'Global Europe' agenda – which still makes for the core of EU external economic policy strategy today - into the context of progressive change of international legal institutions and changing patterns of international commerce.

As for international legal institutions, Helpman and Grossman, as noted in the previous chapter, find that "[s]uch rules limit the policy choices open to national governments and change the nature of the strategic interactions between elected officials and their constituents."[106] Indeed, EU external economic governance can be modeled as a 'multilevel-level game', in which EU negotiators are required to balance domestic and international legal, political, and economic constraints with a view to creating sustainable international legal institutions. In a highly influential article of 1988, Robert Putnam conceptualizes negotiations of agreements under public international law as interactions of two levels: "The politics of many international negotiations can usefully be conceived as a two-level game. At the national level, domestic groups pursue their interests by pressuring the government to adopt favorable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of

[105] The second part of this chapter as well as chapter IV draw from insights gained in 15 interviews, which the author conducted and recorded in Brussels from March 2013 to February 2014. A list of the interviewees forms part of the bibliography of this study. Conclusions drawn from these interviews can and shall in no way be attributed to individual interviewees.
[106] Helpman & Grossman (1994): p 849

foreign developments." [107] Putnam recognizes, moreover, that a two-level game model does not suffice to explain EU international-supranational-national interactions in bilateral or multilateral negotiations of international legal institutions: "many institutional arrangements require several levels of ratification, thus multiplying the complexity of win-set analysis. Consider, for example, negotiations between the United States and the European Community over agricultural trade."[108] Hence, other authors have adapted Putnam's two-level model to a 'multi-level game' model for the purposes of EU external negotiation research.[109]

With these considerations in mind, this chapter sets a starting point for the integrated analysis of the law, practice, and institutional change of EU external economic governance in the subsequent chapters. Its essential purpose is to project a conception the 'task' that EU external economic governance performs and manages under domestic and international institutional constraints.

This conception can be viewed against the background of – or in contrast to – the vaguely formalized normative guidelines of the CCP, which are codified in Article 206 TFEU and Article 21 TEU. Viewing the object of EU external economic governance through the conceptual lens of a multi-level game model can generate important insights for an assessment of the institutional choice of the Lisbon Treaty drafters, the practice of CCP governance, and hence of the quality of institutional change that the Lisbon Treaty has set in motion. A normative question is, in this context, whether the law, practice, and institutional change of EU external economic governance enables the Union to accomplish legitimate objectives of its Common Commercial Policy. To illustrate this point, we can consider the complexities, challenges, and opportunities that arise for EU negotiators of the substantive content of external economic integration in Putnam's two-level game scenario. Three considerations are particularly noteworthy for the purposes of this study.

Domestic complexities and challenges, first, increase in a 'three-level game' scenario, which, as mentioned above, has been employed to describe EU external negotiation dynamics more adequately. Adding further levels, or increasing the number of veto-playing domestic institutions, reduce – according to Putnam's logic – the size of the 'win-set' (i.e. all possible Level I agreements that would be ratified by

[107] Putnam, Robert (1988): p434
[108] ibid. p449
[109] See, for instance: Bonvicini, Davide (2008)

Level II, III, n constituencies). The 'Wallonian-Saga' that evolved around the threat of the Belgian regional government of Wallonia to veto the signature of CETA, in October 2016, exemplifies the difficulties of incorporating a fourth level of governance in a 'multilevel-game' negotiation / ratification process. It is not surprising, for this reason, that the episode stirred considerable political debate over the effectiveness, efficiency, and credibility of EU external economic governance. I further examine this incident of CCP practice in Chapter VI. As Putnam notes in regard of the two-level game context, in 1988, "[t]he greater the autonomy of central decision-makers from their Level II constituents, the larger their win-set and thus the greater the likelihood of achieving international agreements."[110]

If compared to national parliamentary democracies, the autonomy of central decision makers – or 'state strength' - in the EU or US system of checks and balances can be considered as weak, which, in turn, reduces the likelihood of achieving international agreements in comparative terms. In the EU system, the EP and the Council votes are not tied to the long-term approval of the executive through a governing coalition. Voting-behavior and political coalitions, rather, are issue-specific. Moreover, Council approval depends on the existence of national coalitions and thus the interactions of national Council representatives with domestic constituencies. The complexity of national / European / international interactions necessary for gathering political support for the international agreement in question increase manifold in the scenario of 'mixed' agreement signature and ratification, which adds up to 38 national parliamentary veto-players after negotiations on the substance of the agreement in question have already been finalized.

Yet, secondly, the functional benefits of increasing degrees of autonomy of central decision-makers from domestic constituents are not unlimited. In Putnam's words, "two-level analysis also implies that, *ceteris paribus*, the stronger a state is in terms of autonomy from domestic pressures, the weaker is its relative bargaining position internationally. For example, diplomats representing an entrenched dictatorship are less able than representatives of a democracy to claim credibly that domestic pressures preclude some disadvantageous deal. This is yet another facet of the disconcerting ambiguity of the notion of "state strength."[111] We can consider, for instance, that "one effective way to demonstrate commitment to a given position in

[110] Putnam (1988): pp436-443
[111] ibid: p449

Level I bargaining is to rally support from one's constituents."[112] In this way, negotiators can credibly assert that their hands are tied domestically, leaving no room to divert from a chosen position. As illustrated in the brief EU-Japan case study at the end of this chapter, Level II institutions can increase the effectiveness of Level I negotiators by anchoring their positions domestically, e.g. by rendering domestic approval conditional on the achievement of specific negotiation objectives.

Third and finally, it is worth taking note of the implications of the politicization of certain negotiation dossiers for the likelihood of reaching an international agreement. According to Putnam, "[t]he composition of the active Level I constituency (and hence the character of the win-set) also varies with the politicization of the issue. Politicization often activates groups who are less worried about the costs of no-agreement, thus reducing the effective win-set. […] This is one reason why most professional diplomats emphasize the value of secrecy to successful negotiations."[113] The transparency objective pronounced by the Laeken Declaration does not make for a central object of enquiry in this study. It is important to take note, however, of how the politicization of specific negotiation dossiers through concentrated campaign efforts has activated large and otherwise dormant Level II constituencies and thus enhanced the potential of majoritarian bias over the decision of concluding international trade agreements.[114]

The remainder of this chapter presents basic concepts and developments of contemporary international economic integration through law and the introduction of the notion of 'competitive liberalization' as a potent external driver of the contemporary CCP agenda. As a matter of illustration, the chapter then outlines selected domestic and external institutional challenges that EU negotiators are confronted with in contemporary CCP governance. The chapter closes with an illustration of EU external economic, institutional, and domestic political dynamics that characterize the negotiation and forthcoming signature of the EU – Japan Economic Partnership Agreement (JEEPA).

[112] ibid: p450
[113] ibid: p445
[114] Bauer, Matthias (2016)

2. International Economic Integration through Law: Core Concepts

Many scholars have failed in the attempt to find a comprehensive definition for the concept of regional and international economic integration over the course of many pages, articles, or book chapters. There are four good reasons for this difficulty: International economic integration through law has, first, become increasingly complex in technical, political, and economic terms; is, secondly, a highly diverse phenomenon in terms of legal and geographical coverage, enforceability, and governance structures; and is, third, a constantly evolving area of international economic law that is, fourth, adapting to new and rapidly changing patterns of international trade and commerce as well as political objectives of all actors involved.

For the purposes of this study, for the sake of simplicity, international economic integration through law shall be understood as any agreement between two or more nation states or customs territories under public international law that is effective in, or aims at facilitating cross-border commercial transactions and economic activities.

Governments employ countless different legal instruments to limit or eliminate cross-border transaction costs of commerce. Governments can reduce border taxes and quantitative restrictions (quotas; tariff rate quotas, import licenses) to allow for cheaper import of goods. The harmonization of customs procedures allows businesses across a region to spend less time and other resources on complying with different customs clearance procedures. Governments may deregulate foreign ownership of enterprises situated in their jurisdiction to attract foreign direct and portfolio investment; governments may decide to facilitate the entry of foreign managing staff of companies situated in their territory. The recognition or harmonization of food safety standards or technical regulations for production across different jurisdictions further reduces businesses compliance costs. The liberalizing effect of regulatory convergence is not limited to merchandize trade: governments may come to international agreements to harmonize standards, technical regulations or recognition procedures for services suppliers.

Yet, even if governments open domestic markets to foreign competition, business practices or government subsidies to local producers may still offset market access preferences granted to third country enterprises. In order to level the playing field for commerce in the region, governments may hence enact regional competition policies and establish a joint competition authority with enforcement rights. But

selling goods in third countries – or their production abroad – may still not be appealing for companies if laws and the judiciary of the jurisdiction a product is destined for do not effectively protect intellectual property rights (IPR). In this way, the existence of effective IPR regimes are considered to factor into decisions of economic actors to sell or invest in third country markets.

The aforementioned instruments, to be sure, work both ways. Governments' intent to protect domestic commercial activity from foreign competition frequently manifests itself in rising tariff barriers and quantitative restrictions or in market segmentation driven by non-tariff barriers to trade. International legal institutions of the WTO-centred multilateral trading system, as well as bilateral and plurilateral institutions of international economic law, serve to govern the permissibility of domestic policy formulation through the core principle of non-discrimination.

2.1 Negative vs. Positive Integration

In order to give more conceptual clarity to the wide range of government measures, we can broadly distinguish between two forms of economic integration through law, notably negative and positive economic integration.[115] Negative economic integration denotes the reduction or complete elimination of taxes (i.e. duties and tariffs) and quantitative restrictions (e.g. import quotas) that are applied to the imports at the border as well as the reduction and elimination of internal taxes or administrative barriers applied to trade among two or more nation states or customs territories. Positive integration, in contrast, transcends the notion of negative integration in that governments not only eliminate and reduce barriers to merchandize trade. Positive integration additionally encompasses the joint development of the legal and institutional prerequisites for the free movement of goods, services, labor, and capital through common approaches to regulation in a wider area of economic policies. The prominent instruments of positive integration are the harmonization of laws and regulations or the mutual recognition of legal standards as 'equivalent' in law and/or effect. Regulatory convergence, in this way, is generally thought to reduce the transaction costs of doing business across countries' jurisdictions.

Negative economic integration solely aims at the mutual opening of markets for businesses situated in the respective other party's territory. Positive integration,

[115] Scharpf, Fritz (1999) p55

beyond the mere creation of commercial opportunities, also seeks to address the failure of free market economies and/or the inability of individual national governments to protect or create important public goods across borders. It is for these purposes that governments enter into intergovernmental legal agreements with each other or transfer legislative, executive, and judicial powers to joint institutions in order to provide of transnational governance important policy areas such as financial stability, competition, the protection of property, the environment, food safety, or of labor rights.

2.2. Four Stages of Regional Economic Integration

More specifically, we can identify and differentiate among five different stages of regional economic integration through law. We can think of these four different stages as an evolution from 'shallow' integration through law to 'deep' regional economic integration that may take place over years and decades, depending on the strength of the economic and political rationales that drive integration processes forward. These are free trade areas, the customs union, the common market, as well as the monetary and fiscal union, which are – for introductory purposes and the sake of completion – outlined below.

2.2.1. Free Trade Areas

Free trade agreements (FTAs) typically aim at creating 'free trade areas' by eliminating or reducing border tariffs and quantitative restrictions to trade in goods among two or more nation states or customs territories. The basic economic rationale of free trade areas is the creation of larger markets for businesses and the generation of benefits that are associated with increasing competition - such as lower prices, increasing product variety, better quality, and businesses enhanced efficiency of resource allocation. Most 'Free' Trade Agreements do not really eliminate all tariffs and import quotas among the participating states, which is why scholars often prefer to call these accords 'preferential trade agreements' (PTA). As such, the term gives more semantic justice to what we can observe in practice.

Whilst dismantling traditional market access barriers to trade, FTA parties frequently retain customs procedures and border controls amongst the different customs territories and maintain their own border regimes vis-à-vis third countries. At the same time, FTA partners agree on a common set of rules that define the

characteristics of products that are considered to be 'originating' from within the FTA members customs territories. The primary purpose of such 'rules of origin' (ROO) is to mend a particular problem that arises as a consequence of maintaining different external border regimes. Allowing for different national border regimes vis-à-vis third countries while trading 'freely' with PTA member countries can generate economic inefficiencies. Different external tariffs held by the members of the FTA set incentives for third country businesses to clear their products at the cheapest, or administratively 'easiest' point of entry of the free trade area rather than through the customs administration of the country that the product is destined for. Such incentives can result in the diversion of border tax income to low-tariff FTA members, inefficient trade routes, and political friction among FTA member governments that afford different levels of tariff protection to domestic businesses. FTA wide rules of origin that are enforced at the national borders avoid such inefficiencies by creating product eligibility rules for FTA-internal tariff preferences.

2.2.2. Customs Unions

The customs union, in essence, dispenses with the notion of customs control amongst the parties to the agreement. The creation of a customs union adds a dimension to the FTA setting in that it requires the adoption of common external tariffs (CET) and common rules for the border administration of trade with countries that are not members of the customs union. In addition to common external tariffs and customs regimes, there are two further structural prerequisites. First, a functioning customs union requires the free circulation of goods across borders within the customs union territory. Free movement of goods within the shared single customs territory avoids double taxation of imports from third countries once they have cleared the union's customs procedures. Secondly, a customs union requires a minimum transfer of legislative and administrative powers to a joint regional decision-making body and an external trade administration that are tasked with devising, implementing, and enforcing the customs union's external trade rules and policies.

2.2.3. Common Markets

The establishment of a common market among a number of countries, furthermore, builds on the structural characteristics of the free trade area and the customs union but goes far beyond the intra-regional free movement of goods and joint external border

regimes for merchandise trade. Government-driven economic integration towards a common market aims at achieving the transnational regulatory and institutional conditions that facilitate the free movement of production factors – capital and labor – as well as services and enterprise. The key objective is the elimination of market segmentation that stems from uncoordinated national regulation as well as anti-competitive practices of businesses. Notionally, the economic rationale for the establishment of a common market derives from neoclassical economics theory of a perfectly competitive regional marketplace in which transaction costs for the allocation of production factors and trade are minimized, productivity is enhanced, and aggregate economic welfare is maximized. Transnational positive integration, as mentioned above, frequently goes hand in hand with economic, social, and environmental regulation that seeks to correct market failures associated with negative externalities and the undersupply of public goods through economic activity across borders.

Common market regulation is inherently complex not only because it requires an abundance of accurate information about the modalities and effects of the joint regulatory approaches that are supposed to facilitate intra-regional economic activity in an efficient as well as socially and environmentally sustainable way. It is challenging also from a governance perspective in that it necessitates the establishment of intergovernmental and/or supranational political and legal institutions that govern the process of common market implementation and its maintenance in a democratically legitimate fashion. Common markets, in other words, require multi-level 'federal' governance institutions - such as the 'European Institutions' in Brussels, Strasbourg, and Luxemburg –, a quasi-constitutional legal basis, as well as national administrations to implement and enforce regional policies domestically. The EU Single Market remains the most advanced - yet unfinished - form of regional common market development.

2.2.4. Monetary and Fiscal Union

A monetary union, moreover, exists where multiple countries adopt a common currency through a joint issuing authority – a regional central bank – and mandate an institution with devising a common monetary policy. The fiscal union, finally, denotes the integration of fiscal policies – i.e. rules and decisions about taxation and tax expenditure - across nation states via joint regional institutions.

These five stages of regional integration through law are conceptually fluid as they may overlap with respect to their structural elements. While deep integration arrangements frequently encompass most or all of the structural elements of previous stages, the legal coverage of generally shallow integration agreements, such as a basic FTA, may also contain some positive integration elements, e.g. common standards for environmental or labor regulation. The 2011 World Trade Report even differentiates between six stages of regional integration through law, as displayed in the chart below.[116]

Integration level	Type of PTA	Features	Example
SHALLOW INTEGRATION ↓ DEEP INTEGRATION	Free trade agreement (FTA)	Members liberalize internal trade but retain their independent external tariffs	US-Israel FTA
	FTA+	An FTA that in addition harmonizes some beyond the border standards (e.g. environmental standards)	NAFTA
	Customs Union (CU)	Members liberalize trade within the union and adopt common external tariffs against the rest of the world	SACU
	Common Market	Establishment of the free movement of all factors of production within the PTA, including labour and capital	EU
	Monetary Union	Establishment of a common currency and completely integrated monetary and exchange rate policy	Euro Area
	Fiscal Union	Establishment of a common fiscal policy	US

Note: The depth of integration of PTAs might overlap across types of agreements in certain circumstances.

Source: WTO: The WTO and preferential trade agreements: From co-existence to coherence, World Trade Report, Geneva, 2011.

For simplicity purposes, in coherence with the prevalent use of the term in academic literature this study further employs the terms 'preferential trade agreement' (PTA) and wider concept of 'regional economic integration through law' as synonyms.

[116] WTO (2011): *The WTO and Preferential Trade Agreements – From Coexistence to Coherence,* World Trade Report 2011.

2.3. The Relationship between *de jure* and *de facto* Economic Integration: The Case of '21st Century Trade'

Using yet another angle to grasp the concept and phenomenon, we can think of regional economic integration through law – i.e. *de jure* regional economic integration - in its relationship to *de facto* regional economic integration. In economic terms, the conclusion of regional integration agreements between two or more countries can be explained by means of two rationales, which place *de facto* and *de jure* economic integration at the opposite ends of the respective causality chain.

According to the first approach, two or more governments conclude economic integration agreements in a context of low levels of economic interdependence in order to unleash the commercial potential between their economies. This process typically starts with the dismantling of traditional market access barriers – tariffs and import quotas – i.e. negative integration disciplines. The second hypothesis considers that high levels of trade interdependence make the conclusion of regional economic integration agreements necessary: policy-makers seek to reduce increasingly complex (non-tariff) barriers to trade behind the border, which only come to the forefront as a result of an already high degree of economic interdependence. In other words, *de jure* integration is seen as a consequence of either underdeveloped or advanced *de facto* economic integration among the partner countries. The two perspectives are complementary, however, in that they describe *de jure* economic integration at different progressive stages of *de facto* economic integration. In other words, different stages of *de facto* economic integration require distinct legal and institutional responses over time.

The same is true for changing patterns of cross-border trade and investment as well as technological innovation. In a highly influential article on '21st century regionalism', Richard Baldwin notes:

> "[In the 20th century], trade mostly meant selling goods made in a factory in one nation to a customer in another. Simple trade needed simple rules. (…) Today's trade is radically more complex. The ICT revolution fostered an internationalization of supply chains, and this in turn created the 'trade-investment-services nexus' at the heart of so much of today's international commerce. […] This means that 21st century regionalism is driven by a different set of political economy forces; the basic bargain is 'foreign

factories for domestic reforms' – not 'exchange of market access'. As 21st century regionalism is largely about regulation rather than tariffs, regulatory economics is needed rather than Vinerian tax economies."[117]

In other words, the increasing fragmentation of production networks across countries through offshoring of intermediate goods production as well as services supply has resulted in a demand for increasingly complex sets of rules: contemporary regional economic integration through law ought to legally secure regional trade in inputs as well as investments abroad and lower transaction costs associated with 21st century trade and investment patterns. As such, deeper *de facto* regional economic integration can both lead to and result from deeper *de jure* regional economic integration.

2.4. Determining the Scope of Economic Integration through Law: Heterogeneity, Diversity, and Proximity Factors

Strategies for regional economic integration are ideally closely tied to the social, economic, political, and institutional conditions that prevail in the respective countries. The scope and depth of regional economic integration through law should be devised in adaptation to country-specific factors such as regime type, commonly shared beliefs, the degree of economic development, regulatory culture, language diversity and many others. As such, the degree of heterogeneity among potential parties to a regional integration agreement may have a limiting effect on the legal coverage and depth of that agreement. In a scenario of multiple highly heterogeneous potential parties to an agreement, government negotiators face trade-offs between an inclusive membership approach, on the one hand, and more comprehensive and deeper commitments, on the other. In other words: diversity matters greatly for the effectiveness of regional economic integration through law. Diversity factors are ideally taken into account at the stage of regional rule design *ex ante* to allow for effective implementation and to achieve desired policy outcomes.[118]

Instead of using the concept of 'heterogeneity', we can also think of 'proximity' as the conceptual determinant of the coverage and scope of regional

[117] Baldwin, Richard (2011): p3
[118] Chauffour, Jean-Pierre & David Kleimann (2013)

integration: notwithstanding the nominal gains and benefits of *de jure* regional economic integration, policy-makers can factor adjustment costs into their assessment of the necessary depth as well as geographic and material scope of integration. Adjustment costs of domestic reform tend to be low in cases of high 'proximity' between the partner countries in terms of factors such as geography, language, levels of development, legal systems, institutional compatibility, policy objectives, and regulatory preferences. Adjustment costs tend to be high for countries, on the other hand, where *de jure* integration would require the deviation from a national standard that optimally reflects domestic policy preferences and implementation capacities.

2.5. Multilateral vs. Regional Economic Integration: Moving from 'Creative Tensions' to 'Systemic Threats'?

It is in the context of diversity and heterogeneity that multilateral – i.e. global – economic integration through market access liberalization and common approaches to rules and standards has often failed to reach compromises that would reflect the policy preferences of all negotiating parties likewise. In the ideal world of neoclassical welfare economics theory, the most inclusive membership of *de jure* economic integration initiatives would also result in the largest nominal welfare gains. In theory, multilateral market opening and international trade regulation through the intergovernmental World Trade Organization (WTO) with its 164 members would be the first-best institutional solution because reciprocal market opening allows all members likewise to make efficient use of their comparative advantages of production. Moreover, global trade rules could address global market failures more effectively than regional initiatives. In the almost 70 years lasting history of the WTO and its predecessor – the 1947 General Agreement on Tariffs and Trade (GATT) - the high diversity of membership and diverging policy preferences resulting from such diversity has frequently inspired regional and sectoral economic integration initiatives: as some members of the WTO or – before 1995 – parties to the GATT desired stronger or different trade liberalization and trade rules than others, regional integration through law emerged as the second-best institutional alternative to multilateral trade negotiations.

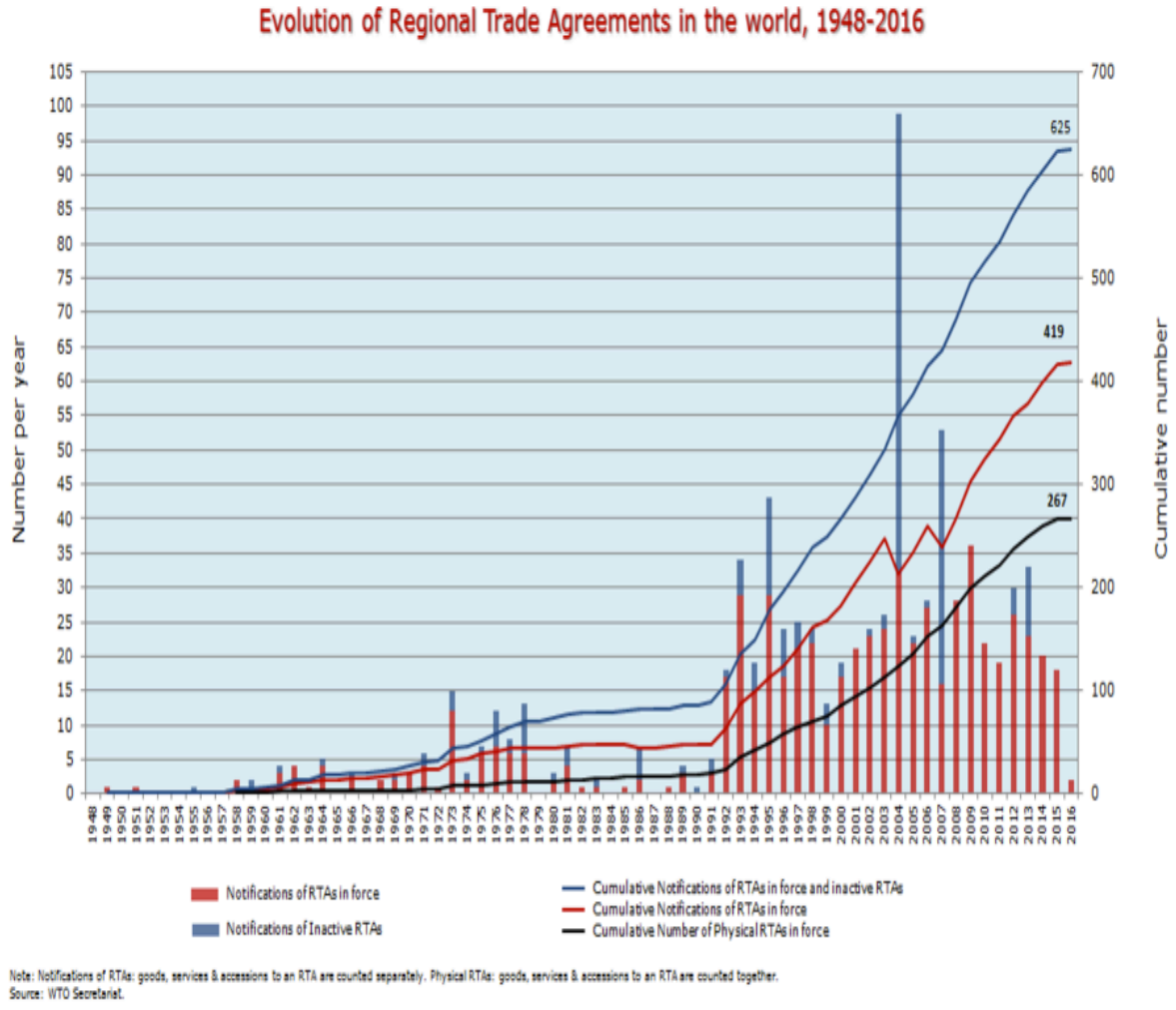
From a comparative institutional analysis perspective, intra-regional or inter-regional economic integration is considered the 'second-best' institutional alternative

to multilateral trade negotiations because they frequently afford trade preferences to parties to the legal arrangements but exclude third countries. While these preferences create trade between the parties and hence generate additional economic welfare, they frequently divert trade away from more efficient producers that, however, are situated in the territories of countries that are not parties to the regional trade agreement. While such trade diversion is inefficient from a welfare economics perspective, it may also incentivize governments of countries that are not party of a preferential trade agreement to join that agreement or enter into agreements with other countries in order to generate additional commercial opportunities for their businesses. Regional or inter-regional preferential trade agreements can thus be seen as viable alternatives to multilateral trade deals and/or complements: broad regional trade liberalization can, over time, lead to the 'multilateralization' of regional trade preferences, i.e. a global trade arrangement that includes all WTO members. The proliferation of regional economic integration agreements and the underlying dynamic of 'competitive liberalisation' among different regional economic integration initiatives can therefore be seen as both 'stumbling blocks' and 'building blocks' for the process of multilateral trade negotiations.[119] The interplay between regional and multilateral economic integration has been well described in a widely read article authored by Fred Bergsten as early as in 1997.[120]

Over the course of eight GATT trade negotiation rounds over the last 70 years, legally bound average tariffs have decreased from 21 percent prior to the Geneva Round in 1947 to just below 5 percent as a result of the implementation of the Uruguay Round agreement of 1994.[121] But despite the GATT success in bringing down tariffs around the world throughout the history of post-WWII global economic integration, multilateral and regional trade liberalization have continuously stood in a relationship of creative tension towards each other. The 2011 World Trade Report identifies three 'waves' of economic regionalism that have unfolded in parallel to the GATT and WTO centered evolution of the multilateral trading system. Each one of these waves "has been driven, at least in part, by a perceived need among groups of countries to go further and faster" than the broader GATT system in order to manage

[119] Baldwin, Richard and Elena Seghezza (2007)
[120] Bergsten, Fred (1997)
[121] Bown, Chad and Douglass Irwin (2015)

'deeper' trade integration."[122] The European integration process has been at the center of all three 'waves'. North American economic integration - via the North American Free Trade Agreement (NAFTA) - as well as economic regionalism in East and Southeast Asia gained momentum and importance over time as well. By 2016, the 164 members of the WTO have notified no less than 625 preferential trade agreements, 419 of which are currently in force.



The sheer amount of preferential intra-regional and inter-regional trade agreements as well as the massively enhanced proliferation of such accords since 1990 is striking not only because regionalism is considered to be the second-best institutional option from an economic point of view. Legally speaking, too, regional economic integration through law is meant to be the exception to the rule.

[122] WTO (2011): p51

It is the Most-Favored-Nation (MFN) principle – the principle of non-discrimination among the parties of the GATT and the members of the World Trade Organization - that makes for the single most important legal cornerstone of the world trading system and therefore of international economic law. It is not by coincidence that the MFN principle is enshrined in Article I of the GATT:

> "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, (…) *any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties*" [emphasis added].

A trade concession accorded to a product originating from one party to the GATT (now: WTO member) must also immediately be accorded to all other WTO members' exporters of that product. It is in this way that the MFN non-discrimination principle ensures inclusivity of the multilateral trading system. The obligation to afford MFN treatment to all WTO members, however, knows a number of exceptions. At this point, it suffices to draw attention to the exception that is most important for the purposes of this study: subject to a number of conditions, it is GATT Article XXIV that allows for the deviation from the MFN principle for the purposes of the establishment of free trade areas and customs unions.

2.6. Economic Regionalism: The 'New Normal' of the World Trading System?

The large number of PTAs that have been notified to the WTO under Article XXIV provides an indication for the possibility that what was foreseen to be the exception to the rule by the drafters of the GATT has now become and may remain the new normal of the international trading system. The failure of the latest multilateral negotiation round – the Doha Development Agenda (DDA) – to result into an

agreement, could be interpreted as the end of a long lasting conflictual albeit creative relationship between multilateralism and regionalism. The roots of the DDA failure in July 2008 can be found in the diverging policy demand of key WTO members with respect to core 'negative integration' items on the agenda, notably market access liberalization in merchandize trade.[123] While some members constituencies – notably in the United States - were not able to live with a narrow market access agreement, domestic institutions in China, India, and Brazil were not prepared to commit to elements of a high-ambition '21st century trade' agreement, resulting in a fatal mismatch of demands and offers at the negotiation table in Geneva.

The failure of the DDA – as widely acknowledged by trade ministers at the latest WTO Ministerial Conference in Nairobi in December 2015 - has yet again increased the momentum of economic regionalism and competitive liberalization and resulted in negotiations of so-called mega-regional PTAs. Mega-regional PTA negotiations, such as the Transatlantic Trade and Investment Partnership Agreement (TTIP), the Trans-Pacific Partnership agreement (TPP), the EU-Japan FTA or the Regional Comprehensive Economic Partnership agreement (RCEP), challenge, at the very least, the centrality of WTO law and obligations for the international trading system as they undermine and erode the core tenet of WTO law, notably the MFN principle. Yet, for the time being, they present the second best and currently only available institutional alternative to the multilateral negotiation track.

In response to early warnings about the systemic implications of 'mega-regional' PTAs, commentators and government officials leading respective negotiations have taken pains to advertise such treaties as a contribution to long term multilateral economic integration and as 'test-laboratories' for the development of WTO trade rules. EU and US PTA concessions and trade rules could be multilateralized - the story goes - once China, India, Brazil and others were ready to match EU and US concessions and are ready to implement associated domestic trade reforms.

The proponents of this view refer to previous waves of preferentialism in the past seventy years, which were frequently followed by a multilateralization of preferential tariff concessions in the GATT and WTO framework. This observation has prompted analysts to depict international trade liberalization and economic

[123] Kleimann, David and Joe Guinan (2011)

integration as a pendulum that continuously and predictably swings from one side (multilateral) to the other (regional / preferential) and back again.

This historicism, however, warrants skepticism for three main reasons. The first reasons stems from a dramatic change in the distribution of global market power since the last multilateral trade round – the Uruguay Round - was concluded in 1993. The history of international trade liberalization and regulation through successive GATT negotiation rounds and agreements is one of Western dominance. Contemporary market power distribution, however, is multipolar and polycentric. Against this background, it is conceivable that emerging regional hegemons seek to reinforce their dominance through competing regional models of economic integration. These models may be incompatible and mutually exclusive at the global level. In this scenario, international economic integration could well be pursued regionally rather than multilaterally, in the long run.

The second reason relates to the dramatic change in the substance of trade regulation and liberalization: first-generation trade barriers such as tariffs and quantitative restrictions are easy to dismantle in the context of multilateral negotiations because of relatively simple modalities of liberalization. This is exemplified by the success of eight consecutive GATT negotiation rounds. By contrast, it appears that bilateral or regional configurations are better suited to address most of the more complex items on the 21st century 'supply chain' trade agenda, such as services and investment liberalization as well as the proliferation of uniform approaches to intellectual property protection, technical standards, food safety regulation, and conformity assessments. In light of the heterogeneity and diversity considerations outlined above, multilateral negotiations are improbable to yield meaningful results in the foreseeable future. Respective challenges arise in context of the lowest-common-denominator problem that persists in the context of a 164 countries membership and complexities that the material substance of these negotiation items creates in a multilateral setting.

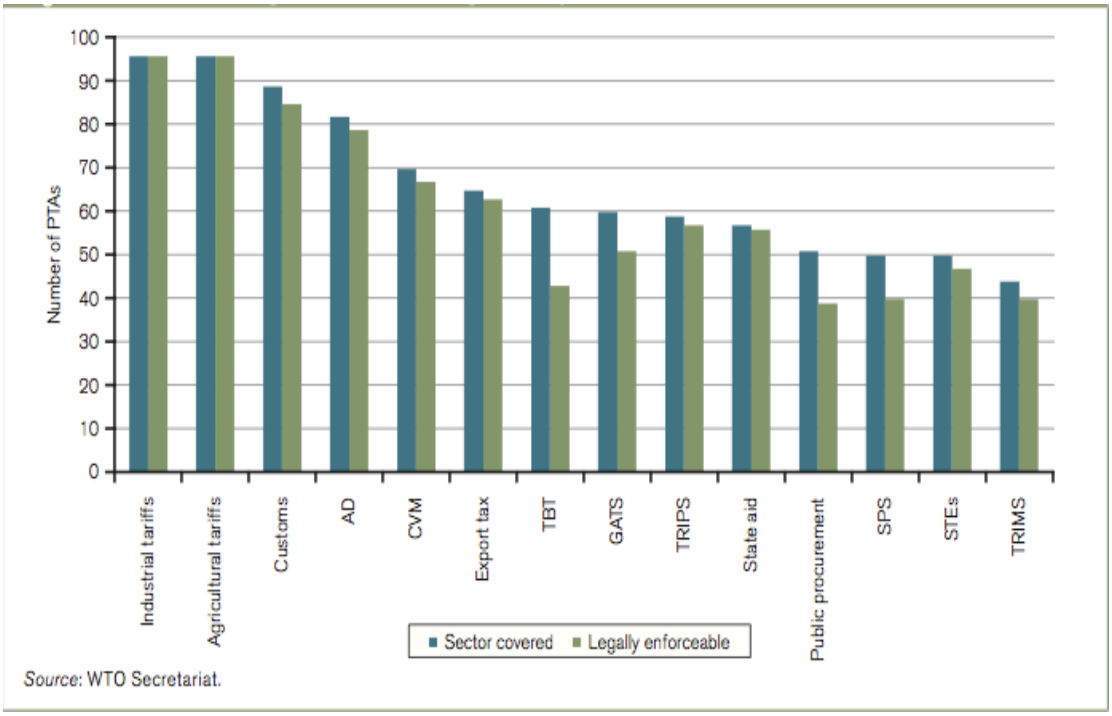
Elements of the '21st century trade' agenda may be challenging to regulate in a preferential discriminatory manner: governments may find it impractical to advance common regulatory approaches in a way that precludes third countries' businesses from entering regional markets. As such, common regional trade rules that do not discriminate against non-members of regional blocs – so-called 'open regionalism' -

could mitigate the challenges that mega-regional PTAs and other regional initiatives pose to the multilateral trading system.[124]

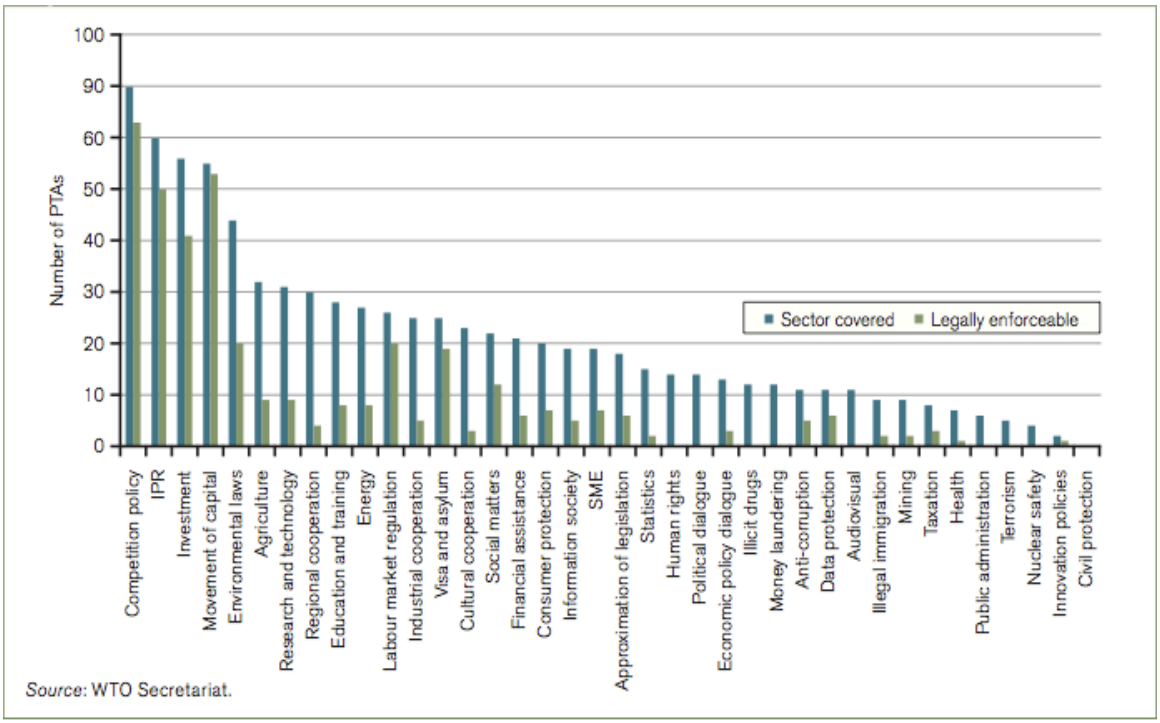
Governments' appetite for trade regulation and trade related economic cooperation beyond the WTO rulebook is evidenced by a mapping exercise that researched the legal coverage of a sample of 96 PTAs conducted by the WTO Secretariat using a methodology developed by Horn, Mavroidis, and Sapir in their study of 28 EU and US PTAs in 2009.[125] The first table below depicts the legal coverage of PTAs in policy areas that are already included in the WTO rulebook. The table indicates in which of those policy areas PTA parties decided to move beyond (or 'deeper' than) their WTO obligations by including WTO-plus commitments.The second table depicts policy areas that are not covered by the WTO rulebook at all, so called WTO-extra policy areas. More than 50 PTAs of this sample cover key '21st century trade' policies, i.e. competition, intellectual property rights, investment, and movement of capital. Additionally, more than 30 of 96 PTAs cover environmental regulation. Overall, PTAs tend to cover a large amount of WTO-plus and WTO-extra policy areas.

[124] Bergsten, Fred (1997)
[125] Horn, Henrik, Petros Mavroidis, and André Sapir (2010): p132

Legal Coverage of WTO-plus policy areas in 96 PTAs



Legal Coverage of WTO-extra policy areas in 96 PTAs



3. Contemporary EU Common Commercial Policy: Developments and Dynamics

Against this backdrop, it is easy to understand that, since the entry into force of the 1957 Treaty of Rome, EU primary law provisions governing Common Commercial Policy have been considerably broadened in scope through progressive EU treaty amendments. The evolution of CCP Article 113 EEC Treaty, over Article 133 EC Treaty to, eventually, Article 207 TFEU reflects the efforts of the treaty drafters to adapt the ambit of the CCP to changing patterns in international trade over the past six decades. The treaty reforms demonstrate the demand for a sufficiently wide constitutional framework that enables mandated political institutions to respond to opportunities and challenges of what has been prominently termed '21st century trade' by Richard Baldwin.[126]

It is by no coincidence, therefore, that the CCP initially only extended to basic border measures for trade in goods.[127] Consecutive reforms of the primary law provisions through the treaties of Amsterdam[128], Nice[129], and Lisbon[130] have widened the scope of the CCP to cover a larger amount of policy instruments that affect external trade in goods and services, and foreign direct investment at the border and beyond. The 1957 Treaty of Rome originally designed the CCP with a view to providing the Community with exclusive powers to establish the Common External Tariff, to enter into external negotiations over obligations that mutually reduce import duties and quantitative import restrictions within the GATT framework, and to adopt autonomous measures which define the framework of its commercial policy. At the early stage of the evolution of this unique purely external area of EU competence, the judges in Luxembourg were confronted with the question whether the CCP merely extends to trade liberalization or could encompass the regulation of international commodity trade, too.

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[126] Baldwin, Richard (2011) p3

[127] The original version of CCP Article 113(1) of the 1957 Treaty Establishing the European Community reads: "The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies."

[128] For a contextualization of Amsterdam Treaty amendments in ECJ jurisprudence and treaty negotiation see: Cremona, Marise (2001)

[129] For a comprehensive description and discussion of the Nice treaty amendments, see Herrmann, Christoph (2002)

[130] Krajewski, Markus (2012)

In Opinion 1/78, the Court opted for a markedly dynamic interpretation of the scope of the CCP. More than two decades after the entry into force of the Treaty of Rome, the Court held that

> "it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of more elaborate means devised with a view to furthering the development of international trade. It is therefore not possible to lay down, for Article 113 of the EEC Treaty, an interpretation the effect of which would be to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanisms such as appear in the agreement envisaged. A "commercial policy" understood in that sense would be destined to become nugatory in the course of time."[131]

Rather than being subject to dynamic judge-made expansion, however, the CCP has been progressively adapted to match the needs of EU external action in the WTO and then further expanded to cover 'new generation' trade policy instruments by means of treaty amendments. The 1997 Treaty of Amsterdam saw the addition of 'services' and 'commercial aspects of intellectual property rights' to the general scope of the CCP. The 2001 Treaty of Nice placed those concepts within the realm of exclusive competence of the Community. The latest EU primary law reform - the 2007 Treaty of Lisbon - further consolidated of the CCP provisions and amended its scope to include 'foreign direct investment'.[132]

Whether the content of the new generation of external economic agreements matches or exceeds the scope of the CCP and thus Union exclusive powers over treaty-making is the very question that stands at the centre of the Opinion 2/15 proceedings, which is subject to analysis in the following chapters. It is of particular

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[131] Opinion 1/78: para 44

[132] CCP Article 207(1) TFEU now reads: "The common commercial policy shall be based on uniform principles, particularly with regard to *changes in tariff rates*, the conclusion of tariff and trade agreements *relating to trade in goods* and *services*, and the *commercial aspects of intellectual property*, *foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of *dumping or subsidies*. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action" [emphasis added].

concern here whether the Union's exclusive treaty-making competences extend to the entirety of EUSFTA obligations including portfolio investment, transport services, as well as to the arguably *non-commercial* provisions, such as the 'sustainable development' (labor rights and environment protection) provisions of the treaty.

As predicted by the Court in 1/78 and retrospectively observed by Baldwin, the changing nature and increasing complexity of international trade and investment patterns in the past decades has generated a demand for a continuously widening constitutional framework which adapts the powers of the Community (and Union) institutions to engage in the regulation of its external economic environment. The profit and welfare enhancing potential of commercial opportunities inherent to international trade as well as the evolving complementary international legal institutions that have facilitated and regulated international commercial transactions have further driven the demand for institutional changes of primary legal institutions governing the EU's common commercial policy.

The otherwise rare exclusive nature of EU competence for the CCP as well as the vagueness of its provisions with respect to its material scope and purpose(s),[133] has, however, provided strong incentives for political disagreements between the Community's political institutions over the operation of the CCP. It is in this context, that the interplay between policy demand and constraints generated by international economic and legal institutions; the inter-institutional political process at the Community level; primary law reform; and CJEU litigation has created an arguably constructive tension. It is this interplay, which has driven as well as constrained incremental progress towards greater legal clarity over the operation of the CCP provisions and towards an expansion of the scope within which EU unity in external commercial policy remains an *a priori* possibility.

The following paragraphs outline developments in EU Common Commercial Policy that have their origin in pre-Lisbon Treaty policy initiatives of the European Commission and have been inspired by domestic policy demand as much as by external developments in international trade regulation. These policy initiatives as well as EU external institutional and political constraints shape the problem pressures of EU political institutions after the entry into force of the Lisbon Treaty. As such, this section pays tribute to the fact that processes of institutional change are context

[133] Cremona, Marise (2001): p6

specific, path dependent, and respond to – among other variables - problem pressures that arise from complex environments.

Following the release of the 'Global Europe' strategy communication[134] and the end of the European moratorium on bilateral trade negotiations with commercially meaningful partner countries in 2006, policy-makers in Brussels have significantly expanded and diversified the portfolio for the negotiation of EU external economic agreements. Since then, the European Commission has initiated and partially completed a wide range of PTA negotiations with significant trade and investment partners such as South Korea, Canada, India, ASEAN member states, as well as Japan and the United States. Adding to the longstanding efforts to advance EU foreign policy objectives through the negotiation of Association Agreements with lesser developed and EU neighbourhood countries, the Commission, in 2010, declared that "the latest generation of competitiveness-driven Free Trade Agreements is precisely inspired by the objective to unleashing the economic potential of the world's important growth markets to EU trade and investment."[135] But while the underlying rationale for the negotiation of EU preferential trade agreements (PTA) is now more than ever grounded on commercial motives, the entry into force of the Lisbon Treaty in December 2009 has - with the empowerment of the European Parliament on trade and investment policy matters - enhanced the political dimension of EU trade and investment policy formulation by decreasing the costs of political participation for special and diffuse interest advocacy likewise.

The following subsections review 'Global Europe's' origin and its economic rationale; the main challenges that the European Commission – as the Union's negotiator – faces with respect to the substance and process of ongoing and prospective PTA negotiations; and the domestic challenges that EU leaders may face when it comes to the adoption of 'Global Europe' PTAs by the Council and the European Parliament in Brussels and Strasbourg. The final subsection of this chapter provides for a case study, which exemplifies the evolution of international legal institutional change driven by external economic pressures - commonly known as 'competitive liberalization' – under domestic political constraints.

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134 European Commission (2006): *Global Europe, Competing in the World – A Contribution to the EU's Growth and Jobs* Strategy

135 European Commission (2010): *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.*

3.1. The Origin of 'Global Europe' and its Economic Rationale

At the time of its release, 'Global Europe' responded to a growing awareness among policy-makers in Brussels and EU Member States' capitals that European commercial interests would not be satisfied by the outcome of the protracted WTO Doha Round negotiations at the WTO. Businesses, policy makers, and negotiators demanded - but could not receive from third country negotiators within the multilateral framework - substantial access for EU goods and services to the high growth markets in South, East, and Southeast Asia as well as Latin America. Moreover, the increasing fragmentation of production through the development of international supply chains generated a business demand for common approaches to competition, standards, investments, intellectual property rights, and other 'behind the border' policies. The economic rationale for common disciplines in these policy areas is to decrease trade (transaction) costs and to enhance the legal security of international production networks.[136] As a result, such '21st century trade' issues were rising up the list of priorities of EU businesses and governments.[137] WTO Ministerial Conferences in both Cancun (2003) and Hong Kong (2005), however, considerably frustrated EU hopes that the Doha Round would ever deliver on any of the key objectives of EU commercial diplomacy. At both summits, major rifts between the positions of developed and large developing countries surfaced and left EU negotiation targets out of reach.[138]

The release of the 'Global Europe' communication one year after the Ministerial Conference in Hong Kong marked the consequent strategic shift. By ending the EU's PTA negotiation moratorium, which the Commission had put in place in 1999 under external trade Commissioner Pascal Lamy to underpin its commitment to the Doha agenda, the EU *de facto* started to turn its back on the Doha Round in 2006. Less than two years later, following the eventual collapse of Doha talks in Geneva in July 2008, the Commission's Directorate General for External Trade already went as far as to consider options for PTA negotiations with all major OECD economies. This radical reorientation, which began to materialize with the start of a PTA scoping exercise with Canada - ordered by EU trade Commissioner

136 Baldwin, Richard (2010)
137 On the importance of adapting trade policies to the realities of international supply chains, see: Hoekman, Bernard & Selina Jackson (2013)
138 For an overview of Doha Round negotiation dynamics and major events, see: Kleimann, David and Joe Guinan (2011)

Mandelson in 2008 - had previously been deemed taboo, given the clouds that bilateral engagements among the richest economies casted over the Doha negotiation agenda.

Ever since 2006, the European Commission, backed by a northern European free trade-oriented coalition of EU member states in the Council, has spared no efforts to meet the 'Global Europe' objective of creating economic growth through so-called 'deep and comprehensive' integration with the commercially most potent regions of the world. These efforts are mirrored in the large number of ongoing and proposed negotiations with respective target governments as well as in early signs of success, notably the conclusion of negotiations of state-of-the-art agreements with South Korea, Singapore, Canada, and Vietnam. On a parallel track, the Commission has initiated negotiations that aim at upgrading existing Association Agreements with governments in Mediterranean countries as well as with Mexico and Chile – which originally entered into force around the millennium - to adapt the substance of these accords to contemporary commercial realities and challenges. Moreover, the Commission pursues a number of sectoral plurilateral accords with a critical mass of WTO members, including the Trade in Services Agreement (TISA) and has concluded an upgrade of the 1994 WTO Information Technology Agreement (ITA) in 2015, and an upgrade of the 1981/94 WTO Government Procurement Agreement (GPA) in 2014.[139]

Arguably, the Commission's mandate for the execution of the Global Europe strategy has rendered external trade and investment policy the Union's most dynamic area of EU external action and provides for a credible prospect of advancing both European commercial as well as geopolitical interests. At the same time, the Commission, as the treaty-mandated institutional driving-force of Europe's PTA agenda, is confronted with a number of formidable external and domestic challenges.

3.2. External Challenges to the 'Global Europe' Agenda

Above all, EU negotiators have been running out of 'bargaining chips' vis-à-vis the lesser developed of their desired negotiation partners. The EU's comparatively low tariff protection average leaves Commission officials with little to offer to their

[139] For a discussion of the legal characteristics and political-economic merits of plurilateral agreements as 'second-best' institutional solutions to MFN liberalization, see Hoekman, Bernard and Petros Mavroidis (2015)

counterparts. The list of EU offensive interests, however, is long, ranging from the liberalization of tariffs, services, investment, and government procurement to regulatory reforms of partner countries' regimes governing customs, competition, intellectual property rights (IPR), product quality control, labour rights, and environmental protection. As a result of this unfavourable exchange rate, several lower-middle income developing country partners, particularly in Southeast Asia, have proved to be considerably reluctant to join the EU at the negotiation table in the first place.

Given the long list of EU demands and its fading ability to offer concessions in return, the Commission decided to complement its PTA negotiation strategy through several more defensive elements that are designed to (re-)gain leverage over a number of developing countries' governments that have initially shied away from a negotiation engagement. For instance, the European Commission's 2011 proposal for a revised scheme of non-reciprocal trade preferences for developing countries showcased its intent to exclude several emerging economies from preferential tariff treatment.[140] The revision of the EU's Generalized System of Preferences (GSP), which has come into effect in 2014, entirely strips several upper-middle income countries of their traditional preferential status. Moreover, the new scheme provides for product graduation criteria, which eliminates preferential treatment for many developing countries on a product-specific basis. Among those affected by the reform are several governments with which the Commission currently negotiates or aims to negotiate PTAs in the future, including Argentina, Brazil, India, Indonesia, Malaysia, the Philippines, Thailand, and Vietnam. The elimination of these preferences provides EU negotiators with additional negotiation leverage. Moreover, the prospect of losing EU preferential tariff treatment has increased incentives for the affected country governments to reconsider EU courtship for the launch of negotiations.

Regaining leverage, by the same token, is also at the core of the Commission's 2012 legislative proposal on government procurement, which would allow EU member states to exclude bids from companies located in countries that are not parties

[140] *Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No. 732/2008.*

to the WTO Government Procurement Agreement (GPA) and do not grant EU producers access to public procurement markets comparable to EU practices.[141]

The persuasive power of (the withdrawal of) EU market access concessions, however, is likely to find its limits in the political and economic costs that emerging and developing countries' governments associate with the domestic implementation of the EU's 'deep and comprehensive' PTA negotiation template. As with every commercially meaningful trade agreement, sector specific economic adjustment costs that result from reciprocal market opening make for a political price to pay for a net economic welfare increase. Secondly, comprehensive market access concessions for goods, services, and investment, as well as bilaterally agreed rules on government procurement, intellectual property, and competition can considerably limit the amount of policy space that developing countries' governments have at their disposal. Such policy space can be instrumental in directing the development process of the domestic economy, for instance by shielding infant industries from foreign competition. Third, the domestic implementation of deep integration PTAs can confront middle and low-income developing countries with significant institutional, financial, and political obstacles. Tailor-made institutional design can - if based on country-specific structural contingencies - help to avoid overloading partner countries' reform agendas and the inefficient diversion of institutional, financial, and political resources.

The potential problems that derive from overburdening developing country partners, however, are manifold. They range from eventual frustration of EU stakeholders' expectations about partners' (sometimes predictable) non-compliance, over inefficient prioritization of resource dedication in the resource scarce environments of developing countries, to the creation of adversarial rather than cooperative bilateral relationships with the partner countries.[142]

The negotiation of Economic Partnership Agreements (EPA) with African countries in the past ten years may hardly be comparable to the dynamics of 'Global Europe' negotiations for various reasons. However, the experience can provide EU negotiators with valuable lessons that generally apply to the consequences of a potentially overambitious agenda and the necessary balancing between short-term

[141] European Commission (2012): *Proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries.*

[142] For a general discussion of this notion, see: Hoekman (2010)

commercial objectives and the EU's long-term strategic interests in a cooperative relationship with the partner countries.

Several of the EU's 'Global Europe' negotiation partners in South and Southeast Asia - as a result of their assessment of domestic economic adjustment costs; of the policy space required for the promotion of economic development; and of their own implementation capacities - may come to the conclusion that they are currently not prepared to sign up for the comprehensive hard legal obligations foreseen in EU PTA template. The deadlock of negotiations with India and Malaysia are the current prime examples of this scenario.

The engagement with large developed partner countries - such the U.S., Japan, and Canada - confronts EU negotiators with a very different set of realities and challenges. For starters, the degree of *de facto* economic integration between these economies has already reached very high levels, border protection has largely been dismantled, institutional capacities on all sides are strong, and economic cooperation among the partners has been well rehearsed over the past decades. As a result, the respective sensitivities, the remaining impediments to trade flows, as well as partners' institutional machineries are well known by all parties. The trade barriers that these negotiations will thus have to tackle are to a large extent those that have proved to be the most resistant to removal in the past, such as agricultural market access in Europe and Japan as well as numerous non-tariff barriers on all sides, ranging from diverging product standards over incompatible technical regulations and the regulation of services sectors to different approaches to food safety regulation.

Comprehensive economic integration of the largest OECD economies through EU PTAs with the U.S. and Japan has been estimated to result in substantial benefits.[143] At the same time, however, the practical challenges and obstacles to successful integration of the largest and most advanced economies of the world are considerable. They shall be briefly examined, with reference to TTIP negotiations, in the following paragraphs.

First, the generally low average border protection figures on both sides in fact hide a number of remaining tariff peaks, which protect sensitive sectors. Such tariff peaks are still in place because special interest groups have successfully lobbied for

[143] European Commission (2012): *Impact Assessment Report on EU-Japan Trade Relations,* Commission Staff Working Document

protection. The attempt to eliminate these tariff peaks will likely be met by vigorous opposition from the affected industries and eventually involve political costs to be paid by EU domestic political institutions.

Secondly, many of the technical and regulatory barriers to trade that these 'mega-PTAs' are supposed to remove exist due to the prevalence of diverging policy preferences, which shape both the modalities of the regulatory process as well as the substantive outcomes of regulation. The convergence of such preferences is difficult to achieve as they are anchored in the regulatory cultures of the partner countries and legitimized by multilevel political processes.

Such systemic and cultural issues are not new. In the case of the transatlantic partners, negotiators on both sides have sought to remove associated trade irritants in a variety of different bilateral fora over the past two decades - with modest success.

The technical solutions, too, are, in principle, well known. The two basic alternate instruments for the elimination of regulatory bottlenecks are the harmonization of regulatory processes, regulatory substance, and standards, on the one hand, and the negotiation of mutual recognition agreements (MRA) for regulatory content or conformity assessments, on the other. Harmonization is said to be more difficult to achieve than MRAs. However, the negotiation of MRAs similarly requires a minimum degree of convergence of regulatory processes, content, or conformity assessments. As such, the value of sectoral MRAs, as an alternative to harmonization, may often be overestimated.

Third, given the complex polity of the economies involved, the alteration of regulatory processes and outcomes in the name of bilateral convergence requires the involvement of various domestic stakeholders and political decision-makers at different levels. But domestic regulatory agencies and legislators frequently hold strong interests in retaining regulatory and enforcement autonomy at the national or sub-national level. Stakeholders, moreover, such as the affected industries, may oppose the short-term costs associated with the adaptation of production to new regulatory regimes. Adaptation costs are particularly high for smaller enterprises, which benefit from less scale economies. Consumers and voters, finally, may express legitimate opposition to a different regulatory process or standard.

In sum, apart from the enthusiasm expressed by representatives of export sectors, the announcement of TTIP negotiations has been met with considerable

scepticism among observers in Brussels and elsewhere.[144] This scepticism responds to the failure of political decision-makers and regulators on all sides to achieve enhanced market integration in the past decades for the reasons outlined above.

The challenges are significant. Administrations on respective sides have to engage in costly political battles in order to keep special interest advocacy at bay and would have to find innovative legal-institutional solutions to address the challenges posed by complex governance structures and diverging structural contingencies in the respective partner country. In this respect, the EU agreements with emerging economies and those with the United States and Japan have a commonality. The value of these treaties will not only be measured in terms of the static hard legal commitments that the parties codify in various areas. Rather, much of the merits of these accords will depend on how they institutionalize the process of ongoing and future liberalization and integration in issue areas that are not ready for detailed hard legal commitments yet.[145] More generally, the long-term viability of 21st century trade agreements depend on the bilateral and plurilateral institutional solutions that governments find for the management of continuous integration and implementation processes.

3.3. Domestic Challenges to the 'Global Europe' Agenda

At home, the Commission faces a number of challenges related to the political process leading up to the adoption and ratification of Global Europe PTAs. This is particularly so in context of the fact that the European Parliament (EP) has been given amendment and veto rights on CCP legislation as a result of the Lisbon Treaty reform. Parliamentary participation in the decision-making process has significantly changed the rules of the game and has rendered trade policy-making in Brussels an ever more political exercise, as the EP has now become an additional access point of special and diffuse interest advocacy.

As such, the real test for the EU's ambitious trade and investment policy agenda will only come when the large number of agreements that are currently in the pipeline arrive in the Council and Parliament for adoption. As advocacy efforts

144 For a particularly pessimistic view, see: Sapir, André (2013)
145 For an empirical analysis of institutional design chosen in the area of regulatory cooperation mandated by different PTAs, see: Steger, Debra (2012)

frequently culminate at the time when legislative files are tabled for decision, MEPs will carefully weigh the political costs and benefits of a 'yes' or 'no' vote.

Recent political quarrels related to trade policy decision-making may serve as a foretaste of what may yet unfold. The current economic climate appears to have divided the EU, broadly speaking, into a highly competitive northern pro-trade alliance, on the one hand, and a protectionist southern coalition struggling with the impacts of the 2008/09 economic crisis, on the other. Along these fault lines, respective political battles have been fought out in the arenas of the Council and the EP, with the Commission in the role of an economic integration-biased mediator in pursuit of open and but reciprocal trade relations. Examples that showcase the north-south divide on trade issues include the political processes leading up to the adoption of the EU-South Korea PTA by the Council, the adoption of a safeguard mechanism for the EU-South Korea PTA by the EP, and the Commission's initiative to grant flood assistance in the form of tariff preferences on textile products to Pakistan following the natural disaster of 2010. Moreover, the reform of the EU's procedural rules for the employment of trade defence instruments by the Commission within the new legal framework for delegated and implementing acts has surfaced similar divisions. A months-long stand-off eventually resulted in a partial 'victory' for the coalition of southern EU Member States (including France), which advocated looser procedural requirements for the use of anti-dumping, safeguard, and countervailing measures against third countries.[146]

As 'Global Europe' PTAs are tabled for signature, consent, and conclusion, the 8th European Parliament and the Council are confronted with the domestic economic and political costs of 'Global Europe' PTA implementation. In that process, the Commission faces considerable headwinds concentrated interests, which defend the indirect benefits that EU external economic integration has afforded to them over the past decades. Moreover, the Commission has been challenged to develop strategies to appease and/or contain the influence of anti-globalisation oriented civil society groups that have proven to be highly effective in persuading MS governments represented in the Council and MEPs in the ACTA episode and have managed to steer diffuse mass voter sentiments on a number of dossiers, which form an integral part of the EU's trade and investment agenda.

[146] Brandsma, Gijs Jan & Jens Blom-Hansen (2011)

More recently, the national politics of CETA and TTIP appear to have diverged from a pattern of traditional northern pro-trade vs. southern trade skeptical alliances in the Council. Since 2013, majorities of citizens of most 'southern' member states consistently supported the conclusion of these agreements. STOP-TTIP and STOP-CETA campaign efforts spearheaded by Campact and Foodwatch, however, have been particularly effective in activating diffuse – and otherwise dormant - interests groups in Germany and Austria.[147] The politicization of the TTIP and CETA dossiers through the activation of latent groups generated a significant political challenge to national governments in germanophone Europe, the Commission, and - in a climax of political tensions around the signature of CETA - the federal government of Belgium.[148]

As I will discuss in greater detail chapter V and chapter VI of this study, the Commission and member states' governments may have to ensure consent and ratification by up to 38 additional veto-playing domestic institutions – the national legislatures of EU member states – if the Union continues past practice of employing the 'mixed agreement' *modus operandi* for the signing and conclusion of external economic agreements.

In sum, the European Commission – as the Union's mandated external negotiator - is confronted with a large number of formidable challenges associated with the execution of the 'Global Europe' strategy, both domestically and externally, in addition to shaping the trade and investment dimension of the EU development and neighbourhood policies.

It is in this broader context of internal and external problem pressures that EU external economic governance has undergone the most radical constitutional reform of its primary legal institutions, in 2009, since the entry-into-force of the Treaty of Rome, which has set in motion a process of institutional change that has the potential to manifest itself in the incentive and value structure of CCP secondary legal institutions, in light of the reduction of the cost of political participation. Notwithstanding the significant elevation of the European Parliament in the procedures applying to the adoption of CCP framework legislation and the conclusion of trade and investment agreements, the institutional choice between mixed vs. EU-only signing and conclusion of EU external economic agreements will be crucial for

[147] Euroactiv (24 February 2015): *Malmstrom: Germany's TTIP debate 'more heated'*
[148] Bauer, Matthias (2016): pp193-212

the assessment of the efficiency, effectiveness, and legitimacy of the negotiation and conclusion of EU external economic agreements in the post-Lisbon era.

4. Institutional Change through Competitive Liberalization under Domestic Constraints - The EU-Japan FTA

The presence of the EU 'all-star' team that Brussels' institutions deployed to Tokyo for the 23rd EU-Japan Summit on May 27-29, 2015, sent a strong message: EU leaders have underlined the significance of EU relations with Japan. European Commission President Jean-Claude Juncker, European Council President Donald Tusk, EU High Representative for Foreign and Security Affairs Federica Mogherini, and EU Trade Commissioner Cecilia Malmström all made their way around the globe to pay tribute to Europe's ties with its strongest ally in East Asia. In 2013, both sides embarked on negotiations on a Strategic Partnership Agreement as well as a comprehensive preferential trade accord.[149] Together, these agreements aim at upgrading bilateral relations and adapt them to the geopolitical and geo-economic realities of the 21st century, thus bringing EU-Japan relations to a seminal phase of political and economic renewal.

Meanwhile in Brussels, headlines in the EU's capital during the summit were not about Japanese Prime Minister Shinzō Abe's deliberations on the future of Europe-Japan relations with EU political celebrities. Rather, the attention of the interested public and media outlets was largely concentrated on a committee-level European Parliament vote on a non-binding resolution concerning the Transatlantic Trade and Investment Partnership Agreement negotiations (TTIP) with the United States.[150]

The disproportionate bias in public attention, as further argued below, is unjustified from both an economic and geopolitical point of view. EU trade policy, it appears, has only been partially and selectively politicized 'in favor' of TTIP, while EU-Japan FTA negotiations remind observers of the trade policy *modus operandi* of the pre-Lisbon Treaty era. In the remainder, this chapter reviews the mercantilist

[149] For further analysis on the relationship between negotiations of the EU-Japan Strategic Partnership Agreement and the Free Trade Agreement, see: Tyszkiewicz, Radoslaw (2013).

[150] *European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership*

'competitive liberalization' dynamics that underlie the negotiation strategies of EU and Japanese policy-makers and provides an outlook as to whether EU – Nippon economic relations could follow TTIP in making the significant step from 'negative' to 'positive' integration by means of intensified regulatory cooperation.

4.1. TTIP and the (Partial) Politicization of EU Common Commercial Policy

In the EU political discourse, TTIP negotiations stand as the prime example of what has been termed the "politicization" of EU trade policy in recent years. Since the EU Lisbon Treaty came into force in 2009 and empowered the European Parliament on EU trade and investment policy matters, EU institutions have experienced intense European and national media scrutiny devoted to trade issues as specific as investor-to-state dispute settlement (ISDS) and regulatory cooperation provisions in TTIP. Media coverage and social media campaigns, in turn, have had a strong influence on the political discourse in Brussels, Strasbourg, and member states' capitals.

The European Parliament's right to veto the conclusion of trade agreements, as well as other EP control rights, has also resulted in unseen levels of transparency and political debate of the substance of EU external economic agreements: the official publication of up-to-date TTIP negotiation documents, frequent leaks of draft texts to the media, or the Commission's unprecedented conduct of a public consultation on the draft TTIP investment protection chapter have met and reinforced the interest and political participation of a broad range stakeholders. For example, the Commission's current effort to reform the ISDS rules that it wishes to include in TTIP occurred after voters and NGO campaigners applied political pressure through the institutional mechanisms of the European Parliament and the Council. The massive supply of research, publications, and social media activity on TTIP talks further evidences the fast-paced post-Lisbon politicization of EU external trade policy. The political market, it appears, has attracted (and partially funds) a research, campaign, and consultancy infrastructure that feeds the political deliberation and negotiation process with information of varying degrees of focus, detail, and technical accuracy.

The intense public and EU institutional scrutiny to which TTIP negotiations have been subject is as much evidence of an increased politicization of the EU's trade and investment policy as it is proof of the sometimes irrational bias that underlies the deliberation processes of majoritarian public decision-making. EU-Japan Free Trade Agreement negotiations, which are likely to result in one of the three most significant

free-trade corridors ever created, serve as a case in point. The magnitude of TTIP's potential socioeconomic and geostrategic impact may well justify the extensive attention it attracts. Similar considerations, however, hold true for EU-Japan economic relations. EU-Japan trade talks, which were launched a few months before the first round of TTIP negotiations in July 2013, have remained almost entirely devoid of similar public political energies.

Since March 2013, EU trade negotiators have been working in the shadow of the unprecedented public debate devoted to TTIP. This circumstance has reportedly been welcomed with a sigh of relief behind the walls of the Commission's headquarters in Brussels. The relatively low degree of transparency of EU negotiations with Japan reminds observers of EU trade policy practice in pre-Lisbon Treaty times. Commission officials have been careful to protect the evolving balance of concessions from diffuse and special interest scrutiny in order to retain space for maneuver vis-à-vis their Japanese interlocutors, free-trade lobbyists in Brussels, rent-seeking protectionist industries, and civil society campaigners.

4.2. The EU-Japan FTA: A Giant in the Shadow of TTIP and TPP

On the other side, Japan's negotiators at the government's Ministry of Economics, Trade, and Industry (METI) are facing a similar scenario in the context of the 12-party Transpacific Partnership Agreement (TPP) negotiations. Japanese efforts to strike a critical deal with the U.S. administration, which would likely bring a speedy conclusion to protracted TPP negotiations, has almost entirely diverted Japanese public attention away from the EU-Japan FTA. Moreover, as TPP talks near their end, Japanese policymakers and trade officials have made the conclusion of the transpacific agreement a priority. As the most sensitive negotiation items are frequently left for the last stage of trade negotiations, Japanese policymakers are now taking pains to balance farm trade concessions offered to the United States with the domestic political costs of upsetting highly protectionist Japanese farm lobby groups. EU-Japan engagement, as a consequence, only made incremental progress at that stage.

Notwithstanding popular sentiments in Europe and executive priorities in Japan, the EU-Japan FTA makes for one of the central pillars of EU and Japanese external economic integration agendas and carries similar — albeit qualitatively different — economic and strategic weight compared to TTIP. Trade and investment

flows between the two economic giants make for 30 percent of world production (compared to 50 percent for the EU and United States). Within the last two decades, however, both EU-Japan and U.S.-Japan commercial relations have come under severe pressure from East and Southeast Asia.

EU-Japan economic relations are – in comparison - under-developed. Trade share and trade intensity indexes have been declining over the past two decades. Recent years have even seen a decline in nominal trade volumes, which largely accounts for a drop in Japanese exports to the EU since 2012. The same is true for Japan's economic ties with the United States, although from a stronger baseline. The EU's share of Japan's total trade dropped from nearly 20 percent in 1990 (United States: 28 percent) to just below 10 percent in 2012 (United States: 13 percent). In the same period, EU trade intensity with the Japanese economy — a measure that adjusts for the GDP-size bias of trade shares — has dropped from 0.42 to 0.3 index points (United States: 2.11 to 1.32 points).

The most significant cause of the steady erosion of EU and U.S. market shares in Japan is well documented: Chinese, Korean, and Southeast Asian economic growth, as well as market-driven regional integration in East and Southeast Asia, has created a new center of economic gravity in which EU and U.S. businesses are increasingly marginalized. China's share of Japan's total trade has increased more than five-fold in the last 20 years (from 3.5 percent in 1990 percent to almost 20 percent in 2012), while trade intensity between the two economies has increased from 1.7 to 2.0 index points. Moreover, Association of Southeast Asian Nations (ASEAN) economies' growing trade share (from 12 percent to 15 percent) and relatively stable trade intensity with ASEAN member states (between 2.9 and 2.3 index points) are evidence of a continuously progressing regionalization of Japanese trade relative to economic relations with Europe and North America. From a European perspective, too, trade with Japan has declined in importance if expressed in nominal terms. Over the last 20 years, total trade volumes of EU- Japan trade have increased by only 150 percent, compared to 200 percent for EU trade with the United States, 300 percent with Canada, 400 percent with ASEAN economies, 750 percent with India, and 2,000 percent with China.[151]

[151] All indicators are drawn from *Asian Development Bank (ADB) — Asia Regional Integration Center — Integration Indicators*

But Chinese as well as ASEAN economic growth and market-driven regional integration in East Asia are not the only reasons for the continuous downward trend in EU-Japan and U.S.-Japan economic relations. Restrictive trade and investment regimes have played a major role in preventing enhanced inter-regional economic integration. Japan is not only infamous for strong tariff protection and subsidy support for its domestic agricultural and processed foods sectors but has also shielded important industries from import competition and foreign direct investment (FDI) through non-tariff barriers (NTB) and investment regulations that have been difficult to tackle in trade negotiations over the past century. In the same vein, Japan has managed to protect its dense production networks in Southeast Asia from the market entry of foreign competitors.[152]

The Japanese economy remains one of the OECD's least penetrated markets both in terms of exports and FDI. But with the exception of the agricultural and food sector, tariffs do not play an important role in the Japanese trade policy toolbox. Japanese market access constraints stem from a complex mix of behind-the-border measures and market factors. These take the form of an intricate web of NTBs such as restrictive investment, government procurement, services, and production regulations; discriminatory business practices; the partial non-alignment of Japanese industrial standards with international norms; and national consumer preferences that strongly favor Japanese brands over foreign substitutes.[153]

In contrast, European trade barriers to competitive Japanese exports predominantly take the form of tariffs on motor vehicles, electronics, and machinery. The resulting asymmetry in the tools of protection on the two sides, i.e., tariff vs. non-tariff barriers to trade, creates a challenging negotiation scenario: EU officials would have to find legal and political instruments that prevent the resurrection of Japanese NTBs or alternate restrictive regulatory measures in exchange for the elimination of European tariffs.

4.3. Competitive Liberalization and Mercantilism in EU-Japan Economic Relations

The conclusion of bilateral trade agreements and the ambition that underlies their eventual content, however, depends on a number of complex domestic and

[152] European Commission (2012): *Impact Assessment Report on EU-Japan Trade Relations.*
[153] WTO (2012): *Trade Policy Review – Japan*. Matthes, Juergen (2012)

international factors that constrain government negotiators. A potential EU-Japan FTA should be understood as the outcome of a strategic game played by rational government actors making sequential moves under domestic and external political, economic, and institutional constraints. The increasingly complex multidimensional game of bilateral and plurilateral trade and investment negotiations that is currently underway, in other words, remains a mercantilist exercise, in which all sides assess economic and political costs and benefits amid changing internal and external contingencies.

It is the unavailability of the first-best institutional solution — multilateral trade liberalization within the WTO context — that has incentivized governments around the world to devise plurilateral and bilateral negotiation strategies to generate commercial opportunities for domestic businesses and strengthen their geo-economic and geopolitical positions in regions of strategic importance. In Europe, the Commission abandoned its moratorium on the negotiation of bilateral FTAs in 2006 to clear the path for trade talks with high-growth emerging countries and OECD economies. Likewise, Japan has sought to increase its trade under FTAs to 70 percent from its current 19 percent.[154]

Reaping maximum benefits in the currently unfolding dynamic of competitive market liberalization incentivizes governments to negotiate with smaller trading partners first. In this way, negotiators can gain leverage over larger trading partners that will, as a consequence of eroding preferential margins, be more open to negotiations and reconsider the balance of potential concessions. Smaller economies have strong incentives to capitalize on this dynamic by gaining access to large markets before competitors do. EU and U.S. FTAs with South Korea, which is a direct competitor to Japanese exports, in 2011 and 2012 respectively, are among the more recent examples of this negotiation strategy. The agreements are characterized by significant substantive similarity. The entry into force of the two agreements led to an immediate increase in bilateral trade flows, while Japanese exports to the two economic giants — and the Japanese car manufacturing sector in particular — have suffered significantly from the newly acquired Korean trade cost advantage. In anticipation of this scenario, the Japanese government heavily lobbied the European Commission and EU member states' governments to commence FTA negotiations

[154] WTO (2015): *Trade Policy Review – Japan*.

with Japan after EU-Korea talks were launched. In 2012, Japan also filed its request to join the TPP and thereby entered into negotiations with the United States, partly motivated by the opportunity to erode the preferential margins that South Korea had just acquired.

EU institutions have made extensive use of their leverage over Japan in order to permanently remove Japan's notorious NTBs in return for EU tariff concessions. As evidenced by the EU-Japan Summit declarations of 2009 and 2010, EU leaders made the launch of negotiations conditional upon the elimination of a number of Japanese non-tariff barriers in order to test Tokyo's commitment to FTA-driven behind-the-border regulatory reform.[155] The following FTA scoping exercise — an examination of negotiation objectives that frequently precedes the opening of EU trade negotiations — further prescribed a number of "roadmaps" for sectorial NTB elimination in EU priority target sectors. Moreover, the procedure established the concept of "parallelism" in that tariff EU reductions were made contingent on expanded market access through effective regulatory reforms in Japan. A one-year review clause empowered EU member states to halt negotiations in 2014 if Japan's reform efforts were found to be insufficient, but this power has not been used.[156]

The tactic of frontloading Japanese NTB removal and the insistence on parallelism in the implementation of asymmetric concessions has been anchored domestically by strong support in the European Council and Parliament and, in turn, resulted in Japanese reform progress that was considered satisfactory by EU institutions.[157] Tokyo's cooperation in addressing key European demands coincides with and is facilitated by Prime Minister Abe's "three arrows strategy," which is intended to enhance Japanese economic performance through, among other means, structural domestic reform. Thus, the overlap between Abe's desire for domestic regulatory reform to enhance dwindling competitiveness and Brussels' policy wish list has so far played in favor of EU negotiation objectives.

But while EU-Japan trade talks have to date made promising progress in the shadow of highly scrutinized TTIP and TPP talks past delays are rooted in the

[155] Council of the European Union (4 May 2009): *18th EU –Japan Summit, Joint Press Statement*; Council of the European Union (28 April 2010): *19th EU –Japan Summit, Joint Press Statement*, Tokyo.
[156] Council of the European Union (7 May 2014): *22nd EU-Japan Summit, Joint Press Statement*.
[157] *European Parliament resolution of 13 June 2012 on EU trade negotiations with Japan*.

dynamics that underlie the involvement of Japan in the TPP and the bargain that remained to be struck with the United States. Following the logic of sequenced competitive liberalization, agreement with Europe hinges on Japan's success in TPP talks. Preferential U.S. market access in Japan would provide Tokyo with additional leverage over its EU counterpart. EU negotiators are incentivized to insist on receiving preferential treatment similar to the United States, but such preferences would logically come at a higher price following the conclusion of the TPP. EU concessions afforded to Japan, on the other side, would be expected to resemble those codified in the EU-Korea PTA, which has placed the Japanese economy and political class under heavy competitive pressure.

4.4 Outlook: From Negative to Positive Integration in EU-Japan Economic Relations?

It is evident from this negotiation history that EU-Japan trade talks have remained a largely mercantilist exercise. The 'negative integration' character of concessions constitutes the main substantive difference to the envisaged content of TTIP. While the TTIP mandate emphasized regulatory cooperation and convergence in the shape of common approaches to sector-specific transatlantic market regulation from the outset, the EU-Japan FTA was initially devoid of such positive harmonization objectives.[158] Rather, 'positive integration' between East and West were meant to continue through the channels of the EU-Japan Industrial Policy Dialogue — notably outside of the institutional structure of the FTA.[159] But recently intensifying lobbying efforts have placed regulatory cooperation à la TTIP within the realm of possibilities and garnered the attention of chief negotiators. In a number of joint pre-Summit press communications, Business Europe and Keidanren — the respective largest business associations in Europe and Japan — called for an institutional mechanism that resembles the planned TTIP Regulatory Cooperation Body.[160] This bilateral institutional innovation is designed to institutionalize ongoing but loosely organized transatlantic regulatory dialogues under the umbrella of TTIP and provide joint

[158] European Commission (10 February 2015): *TTIP and Regulation*.
[159] European Commission (16 March 2015): *18th Annual Meeting of the EU-Japan Industrial Policy Dialogue*.
[160] BusinessEurope – Keidanren (23 April 2015): *EU-Japan EPA / FTA: Fourth Sector-to-Sector Meeting Held in Brussels.* EU-Japan Business Round Table: *Joint Recommendations – Paving the Way for a Renewed Industrial Partnership*, 27/28 April 2015, Brussels. Keidanren (17 March 2015): *Recommendations for Japan-EU Regulatory Cooperation, Policy Proposals.*

convergence initiatives with additional political weight and a set of clear procedural rules. In apparent response to these calls, the joint EU-Japan Summit statement, for the first time, notes that "regulatory cooperation is also to be dealt with via FTA negotiations."[161]

[161] Council of the European Union (29 May 2015): *23th EU –Japan Summit, Joint Press Statement*.

IV. The Lisbon Treaty Reform of EU Common Commercial Policy: Law, Practice, and Political Institutions[162]

1. Introduction

This chapter introduces and discusses the reform of EU primary law applying to CCP governance by the Treaty of Lisbon reform of 2009 against the background of pre-Lisbon law and practice of EU external economic governance. Particular attention shall be drawn to the reform objectives set out by the 2001 Laeken Council, which sought to enhance the legitimacy of EU governance through "more democracy, transparency, and efficiency". As argued in chapter II of this study, any assessment of the Lisbon reform of the CCP that is mindful of the Laeken objectives ought to account for the constitutional reality of that follows formal reform. This perspective entails the recognition that primary law reform has the potential – at the very least least - to restructure the market for political access to public decision-making. In other words, constitutional reform can reallocate the institutional access points for political participation of stakeholders and – if so - *a priori* alters the *relative* cost of political participation among a given set of diffuse or special interests that act upon the political institutions mandated with CCP governance.

In this way, the formal redistribution of access points to public decision-making implicates the possibility of new normative directions of CCP governance, which may become manifested in the incentive structure that is embedded in secondary legal institutions of post-Lisbon CCP – notwithstanding, or irrespective of, constitutionally formalized ideals of EU external action that are codified in Article 21 TEU. Viewed through this lens, the identity of the EU in its external economic relations is not identical to the material scope and objectives of potential action under the EU treaties. Rather, EU external commercial identity is determined by the drivers of institutional change, which – albeit constrained by primary legal institutions – crystallize in patterns of EU external economic relations conduct.

It is appears obvious, from the outset, that the empowerment of the European Parliament in CCP governance would render the institution a key target of interest group activity - in addition to the Commission as well as member state governments

[162] This chapter and the second part of chapter III draw from insights gained in 15 interviews, which the author conducted and recorded in Brussels from March 2013 to February 2014. The list of the interviewees forms part of the bibliography of this study. Conclusions drawn from these interviews can and shall in no way be attributed to individual interviewees.

and national parliaments. Increasing the amount of access points to public decision-making for interest groups lowers the cost of political participation. Decreasing costs of political participation, however, are distinct from increasing 'influence' of private interests in the same way as 'influence' of political institutions over policy outcomes must be distinguished from formal decision-making rights. Constitutionally granted rights of participation only make for the necessary condition of changing 'influence' over outcomes.

On the policy demand side, 'influence' depends on the efficiency of interest organization, which is subject to the logic of collective action and its underlying information cost asymmetries and may result – as demonstrated in chapter II - in minoritarian or majoritarian biases of public decision-making.

On the policy supply side, the translation of aggregate interests into influence over policy outcomes is contingent – in addition to formal rights - on the information costs that arise in the course of political transactions within political institutions and among political institutions mandated with CCP governance. Most importantly, the effectiveness of political institutions in influencing policy outcomes is a function of their informational capacity - among other structural variables -, which I have defined and discussed in chapter II of this study. Institutional effectiveness and underlying information cost asymmetries can only be assessed in comparison and in their evolution over time.

More formally, if viewed in context of the Laeken Council's call for enhanced democratic legitimacy of the European Union, the empowerment of the EP contributes to the elimination of the long-standing democratic deficit of the CCP, which has led some observers to the conclusion that EU external economic governance – within the realm of the CCP - has now entered a 'post-Lockean era'[163] in that it ends a situation where democratic legitimation of external policy governance is essentially lower than that of the regulation of internal substance.[164]

Following an examination of the primary law reform of the CCP and early practice, this chapter scrutinizes the developing informal institutions as well as key structural features and capacities of EU political institutions that are mandated with CCP governance. As a result of this comparative institutional analysis, the concluding section evaluates the evolving balance among EU institutions involved in CCP

[163] Hilpold, Peter (2013)
[164] Krajewski, Markus (2013): p69

governance. The concluding section acknowledges, at the same time, that any valuable assessment of CCP governance in light of the Laeken objectives of 'more efficiency, transparency, democracy' must encompass a second comparative institutional analysis, which assesses the law and practice of 'mixed' trade and investment agreements in EU external economic governance – and thus takes account of the role of member states' political institutions in that process. The subsequent two chapters are dedicated to that end.

2. Institutional Balance in EU Common Commercial Policy Governance - The empowerment of the European Parliament

Previous to the entry into force of the Treaty of Lisbon, Common Commercial Policy under has traditionally been shaped by formal and informal relationship between two political institutions, notably the Commission and the Council, under the provisions of the EC Treaty.

Under the provisions of Article 133(2) EC Treaty, the Commission proposed framework legislation to the Council. CCP framework legislation governs, for instance, the EU's use of trade defence instruments, tariff rates and quotas, and non-reciprocal trade preferences to developing countries. Framework legislation, moreover, is the necessary legal instrument for implementing legislation, i.e. legislation that can give effect to parts of treaties concluded with third countries, which fall within the scope of the CCP. The Council then had the opportunity to amend and adopt the proposed regulation with qualified majority where the Community held exclusive competence, and unanimously where it shared competences with the member states.[165]

With regard to negotiations of bilateral or multilateral trade agreements, Article 133(3) EC mandated that the "Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations." The Commission negotiated the agreement on the basis of the negotiation directive as amended and approved by the Council. On proposal of the Commission, the Council authorized the signature, provisional application and conclusion of the respective agreement. In cases of 'mixed agreements', i.e. where the

[165] Art. 133 (2) and (4) EC Treaty.

agreement contained provisions falling within the realm of competences shared between the Community and member states or member states' exclusive competences, member state parliaments' consent was required before the conclusion of the treaty.

In line with its reporting obligations under the EC Treaty, the Commission regularly consulted the so-called 'Article 133 Committee' on the status of negotiations.[166] The member states' economic affairs attachés commented, endorsed and criticized the direction that negotiations "in order to assist the Commission in this task"[167] and, most importantly, traced red lines that the Commission should not overstep if it sought final approval for the respective accord from the Council. The Article 133 Committee (now called the 'Trade Policy Committee') holds one full-day session per week behind closed doors in the Council building in Brussels. Essentially, member state government officials receive technical updates from individual DG TRADE officials on a large variety of trade negotiation dossiers and provide Commission administrators political responses from their capitals.

In many respects, Article 133 Committee sessions epitomized the 'black box' character of the pre-Lisbon era trade policy governance process, which was arguably characterized by a lack of parliamentary control, accountability, and transparency, but, at the same time, benefited from technocratic efficiency. The pre-Lisbon polity structure "left trade policy largely in the purview of the generally free-trade oriented career officials in the Commission, with only attenuated connections to voters or constituencies or political concerns, and the economic affairs ministries of member states, through their collective participation in the Council."[168] The European Parliament had little or no role in EU external economic governance. However, with the entry into force of the Lisbon Treaty, the black box power duopoly governing the CCP has been rendered a part of history.

Against this background, the empowerment of the European Parliament is among the most significant CCP reform that the Lisbon Treaty has brought about. Parliament has gained decision-making powers in two main areas, namely co-decision powers applying to domestic framework legislation and the right to consent to or

[166] Art. 133 (3) EC Treaty.

[167] Art. 133 (3) EC Treaty.

[168] Hillman, Jennifer and David Kleimann (2010)

reject trade and investment agreements that the Commission negotiates with third states in bilateral, plurilateral and multilateral negotiation settings.

2.1. Domestic Framework Legislation

The Lisbon Treaty generally expanded Parliament's role in adopting framework legislation in a wide range of policy areas, such as external trade and investment, monetary policy, energy, agriculture and fisheries, personal data protection, intellectual property rights, public health and immigration. Most importantly for the purposes of this study, Article 207(2) TFEU grants co-decision powers to Parliament in the area of framework legislation laying down the Union's external trade and investment policy:

> "The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure [OLP], shall adopt the measures defining the framework for implementing the common commercial policy."

The OLP is the new technical term for the previous co-decision procedure. The OLP is codified in Article 294 TFEU. Under the OLP rules, the Council and Parliament need to jointly agree on and adopt regulations proposed to them by the Commission. The OLP preserves the Commission's exclusive right to initiate legislation[169] and is, at every stage of the proceedings, requested to provide its opinion on amendments made by Parliament and the Council. If the Council and Parliament do not agree on a common position after receiving the amendments of the other party during the first two legislative readings, a Conciliation Committee is formed, in which the Commission formally serves as a mediator between the two institutions.[170] A regulation is only adopted if agreed and voted upon by both institutions following one of a maximum of three readings.[171]

Within the area of the CCP, all trade barrier regulations, trade defence instruments, trade preferences programs, as well as future regulations laying down EU foreign direct investment policy, are subject to the OLP rules. With the entry into force of the Lisbon Treaty, Parliament's International Trade Committee (INTA) has

[169] Art. 294 (2) TFEU.
[170] Art. 294 (10) TFEU.
[171] Art. 294 (13) TFEU.

been granted procedural powers to shape CCP framework legislation, which equal those held by member state governments represented in the Council. The INTA Committee holds significant intra-parliamentary 'gatekeeper' powers in shaping the framework legislation necessary to implement the EU's CCP, as it presents only the final legislative proposal to the plenary for adoption, which may then adopt or reject the text by simple majority vote. A plenary vote that contradicts the vote of the special committee responsible for the respective dossier remains rare.

The inclusion of the EP in the procedure applying to the adoption of CCP legislation implicates a longer and more complex process than in the past. If the Council and the Parliament do not agree on a common position after the first reading or second reading and move to a third reading, the OLP will easily last for more than one year. In addition to the formal duration requirements codified in paragraphs (7), (8), (10), (12), and (14) of Article 294, the obligatory translation of Commission proposals submitted to Parliament into all 22 official EU languages may last for up to three months. Judging purely from an efficiency of governance point of view – if compared to the previous bilateral legislative procedure between the Commission and the Council – it is clear that the introduction of the OLP in the area of the CCP has rendered the adoption of framework legislation a more complex and time-consuming task.

The TFEU does not specifically provide for informal negotiations between the institutions during the legislative process, which would have the potential to decrease the costs of political transactions in the process. The TFEU prescribes the submission of formal positions – and justifications thereof - to the respective other institutions. Article 295 TFEU, however, provides a legal basis for inter-institutional cooperation, which gives the institutions broad discretion to set up arrangements they may deem fit to reduce transaction costs of inter-institutional political exchanges:

> "The European Parliament, the Council, and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude inter-institutional agreements which may be of a binding nature."

As with other EU policy areas – in order to facilitate the legislative process - it has become common practice in CCP OLPs to conduct informal 'trilogue negotiations', in which Commission, Parliament and Council representatives seek to come to agreement on the proposed legislative act early on. In these trilogue negotiations, the Council is represented by the member state holding the rotating EU Presidency. Parliament is formally represented by the rapporteur responsible for any given dossier, who are frequently joined by the 'shadow rapporteurs' of other political groups, as well as (sometimes) by the chairman of the responsible Committee.

Informal trilogue negotiations are instrumental in enhancing the efficiency of OLPs that apply to CCP framework legislation. By 2006, 90 per cent of legislation proposed for co-decision was negotiated through trilogues, a fact that indicates the strong potential of informal inter-institutional meetings to reduce uncertainty about political preferences, and thus cutting the costs of bicameral political exchanges.[172] Such informal institutions hence play a particularly important role – in a context of urgency – e.g. where the provisional application or entry into force of external economic agreements is conditional upon the speedy adoption of implementing legislation that is necessary to give the agreement domestic effect.

At the same time, trilogue informality reduces process transparency and accountability of political agents considerably. Trilogue negotiations – in contrast to formal second or third readings - do not require the publication of written records of decisions. Rules for the appointment of political agents representing each institution are less clear. Moreover, trilogues allow participants to introduce new amendments and compromise texts, which, otherwise, require formal adoption in the respective committees.[173]

2.2. Negotiation, Provisional Application, and Conclusion of External Economic Agreements

The second major treaty prescribed elevation of the European Parliament occurred with respect to the role of the EP in the process of negotiating and adopting of external economic agreements that fall within the scope of the CCP. Even before the entry into force of the Lisbon Treaty, Parliament has traditionally been requested to give assent to all EU external economic agreements negotiated by the Commission

[172] Brandsma, Gjis Jan (2015)
[173] ibid.

although Article 300(3)(1) EC Treaty only required EP consent for Association Agreements, external economic agreements with budgetary implications, and agreements establishing new institutions. CCP agreements were, in contrast, explicitly exempted from the assent procedure by virtue of Article 300(3)(2) EC Treaty.

In any case, parliamentary rejection of a trade accord has never been a credible political option: Parliament had no information rights during the negotiation process, lacked legislative rights for the implementation the external agreements domestically, was the very last in a chain of institutions to provide its final opinion on the conclusion of the treaty and, moreover, lacked the technical expertise and institutional infrastructure necessary to make substantive contributions. Hence EU parliamentary dissent in the pre-Lisbon era has only been a theoretical scenario.

The Lisbon Treaty amendments, on the other hand, have equipped the EP with rights and obligations that formally mandate and enable parliamentary control of the negotiation process and condition the conclusion of EU trade and investment agreement on its consent.

First and foremost, Article 218 (6) TFEU *per se* requires EU parliamentary consent to all external agreements "to which either the ordinary legislative procedure, or the special legislative procedure applies". This, in line with Article 207 (2) TFEU, applies to all CCP agreements.

The TFEU provisions, moreover, confer significant information rights onto the EP. Article 207(3) TFEU requires that the Commission "shall report regularly to special [Council TPC] committee and the European Parliament on the progress of negotiations". Moreover, Article 218(10) TFEU provides that "the European Parliament shall be immediately and fully informed at all stages of the procedure" applying to the negotiation and conclusion of agreements with third states and international organizations as laid down in Article 218 TFEU.

Nevertheless, the TFEU falls short of granting Parliament a formal role in the decision on the mandate or in setting out objectives of trade negotiations more generally, nor does it provide for parliamentary participation in negotiations. The Commission, through proposal by virtue of Article 218(3) TFEU, and the Council, by adopting decisions on negotiation directives by virtue of Article 218(2) TFEU, formally retain this prerogative. The EP's right to be informed, furthermore, - even if fully, immediately, and at all stages - does not match the Council Trade Policy Committee's prerogative "to assist the Commission in" the task of negotiating trade

agreements in consultation with the Commission, which is codified Article 207(3) TFEU. Finally, the EP has no formal role in the signature and provisional application of external economic agreements. Article 218(5) TFEU, in this respect, mandates that "[t]he 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."

The Council, in other words, retains the exclusive formal right to direct the Commission's conduct of negotiations, additional to the Council's exclusive role in amending and adopting proposed negotiation directives, and decisions on the authorization of the signature and provisional application of external economic agreements.

In practice, however, the European Parliament has arguably compensated for the lack of its formal role in the decision on the adoption of negotiation directives, its passive formal role during negotiations, as well as in decisions on provisional application. Parliament has done so by leveraging existing procedural rights and setting out its substantive and procedural demands through its various channels of communication.

The European Parliament, assisted by its specialized Committee for International Trade (INTA), has various means to voice political preferences and set out preconditions for assenting to CCP agreements early on during negotiations. Such means include the use of non-binding parliamentary resolutions, hearings, opinions, exchanges with Commission officials in the course of regular Commission reports to the INTA committee on progress in negotiations, as well as written questions to the Commission.

Parliament has, on many occasions, called "on the Commission (…) to take due account of Parliament's preconditions for giving its consent to the conclusion of trade agreements."[174] In this context, parliamentary information rights vis-à-vis the Commission have an important political value: constitutionally guaranteed full and immediate information on the procedure applying to the proposal and adoption of decisions on negotiation directives and the adoption of agreements, as well as regular Commission reports on progress in negotiations enable Parliament to leverage its consent rights in order to influence the content of negotiation directives, the direction

[174] *European Parliament Resolution of 18 May 2010 on the EU Policy Coherence for Development and the "Official Development Assistance plus" concept.*

of bilateral and multilateral trade negotiations, and hence the substance of the final agreements.

Furthermore, as outlined above, Parliament shares a bicameral function in the process of adopting legislation necessary for the implementation of CCP agreements. Parliamentary powers to block the framework legislation necessary to implement provisions of a trade accord adds additional procedural leverage for it to demand involvement in the political deliberation process that applies to the scope, objectives, and directions of the negotiation of external economic agreements.

In light of these multiple levers – through the EP's formal role in adopting implementing legislation and its right to veto the conclusion of CCP agreements, EP substantive and even procedural demands can hardly be ignored when the Commission and the Council determine negotiating objectives and EU positions in negotiations with third countries.

The EP's intention and efforts to consolidate and lever its procedural rights in the early days of post-Lisbon constitutional practice can be illustrated by means of two case studies. These are, notably, the precedent set by the signing and provisional application of the EU-Korea FTA and the adoption of a special safeguard mechanism necessary for the implementation of the agreement; and, secondly, the negotiation and adoption of the Interinstutional Framework Agreement on Relations between the European Commission and the European Parliament.[175]

2.3. The EU-Korea FTA Precedent and Subsequent Practice

The political dynamic surrounding the first CCP agreement submitted to the EP after the entry into force of the Lisbon Treaty illustrate the evolving constitutional practice and developing institutional balance, as outlined above in the abstract. Moreover, the episode showcases how the EP has become an access point for protection-seeking industries - immediately after its constitutional empowerment.

The Council decision to adopt the EU-Korea FTA negotiation directive dates back to April 2007. Negotiations commenced in May of the same year and marked the first manifestation of the 'Global Europe' FTA negotiation strategy. Negotiations were finalized in early 2010. As such, the agreement required decisions on signature, provisional application, and conclusion, as well as implementing legislation to be

[175] *Framework Agreement on relations between the European Parliament and the European Commission*, 2 November 2010.

adopted under the new primary legal institutional framework set out by the Lisbon amendments of the TFEU.

Following the finalization of negotiations between the Commission and the government of South Korea, the draft accord resulted in considerable opposition from European small-car manufacturers of German and Italian origin and the European Automobile Manufacturers' Association (ACEA), which feared that the EU market would be vulnerable to highly competitive imports of Kia and Hyundai cars once the 10% MFN import duty was eliminated on a preferential basis. Moreover, EU carmakers voiced concerns over the agreement's allowance for the Korean duty drawback scheme, which commits the Korean government to provide refunds for duties paid by Korean producers on car parts originating from outside Korea.

Once it became clear that the accord would be subject to parliamentary consent and implementing legislation under Lisbon rules, the auto industry commenced strong lobbying efforts vis-à-vis national governments and MEPs to reject the agreement in its proposed state, delay its provisional application, and to incorporate specific amendments in the implementing legislation applicable to the agreement's special safeguard mechanism. Such amendments aimed at reinstating MFN tariffs on Korean car imports in the event that the EU industry would in fact suffer a broadly defined competitive disadvantage from the application of the agreement.

In February 2010, the Commission submitted a proposed regulation for a safeguard mechanism to Parliament and the Council.[176] The text proposed a standard safeguard, allowing for the application of MFN tariff rates in the event of 'serious injury' or 'threat of serious injury' to EU industry, caused as a result of the elimination of the MFN rate. The proposal provided that safeguard investigations could be initiated by the Commission on request of a member state, or on its own initiative.

In the course of the first legislative reading of the proposed regulation, the INTA Committee preliminarily adopted 54 amendments.[177] The amendments –

[176] European Commission (9 February, 2010): *Proposal for a Regulation of the European Parliament and of the Council implementing the bilateral safeguard clause of the EU-Korea Free Trade Agreement.*

[177] European Parliament, Committee on International Trade (25 June 2010): *Report on the Proposal for a regulation of the European Parliament and of the Council implementing the bilateral safeguard clause of the EU-Korea Free Trade Agreement.*

overwhelmingly proposed by German and Italian INTA MEPs belonging to various party groups - broadly reflected a strong protectionist agenda and mirrored the capture of the INTA Committee by German and Italian small-car manufacturers and labour unions.[178]

Informal trilogue negotiations between the INTA Committee and the Council showed strong disagreement over the strength and application of the agreement's safeguard clause. Exemplifying the controversy, German MEP Bernd Lange from the group of social democrats stated: "the Council now finally has to move, so that we will have sufficient safeguards for the Free Trade Agreement with South Korea to protect European industries and employees from dumping." MEP Lange's colleague from the German liberal party, Michael Theurer concurred: "we require an effective safeguard clause which covers regional distortions and social and environmental norms which allow us to avoid the inherent duty drawback risks."[179]

It appeared, however, that Parliament had already started to develop a pragmatic *modus operandi* for its institutional competition with the Council. INTA postponed an internal vote on its position in order, as INTA special rapporteur Pablo Zalba Bidegain stated, "not to close the door" for a first-reading agreement with the Council, sending an important signal to those observers and stakeholders who had been concerned about the potentially long duration of legislative procedures resulting from parliamentary involvement.[180]

Connected to its veto-right and EP co-decision powers in this dossier, INTA also made procedural demands, which demonstrated its intent to leverage its formal

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[178] To summarize: INTA demanded an expansion of potential causes for 'serious injury', i.e. including Korean non-compliance with social and environmental clauses of the agreement (Amendment 3), non-compliance with the agreement's non-tariff barriers (A4), competitive effects of the duty drawback exemption (A11), and the non-compliance of third countries production of Korean product parts with ILO and UN standards applying to social and working conditions and environmental standards (A13). Moreover, amendments 22 and 24 envisage a regional application of the safeguard, i.e. the possibility to exclusively reinstall the MFN tariff rate for individual EU member states (such as Italy or Germany) under certain circumstances. Furthermore, the European Parliament or any legal personality acting on behalf of more than 25% of EU industry are demanded to have the right to request the initiation of safeguard investigations, additional to member states and the Commission (A27). The INTA amendments also contain strong language on transparency and reporting requirements on behalf of the Commission, applicable to the functioning of the safeguard and the performance of Korean export produce in European markets. Finally, INTA members demanded that, in the case of a finding "that the safeguard measures are insufficient, the Commission should submit a comprehensive proposal for more far-reaching safeguard measures, such as limits on quantities, quotas, import authorization arrangements or other corrective measures" (A6).

[179] Euractiv (14 September 2010), '*EU-South Korea trade deal under attack*'.

[180] Ibid.

powers under the Lisbon rules in order maximize its influence informally: INTA requested that a Council decision on the provisional application of the agreement was adopted only after the adoption of necessary implementing legislation and after the EP had expressed its consent to the agreement.[181] The EP's efforts were successful in terms of its procedural demands. The Korea FTA was signed as initially planned on October 5th 2010. The agreement's signature was followed by an agreement among the parties to the informal trilogue negotiations on the safeguard regulation in October 2010, in which INTA retreated from many of its protectionist demands – however, only after the Commission and member states had conceded ground on the procedural demands of parliamentary involvement prior to provisional application of the EU-Korea agreement. The parliamentary resolution, as adopted by INTA on 26 January 2011, presented a significant political compromise and important rehearsal of inter-institutional cooperation and CCP practice under the Lisbon rules.[182]

Parliament's plenary eventually adopted the first significant piece of CCP legislation in its history on 17 February 2011. At the same time, Parliament gave its consent to the entire Korea agreement.[183] The Korea episode gives important indications for both the policy preferences of INTA members as well as the modalities of institutional cooperation and competition between Parliament, the Council and the Commission. While the EP and its INTA Committee have proven to establish a new access point for industries demanding protection from foreign competition, it has become similarly evident that it is willing to negotiate its demands and retreat from positions that are unacceptable for the Commission and the Council.

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[181] Ibid.

[182] European Parliament, Committee on International Trade (12 January 2011): *Proposal for a regulation of the European Parliament and of the Council implementing the bilateral safeguard clause of the EU-Korea Free Trade Agreement.* The safeguard regulation does not provide for the possibility of a regional application of the safeguard, the possibility of the initiation of investigations upon request of Parliament, nor does the regulation render the application of the safeguard subject to legally binding provisions on the Korean duty drawback scheme or social and environmental standards. However, many of INTA's demands applying to duty drawback and social and environmental issues have, albeit in a significantly toned-down version, found their way into the preamble of the regulation and an attached declaration by the Commission. The major concession on behalf of the Council and the Commission, on the other hand, is reflected in several provisions on the Commission's monitoring, reporting and surveillance duties with regard to Korean imports, none of which, however, oblige the Commission to initiate safeguard investigations or apply safeguard duties after all. What the regulation does, nevertheless, is to provide Parliament with additional information and transparency instruments that can be employed to mount political pressure on the Commission's decision-making process.

[183] European Parliament, Committee for International Trade, (17 February 2011): *EU-South Korea free trade accord: MEPs agree on the safeguard clause*", 26 January 2011. European Parliament, Press Release, *EU-South Korea free trade agreement passes final hurdle in Parliament.*

The agreement's passage through the reformed institutional framework marked an important milestone for the constitutional practice of post-Lisbon CCP. Ever since, the Commission and the Council have informally guaranteed that decisions on the provisional application of external economic agreements would be rendered only after implementing legislation had been adopted, and only after the EP had expressed its consent to the conclusion of the respective agreement.[184]

We can identify manifold evidence of post-Lisbon CCP practice, which showcase the EP's willingness to use its rights under the TFEU as well as informal levers to influence the objectives, conduct, and direction of external economic negotiations. The EP's rejection of the Anti-Counterfeiting and Trade Agreement (ACTA) serves as a memorable case study of the EP's willingness to make use of its newly acquired veto-right where MEPs expressed that procedural conduct and substance were not to their liking.[185] In parallel, the EP has also made constructive efforts to compensate for the lack of its formal involvement in the adoption of decisions on negotiation directives by the Council. In the case of the EU-Japan FTA dossier, the EP, in 2012, asked "the Council not to authorise the opening of trade negotiations until Parliament has stated its position on the proposed negotiating mandate, on the basis of a report by the committee responsible."[186] In its position on the negotiating mandate proposed by the Commission, the EP furthermore stated that "the Council should establish a clear timetable and include [a larger number of listed concrete] aspects in the Commission's negotiating directives."[187] More explicitly, in a resolution predating the Council decision on the negotiation mandate for TTIP in October 2014, the EP recalled "that Parliament will be asked to give its consent to the future TTIP agreement, as stipulated by the Treaty on the Functioning

[184] European Parliament (27 April 2015), *Parliamentary Questions, Answer given by Ms. Malmstrom on behalf of the European Commission,*: "It is important to note in this context that Commissioner Malmström has declared in writing to the INTA Committee that, '(e)ven if the power to decide on provisional application lies with the Council, (…) I am ready, when proposing decisions to sign politically important trade agreements which fall under my responsibility, to ask the Council to delay provisional application until the European Parliament has given its consent'. It is also to be noted that, in recent years, several important trade agreements were provisionally applied only after the European Parliament had given its consent."
[185] Cremona, Marise (2014)
[186] *European Parliament resolution of 13 June 2012 on EU trade negotiations with Japan*.
[187] *European Parliament resolution of 25 October 2012 on EU trade negotiations with Japan*

of the European Union, and that its positions should therefore be duly taken into account at all stages".[188]

Perhaps most prominently, in its resolution of July 8 2015, the EP set out specific recommendations to Commission negotiators of TTIP, which, despite its non-binding character, effectively put an end to the prospects of the inclusion of traditional investor-state-dispute-settlement (ISDS) mechanisms in EU FTAs. But rather than demanding the abandonment of ISDS altogether – as a multitude of civil society organisations had asked for - the EP resolution projects a highly politicized political compromise, by calling onto the Commission

> "to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured**,** the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives"[189]

In sum, with the coming into force of the Lisbon Treaty, the threat of a parliamentary veto has become a credible one and the need to take into account the views of the Parliament from the very beginning of CCP negotiations has become imperative.

2.4. The Framework Agreement on Relations between the European Parliament and the European Commission

In the early days of the Lisbon era, INTA members have, across party groups and nationalities, aligned behind the objective of consolidating and expanding its newly acquired responsibilities and have sought to give full effect to the provisions granting the respective powers. This has been made clear in various parliamentary

[188] *European Parliament resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America*

[189] *European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP).*

resolutions,[190] MEP statements,[191] as well as by the circumstances and rhetoric surrounding the SWIFT episode.

In order to enable itself to fully participate in the political deliberation process applying to the adoption of negotiation mandates, directions of negotiation conduct and co-decision legislation, the INTA Committee demanded that the Commission give full effect to the TFEU provisions governing the submission of (confidential) information as well as reporting requirements by means of equal and indiscriminate treatment of INTA and the Council. Additionally, it has sought to acquire the right to attend negotiations of trade accords conducted by DG TRADE, as well as meetings between Commission officials and national experts mandated by Articles 290 and 291 TFEU.[192]

A formal letter sent by INTA Chairman Vital Moreira to Commissioner de Gucht in early 2010, aimed at incorporating these demands into the Framework Agreement on Relations between the European Parliament and the European Commission. Article 295 TFEU serves as the legal basis for such agreements by providing that "the European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude inter-institutional agreements which may be of a binding nature." A parliamentary resolution called for a "guarantee that the Commission will apply the basic principle of equal treatment for Parliament and the Council, especially as regards access to meetings and the provision of contributions or other information". Moreover, the resolution seeks "a commitment by the Commission for reinforced association with Parliament through the provision of immediate and full information to Parliament at all stages of negotiations on international agreements (including the definition of the negotiation directives), in particular on trade matters and other negotiations involving

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[190] For instance, in its *Resolution of 7 May 2009 on the Parliament's new role and responsibilities in implementing the Treaty of Lisbon*, Parliament "[w]elcomes the fact that Parliament's consent will be required for a wide range of international agreements signed by the Union; underlines its intention to request the Council, where appropriate, not to open negotiations on international agreements until Parliament has stated its position, and to allow Parliament, on the basis of a report from the committee responsible, to adopt at any stage in the negotiations recommendations which are to be taken into account before the conclusion of negotiations".

[191] Interview with INTA Committee Chairman Vital Moreira on the new role of the European Parliament under the Treaty of Lisbon, 2 June 2010.

[192] Ibid.

the consent procedure, in such a way as to give full effect to Article 218 TFEU, while respecting each institution's role".[193]

It is worth recalling, in this context, that the treaty language of Article 207(3) TFEU – read in the context of Article 218 – makes a distinction between the role of the Council and the Parliament in the course of negotiations, quite separate from the fact that Parliament has no formal role whatsoever in the determination or adoption of negotiation mandates. While the Commission "shall conduct these negotiations *in consultation with a special committee appointed by the Council to assist the Commission in this task*", the Commission shall only "report regularly (…) to the European Parliament on the progress of negotiations." Without further inquiry into the qualitative difference of the terms "in consultation" and "to assist" on the one hand and "report to", on the other, the obvious semantic distinction appears to justify a different treatment of the Council vis-à-vis the Parliament as regards the submission of confidential documents on the conduct of negotiations and the attendance of negotiation sessions and preparatory meetings.

The signature of the on 20 October 2010, by the President of the European Commission and the President of the European Parliament thus represented an important political victory of Parliament vis-à-vis the Council, granting Parliament unprecedented rights of information and access to meetings of the Commission.[194] The agreement, moreover, appears to stretch the scope of the EP information rights under the TFEU.

First, paragraphs 1 and 10 of the Framework Agreement announce a "new special partnership" between the Commission and the Council. Paragraph 9, furthermore, provides that "Commission guarantees that it will apply the basic principle of equal treatment for Parliament and the Council, especially as regards access to meetings and the provision of contributions or other information (…)." Paragraph 25, on international negotiations, grants MEPs conditional access to negotiations and "all relevant meetings under its (the Commission's) responsibility before and after negotiation sessions". Paragraph 3 of Annex 3 of the agreement further obliges the Commission to "take due account of Parliament's comments

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[193] *European Parliament resolution of 9 February 2010 on a revised Framework Agreement between the European Parliament and the Commission for the next legislative term.*

[194] *Framework Agreement on relations between the European Parliament and the European Commission* (2 November 2010).

throughout the negotiations", while paragraph 4 requires the Commission to "explain whether and how Parliament's comments were incorporated in the texts under negotiation and if not why." Finally, paragraph 5 demands that the Commission "shall provide to Parliament during the negotiation process all relevant information that it also provides to the Council (…)."

It is thus perhaps unsurprising that member states' governments opposed the content of the agreement. In a letter addressed to both the President of the Commission and of the Parliament, the President of the General Affairs Council complained that "the Framework Agreement *has the effect of modifying the balance established by the Treaties between the Institutions, according powers to the Parliament not conferred by the Treaties* and limiting the autonomy of the Commission and its President. The Council is *particularly concerned by the provisions on international agreements*, infringement proceedings against member states and *transmission of classified information to the European Parliament*" [emphasis added]. The letter attached the opinion of the Council's legal service, subject to the warning that "the Council will submit to the Court of Justice any act or action of the European Parliament or of the Commission performed in application of the provisions of the Framework Agreement that would have an effect contrary to the interests of the Council and the prerogatives conferred upon it by the Treaties."[195]

In its legal opinion, the Council's legal service particularly noted that the Framework Agreement "involves the obligations imposed on the Commission by Annex 3 to take due account of the Parliament's comments in the entire process of negotiation and to provide it with a whole series of documents (in particular the draft negotiating directives, draft amendments to negotiating directives, draft negotiating texts or any relevant documents received from third parties, subject to the originator's consent) relating to international negotiations. Such obligations, combined with the obligation on the Commission to take account of the European Parliament's views and inform it of the way it has incorporated them in the texts negotiated, are not provided for by the Treaty."[196] Moreover, Point 21 of the draft agreement specifically provides that the Commission will facilitate the participation of Members of the European

[195] Council of the European Union (18 October 2010), *Draft Letter to the President of the European Commission and the President of the European Parliament - Subject: Framework Agreement on Relations between the European Parliament and the European Commission.*
[196] Council of the European Union (17 September 2010), *Opinion of the Legal Service – Subject: Draft Framework Agreement between the European Parliament and the European Commission.*

Parliament as observers in all relevant meetings under its responsibility before and after international negotiation sessions. This provision would allow participation by the European Parliament in the Union's internal coordination meetings, thereby modifying the procedure laid down in Article 218(4) TFEU, whereby "[t]he Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted". According to this provision, in view of the Council's legal service "the Council is the only Institution competent to decide which committee will be consulted and who will participate. Application of the present provision of the draft Agreement would directly undermine the Council's prerogatives."

It may be noteworthy, in this context, that the three political institutions have recently concluded an inter-institutional agreement on 'better law-making', which aims at decreasing the transaction costs associated with private actors' compliance and implementation of EU secondary legal institutions: "legislation should be comprehensible and clear, allow citizens, administrations and businesses to easily understand their rights and obligations, include appropriate reporting, monitoring and evaluation requirements, avoid overregulation and administrative burdens, and be practical to implement."[197]

The EP, the Council, and the Commission are also currently engaged in inter-institutional negotiations over a framework agreement governing their relations in the conduct of external action, including all aspects of negotiating CCP agreements with third countries. In addition to the extensive information rights granted by the Commission under the 2010 Framework Agreement, the European Parliament reportedly demands that the successor agreement – which takes the Council on board - codifies a formal right that would allow for the EP to determine the substantive content of negotiation directives on an equal footing with the Council. EP lead negotiators Elmar Brok (Chairman of AFET) and Bernd Lange (Chairman of INTA), moreover, reportedly seek to formalize past practice that conditions Council decisions on the provisional application of external agreements on previous consent given by the EP.

In sum, we can preliminarily conclude that the EP has been effective in consolidating its newly acquired formal powers under TFEU in the conduct of the

[197] *Interinstitutional Agreement between the European Parliament, the Council of the European Union, and the European Commission on Better Law-Making of 13 April 2016*. Article I(3)

CCP. Moreover the EP informally managed to expand its constitutionally guaranteed information rights vis-à-vis the Commission and the Council – reinforcing its bicameral control functions of Common Commercial Policy practice in the Lisbon era – notwithstanding evolving tensions of such practice with competing Council rights under Article 218 TFEU. Finally, the EP seeks to further formalize its informal leverage over the direction and substance of external negotiations through current inter-institutional negotiations with the Council and the Commission.

3. The Consolidation of the Material Scope of EU Common Commercial Policy

The consolidation of the scope of exclusive EU competences in the area of Common Commercial Policy makes for another significant innovation advanced by the Treaty of Lisbon. [198] Prior to the Lisbon amendments, Article 133(1) EC Treaty listed all areas of the Community's exclusive competences in common commercial policy-making, to which qualified majority voting by the Council applied. It provided that

> "the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies."

The original version of the CCP provision - Article 113 of the 1957 Treaty of Rome - made no mention of investment, services and intellectual property rights whatsoever. The 1994 conclusion of the GATT Uruguay Round and resulting agreements on trade in services (GATS), intellectual property rights (TRIPS), and agriculture (AoA) as part of the 'Single Undertaking', however, triggered litigation between the member states and the Commission over member states' rights of representation (negotiation and conclusion of the final agreement at WTO level) and participation (member state ratification). The dispute was resolved through the Court's decision in Opinion 1/94 in which the ECJ in essence clarified that - in contrast to trade in goods and other areas of EC exclusive CCP competences - the Community and the member states

[198] Opinion 1/94

shared competences for certain modes of services supply and intellectual property rights. It thereby enabled 'mixity' of the WTO agreement and a joint conclusion and member state ratification of the accord.

The impracticality of joint EC and member state negotiation and conclusion of services and intellectual property agreements with third parties prompted member states' governments to insert, as part of the reforms mandated by the 1997 Treaty of Amsterdam, paragraph 5 into Article 113 EC Treaty. The provision enabled the Council, acting by unanimity, to mandate the Commission to negotiate services and intellectual property agreements on behalf of the Community on an *ad hoc* basis.

The 2001 Treaty of Nice substantially redrafted paragraph 5 of Article 113 in the succeeding Article 133 and listed, in a new paragraph 6, certain services sectors, in which the EC and member states explicitly shared competences – notably audiovisual, cultural, social, education and health services. ECJ Opinion 1/08 affirmed member states' rights of participation and external representation with regard to agreements with third countries that contain provisions governing these services.[199] The Lisbon reforms subsequently did away with shared competences in services altogether, but retained the exceptional provision for Council unanimity to do justice to the political sensitivity of the above-mentioned sectors for many member states.[200]

The 2009 Lisbon Treaty expressly conferred additional exclusive external commercial policy competences to the EU level of governance. Article 207 of the TFEU added the terms 'services', 'commercial aspects of intellectual property' and 'foreign direct investment' to the text of the first paragraph of former Article 133 EC Treaty.

The arguably most significant expansion of EU exclusive competence occurred in the area of foreign direct investment (FDI). The addition of FDI in Article 207(1) TFEU has raised legal questions regarding the scope of the Union's competence in this policy area as well as over the substance of EU foreign direct investment policy. While the respective issues will be comprehensively addressed in chapter V and chapter VI, it is worth nothing, at this point that – in the early days of the Lisbon era - it remained unclear whether the Union's competence will be limited to investment liberalisation or would, additionally, include FDI protection. Moreover,

[199] Opinion 1/08
[200] Article 207(4)(3) TFEU

it appeared conceivable at minimum that the transfer of external FDI competence rendered more than 1,000 member states' bilateral investment treaties (BITs) inconsistent with the TFEU and thereby resulted in considerable legal uncertainty for both member states and their external BIT partner countries.

In July 2010, the Commission tabled a legislative proposal that provides for a transitional solution to problems associated with the transfer of FDI competence.[201] Notably, it proposed to authorize member states to leave their BITs in force in order to guarantee legal certainty, while obliging member states to bring these BITs into conformity with the regulation, where necessary. The proposed regulation would also authorize member states, subject to Commission approval, to negotiate individual BITs and envisages the formulation of a comprehensive EU investment policy at a later stage. In 2012, the proposal was approved by the Council and Parliament, following trilogue negotiations after the first OLP reading.[202]

The Commission has negotiated services and trade-related intellectual property rights (IPRs) – i.e. the two other areas that are now part of the realm of EU exclusive competences – since the coming into force of the 1997 Treaty of Amsterdam on the basis of Article 133(5) EC Treaty. Nevertheless, the clarification and consolidation of EU exclusivity of competence in these areas, by means of their inclusion in the first paragraph of the CCP provisions, have important ramifications for member state involvement in the decision-making procedure. First, the formal allocation of the two areas as EU exclusive competences by means of Article 207(1) results in the circumstance that member state governments can no longer invoke the right to unanimous decision-making in the Council. Secondly, member state parliamentary participation in ratifying agreements covering only services- and trade-related IPRs and other EU exclusive competences is *per se* precluded.

Article 207(4)(3) TFEU, however, retains QMV exceptions, which apply to certain services sectors that are regarded as politically sensitive, i.e. cultural and audiovisual services as well as social, health and education services. Nevertheless, in comparison to Article 133 EC Treaty, Article 207(4) TFEU has removed such

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[201] European Commission (7 July 2010): *Proposal for a Regulation of the European Parliament and the Council establishing transitional arrangements for bilateral investment agreements between member states and third countries.*

[202] *Regulation of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.*

services from the field of shared competences and thereby added them to the scope EU exclusive competence under Article 207 TFEU. Article 207(5) TFEU, however, provides for the last bastion of services sectors that fall in the scope of EU shared competence - 'the field of transport services'-, which remains subject to shared EU competence in accordance with Article 4(g) TFEU.

In sum, the further consolidation and simplification of the delineation of external economic competence of the Union has given rise to the expectation of a departure from the past practice of 'mixed' signing and conclusion of EU trade and investment agreements – an issue that takes centre-stage in the discourse over institutional change in EU Common Commercial Policy. EU-only agreements would further elevate the role of the European Parliament vis-à-vis national parliaments; subordinate member states' participation to qualified majority voting in the Council; significantly reduce the number of veto-players involved in CCP governance – and hence limit the access points for special interest rent-seeking and prospects of non-ratification of EU external agreements. The implications associated with the conferral of EU competence for external economic governance will be subject to thorough examination in chapters V and VI.

4. EU Common Commercial Policy under the Umbrella of External Action

In the early days of the Lisbon era, several TFEU and TEU provisions have resulted in debate over the formal relationship between EU CCP and EU external action and the role of the Union's High Representative for Common Foreign and Security Policy. The debate essentially concerned whether the traditional constitutional and administrative autonomy of the CCP from the realm of EU foreign policy would prevail, or whether the Lisbon treaty amendments will result in a full integration of the CCP into the area of EU external action. The following considerations seek to provide some indicative answers to this query.

First, the Lisbon Treaty incorporates the CCP provisions under Part V, entitled "External Action of the Union", which establishes the legal basis of the relations of the Union with third states. Article 207(1) TFEU requires that "the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."

The principles of the Union's external action are listed in Article 21(1) of the Treaty on European Union and entail "democracy, the rule of law, the universality

and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect for the principles of the United Nations Charter and international law." The objectives of EU external action are listed in the following paragraph of the said provision and encompass "sustainable economic, social and environmental development of developing countries", "the integration of all countries into the world economy", "sustainable management of global natural resources", as well as "multilateral cooperation and good global governance". The inclusion of the CCP under the umbrella of the EU's common external action raises several legal and practical questions.

Intuitively, first, the fact that the CCP is now subject to the broad principles and objectives of EU external action demands an answer as to whether the CCP has not been subject to such principles and objectives in the past, but, on the contrary, exclusively reflected the pursuit of commercial interests on behalf of the Community. The experience of past CCP content, however, strongly suggests a positive answer to the first and a negative answer to the second question.

Among Community policies that were motivated by non-commercial objectives are, inter alia, the EU's Everything but Arms (EBA) initiative, which allows all imports except armaments from least developed countries to enter the EU duty- and quota-free; the GSP programme, which sets duties at reduced rates for imports from 176 developing countries; its GSP+ scheme, which provides for even greater tariff reductions for goods from developing countries conditional upon the ratification and implementation of international conventions promoting sustainable development and good governance; the negotiation of association agreements, encompassing mutual trade liberalisation, with a range of developing countries with a view to promoting regional political stability as well as economic and regulatory development; the trade preferences granted to former European colonies/territories in African, Caribbean and Pacific (ACP) countries under the EU-ACP Cotonou agreement; as well as the negotiation of economic partnership agreements (EPA), which succeed the unilateral and found-to-be-WTO-inconsistent Cotonou preferences.[203]

In conclusion, the mere magnitude of Community policies conducted under the CCP legal framework, which pursue the objectives listed in Article 21(2) TEU

[203] WTO Appellate Body Report (22 May 1997): *European Communities – Regime for the Importation, Sale and Distribution of Bananas.*

further suggests that, first, the listed political objectives have informed a core part of the Community's CCP formulation and that, secondly, Article 207 TFEU, read in the context of Article 21 TEU, merely codifies what has been Community practice in the past decades.

Furthermore, the inclusion of the CCP under the heading of EU external action raises the question of whether the CCP now falls, fully or partially, within the realm of responsibilities of the Union's High Representative for Common Foreign Affairs and Security Policy, who chairs the Union's Foreign Affairs Council and is Vice President of the Commission, and the bureaucratic institution assisting her in her tasks, notably the Union's External Action Service (EEAS). Both the High Representative and the EEAS are institutional innovations of the Lisbon Treaty mandated by Article 27 TEU.

However, EU primary law provides for unambiguous distinctions between the area of responsibilities of the High Representative, on the one hand, and EU CCP on the other. For instance, Article 218 TFEU on the negotiation of international agreements prescribes that "the Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorizing the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team." It follows that it is the Commission that will submit recommendations where the envisaged agreement *does not* exclusively or principally relate to CFSP. Furthermore, paragraph 1 of Article 218 renders Article 207 TFEU *lex specialis* with regard to the negotiation of trade agreements. Article 207(3) TFEU, in turn, preserves the Commission's exclusive right to make recommendations to the Council to adopt negotiation directives and specifies the Commission as the sole negotiator of the respective agreements. Article 207 TFEU includes no mention of the High Representative or the External Action Service. A claim of responsibility for EU CCP therefore lacks a legal basis.

Another potential avenue that the High Representative could take to exert influence over CCP formulation, if only partially, is to give full effect to paragraph 3 of Article 21 TEU, which stipulates that "the Union shall ensure consistency between the different areas of its external action and between these and its other policies. The

Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect." Areas of the Union's external action are the common commercial policy, development cooperation, humanitarian aid and common security and defence policy. The provision, however, subordinates the High Representative to the Council and the Commission in the process of ensuring consistency between different EU external action policy areas. In the specific area of Common Foreign and Security Policy (CFSP), in contrast, the treaty equips the High Representative with the power, shared with the Council, to "ensure the unity, consistency and effectiveness of action by the Union" and stipulates expressly that CFSP "shall be put into effect by the High Representative and the Member States".[204]

While the treaty language clearly suggests, by inference, that the Union's CFSP is a policy area by itself, whereas 'External Action' incorporates several policy areas distinct from CFSP, the *lex specialis* status of the provisions applying to CCP may serve the Commission well in defending its responsibilities against attempts of the High Representative to expand her area of institutional competence.[205] The High Representative has, in conclusion, not been endowed with any formal responsibility for CCP formulation and administration, apart from assisting the Council and the Commission in ensuring the consistency of External Action policies with each other and with other policies of the Union.

5. The Political Institutions of EU Common Commercial Policy

The *de jure* reallocation of procedural responsibilities among EU institutions and substantive competences between the EU- and member state-level of governance presents only the necessary condition for the *de facto* reform of the EU institutional framework. An understanding of the constitutional reality and the potential for changing normative directions of CCP that the treaty reform may implicate can arguably only be acquired by taking into account the evolution of individual capacities of the political institutions mandated with CCP governance in a comparative manner.

[204] Article 26(3) TEU

[205] Duke, Simon and Steven Blockmans (2010)

Institutional capacity, in this context, shall be understood as the relative institutional effectiveness to transform a given set of preferences held within an institution into legally binding change of the status quo of secondary legal institutions. Moreover, it shall be understood as the institutional ability to market political preferences with the objective of acquiring maximum public political support in order to endow such political preferences with legitimacy vis-à-vis its institutional competitors and constituencies.

Institutional effectiveness is contingent on a number of factors that I have discussed in chapter II, including formal rights (agenda setting, amendment, veto, information) that political institutions hold within the legislative process vis-à-vis other political institutions; their relative informational capacity; the internal ideological cohesion on a given subject matter; as well as informal institutions that evolve within and among political institutions with the view to reducing transaction costs of political exchanges.

Other than constitutionally allocated decision-making rights, institutional capacity and effectiveness greatly depend on two major factors: the institutional rights and ability to gain access to information about preferences and the instruments that are suitable to translate such preferences into policy outcomes – including access to confidential information. Political institutions frequently trade representation and access to decision-making for technical information that enables them to translate preferences into outcomes. Comparatively high internal information costs render institutions relatively more prone to acquire information from external public or private actors. In other words, "institutions grant the highest degree of access to the actors that can best satisfy their most problematic resource deficits."[206] Secondly, institutional effectiveness depends on abilities to process and transform respective information into credible political positions that can be negotiated with competing institutions and marketed for legitimacy in the public realm. Finally, political dependencies of institutions mandated with CCP governance – and of their members - determine the configuration of interest aggregation that political institutions need to represent in order to generate input and/or output legitimacy that ensures the political sustainability of policy.

[206] Hauser, Henry (2011): p693

A specific institutional design and choice over alternate institutional frameworks tasked with the provision of public goods can thus result in overrepresentation of special interest groups or mass voter sentiment through distinct access points. I have discussed this notion as minoritarian or majoritarian bias – resulting from collective action failures - of a specific institutional choice and design in chapter II.

In other words, the constitutional reality of CCP formulation in the Lisbon era depends on much more than the rules set out in the Treaties and codified ideals of EU external relations conduct. Notably, it is shaped by the relative capacity of political institutions to operate under their formal constraints to advance political preferences that are input and/or output legitimate in the perception of majority and/or minority stakeholders.

The following elaborations outline structural features of the European Parliament, the Commission, and the Council that determine their relative institutional effectiveness and capacity in the run-up to the Lisbon Treaty's entering into force in December 2009 and in their evolution over time.

5.1.The European Parliament

The European Parliament has entered post Lisbon CCP governance as the 'weakest' of the three political institutions, despite its formal empowerment. Particularly, Parliament was characterized by excessively high costs of information, which sharply decreased the costs of political participation for private stakeholders in the early days after the treaty reform.

This state of affairs, however, is unsurprising. Parliament lacked decades of institutional memory of CCP governance and had no established working relations with its institutional competitors and private stakeholders in the field of CCP; faced resource scarcity with respect to technical expertise in trade and investment law and economics; had little staff capacity dedicated to CCP issues; and was and is a politically highly fragmented institution. Combined, these contingencies increase, in absolute and comparative terms, the cost of organization and information of any given political institution.

Given its negligible role in CCP formulation under the EC Treaty, first, Parliament and its members had no experience in the conduct of trade and investment governance. The INTA Committee itself is one of the most junior committees in the

EP and has only come into existence as recently as 2004 in view of the prospect of the anticipated empowerment of the EP in CCP governance.

INTA has therefore, secondly, not had the opportunity to build working relations with the Commission's DG TRADE and the member states' economic affairs attachés. To the contrary, both the Commission and the Council have reportedly been keen to avoid INTA Committee involvement in CCP governance in order to prevent a politicization of the CCP for as long as possible.

The working relationships between the Commission and the Council, in contrast, have greatly benefited from decades of well-rehearsed cooperation in Article 133 Committee meetings, as provided for by the rules of the EC Treaty, as well as in informal forums. The same applies to working relationships of these institutions with domestic CCP stakeholders in Brussels, member states capitals, external governments, and foreign private stakeholders. Without institutional memory of the internal and external workings of CCP governance, and given the frequently high technical complexity of trade and investment dossiers, the members of INTA had very little time to develop the knowledge and expertise necessary to translate political preferences into credible and informed negotiation positions vis-à-vis its institutional competitors. Ten months after the entry into force of the Lisbon Treaty, INTA already found itself involved in no less than nine co-decision procedures and five consent procedures.[207]

Any given dossier is assigned to one MEP 'rapporteur' (and one 'shadow rapporteur') who writes reports, coordinates the legislative process, collects amendments to legislative proposals and informs the Committee about developments on the dossier. Each MEP usually does not employ more than two assistants and one policy advisor, all of whom tend to be relatively junior professionals. From the outset, the INTA Committee's secretariat was equally constrained in terms of staff capacity. Thus, the INTA Committee must have been expected to face severe capacity constraints in dealing with the vast amount of documentation associated with a wide range of highly technical dossiers.

Furthermore, Parliament, and with it the INTA Committee, is a politically highly fragmented institution that does not formally legitimate the executive through the formation of lasting coalitions but creates varying political alliances on a dossier-

[207] European Commission (13 October 2010): *Civil Society Meeting: Ten Months On – How has Trade Policy been affected by the Lisbon Treaty*

specific basis. INTA, moreover, is a comparatively small committee with 29 members, many of whom were serving their first term in the 7th European Parliament, which assembled for the first time shortly before the entry into force of the Lisbon Treaty. All seven political party groups were represented in INTA, while INTA MEPs originate from no less than 14 countries.[208] The image becomes more complex in light of the distinct nature of MEPs' constituencies. While German MEPs, for instance, are directly elected in their respective electoral district, Italian citizens elect MEP candidates from national party lists. In other words, while the political fate of MEPs from some countries depends greatly on their popular support in small constituencies in their home countries, others are affiliated with the national constituency of their country of origin and are hence rationally concerned about their standing within their national party – view a view to improve likelihood of re-election.

It is noteworthy, in this context, that many aspects of trade policy that overlap and are interlinked with other policy areas, such as agriculture, fisheries, development, environment, human rights, as well as consumer health and food safety, will be dealt with under the leadership, or with the participation, of parliamentary committees other than the INTA Committee. Committees holding substantive responsibilities that potentially overlap with trade policy issues are the Committee on Human Rights (DROI), Development (DEVE), Environment, Public Health and Food Safety (ENVI), Industry, Research, and Energy (ITRE), Internal Market and Consumer Protection (IMCO), Agriculture (AGRI), Fisheries (PECH) and Economic and Monetary Affairs (ECON).

Given the significant political value of the CCP – in light of the exclusive nature of EU competence and the economic effects of law-making - relative to other policy areas of the Union, MEPs in these committees have high incentives to pursue leadership or seek to exert influence on such 'trade and' dossiers. Parliamentary procedure allows any other interested committee to contribute to another committee's internal deliberations on a given agenda item by submitting an opinion. The original allocation of a dossier to a certain committee largely remains a political decision

[208] Party groups represented in the 7th EP's INTA Committee were the European People's Party (10 MEPs), the Alliance of Socialists and Democrats (7), the Alliance of Liberals and Democrats (3), the Europe of Freedom and Democracy Group (2), the European Conservatives and Reformists (2), the Green Group (2), the European United Left (2), and one member without party association. INTA meps originated from France (5 meps), the United Kingdom (5), Germany (4), Italy (3), Spain (2), Romania (2), as well as Portugal, Poland, Lithuania, Sweden, Ireland, Bulgaria, Slovakia, and the Czech Republic.

taken by the leadership of the European Parliament, however. Given the intra-parliamentary power that a mandated committee exerts with respect to both the management of legislative procedures and gatekeeper functions in regard of legislative amendments, INTA MEPs at times find themselves in inter-committee competition for substantive and procedural leadership on 'trade and' issues.

In sum, the first EP that operated under the Lisbon rules displayed a number of structural features that reflect inferior institutional capacity and little potential for institutional effectiveness, with high information costs prevailing within the institution. These circumstances carry risks of governance failures: an overburdened, un- or misinformed, or even side-lined INTA Committee is likely to play an unpredictable and least constructive role in the legislative process applying to highly consequential trade and investment accords and framework legislation. Secondly, in a scenario of political disorientation - with an INTA Committee in search of negotiable positions that could result in the acquisition of political capital - INTA MEPs display a high demand for external information that they trade for political access. In other words, weak institutional capacity implies vulnerability to the siren calls of special-interest groups or advocacy by diffuse interest representatives who are willing to provide counsel and technical expertise at the cost of (over)representation in the legislative process. Third, the political fragmentation of the European Parliament may dilute trade policy objectives, not least because INTA faces strong intra-parliamentary competition for procedural and substantive leadership on many 'trade and' dossiers, as MEPs from other committees seek to satisfy their constituencies by inserting diffuse non-trade concerns and interests into legislative proposals. Finally, the EP's disadvantage in acquiring, processing, and assessing information about policy preferences and effects of policy – if viewed in comparison to the informational capacity of the Commission and the Council – restricts its scope to provide for policy alternatives to Commission proposals and Council positions.

In context of these circumstances, the Commission has sought to address the EP's high information costs with a pro-active strategy of communication and information sharing practices in its relations with the EP and the INTA Committee. The Inter-Institutional Framework Agreement, as discussed above, makes for a cornerstone of the Commission's effort to crowd-out competing external sources of EP information and build a working relationship with the EP that is grounded on trust and cooperation. In illustration: in the period of December 2009 until November

2013, DG TRADE provided 155 informal technical briefings to members and staff of the INTA committee and EP political groups on a diversity of CCP dossiers and presented over 50 times in INTA Committee sessions and monitoring group meetings.[209] Depending on the occasion and purpose of the meetings, DG TRADE has been represented by officials from all levels, including the Commissioner, DG TRADE director general, deputy director generals, directors, and heads of units.

Over time, however, the EP itself has taken a series of measures in order to enhance its informational efficiency and decrease its dependence on external information provided by the Commission and interest groups in respect of CCP governance.

The establishment of INTA Monitoring Groups has been a significant achievement in this respect. Monitoring Groups are established to acquire, process, and communicate information on regional files and recurrent technical files. Monitoring groups are convened by the INTA secretariat and chaired by the standing INTA rapporteur responsible for any given dossier. Monitoring group meetings are also attended by the shadow rapporteurs representing other political groups and officials of the European Commission. They serve to allow for *in camera* (i.e. non-public) communication and Commission briefings on recent developments in specific trade dossiers. The closed-door character of the Monitoring Groups specifically allows for the discussion and evaluation of confidential information. Rapporteurs and shadow rapporteurs then verbally brief members of their political groups on information they acquired in the Monitoring Groups. The 8th Parliament's INTA Committee has appointed 39 standing rapporteurs on various regional and technical files, which define the scope of responsibility of individual Monitoring Groups.[210] Overall, the groups are deemed to have established a crucial *informal* infrastructure for efficient information sharing arrangements between the Commission and the EP. At the same time, the informal character of the groups and applicable confidentiality requirements illustrate the trade-off between effectiveness of governance and parliamentary control, on the one hand, and degrees of transparency of EU CCP governance, on the other.

[209] Internal documentation obtained from DG TRADE – disclosed upon request.
[210] European Parliament: INTA Standing and Shadow Rapporteurs. At: http://www.europarl.europa.eu/cmsdata/118561/inta-standing-and-shadow-rapporteurs.pdf

In addition to the formal INTA sessions that are held on a monthly basis, INTA has developed a practice of organizing public hearings in which external experts from academia and other civil society organizations present technical reports that are commissioned for the purpose of the hearing. Since 2009, INTA has hosted 55 of such hearings on a wide range of timely trade and investment issues.[211] As part of the EP's quest for the acquisition of independent external information, the EP's Directorate General for External Policies grants a five-years framework contract to an independent consortium of scholars that produces information on CCP dossiers on demand. Moreover, in November 2013, the EP established the European Parliamentary Research Service (EPRS): "The European Parliamentary Research Service is the European Parliament's in-house research department and think tank. Its mission is to assist Members in their parliamentary work by providing them with independent, objective and authoritative analysis of, and research on, policy issues relating to the European Union. It is also designed to increase Members and EP committees' capacity to scrutinise and oversee the European Commission and other EU executive bodies."[212]

Following the entry into force of the Lisbon Treaty, INTA also increased its staff capacity, hiring about 20 staff to administer INTA proceedings and the committee's external relations. Political groups, too, aimed at addressing its capacity constraints in the area of international trade and investment by dedicating three to four (on average) employees to the support of MEPs working in this field and administering information flows among the entire group.

The institutional memory of the INTA committee has benefitted significantly from comparatively little fluctuation of its members on the occasion of the assembly of the 8th European Parliament on July 1, 2014. While the committee was enlarged from 29 to 42 members at the time, roughly one third of the original committee members remained with INTA, including almost the entire previous committee leadership, ensuring not only continuity in the political administration of INTA dossiers but also the maintenance and further enhancement of EP external relations with CCP stakeholder groups, DG TRADE, and the Council.

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[211] European Parliament: INTA Committee, Hearings. At: http://www.europarl.europa.eu/committees/en/inta/events-hearings.html

[212] European Parliament: European Parliamentary Research Service. At: http://www.europarl.europa.eu/thinktank/en/home.html

In sum, the EP has taken a number of important measures to lower its absolute internal information costs in order to enhance its informational capacity – and hence its institutional effectiveness. MEPs have grown increasingly savvy in responding to public opinion and interest groups by transforming policy demands into negotiable amendments to legislative proposals and political positions in its resolutions, which now serve as benchmarks that the Commission has to take into account in the conduct of trade and investment negotiations with third countries. The EP has, over time, markedly grown into its role of a bicameral legislature and is increasingly capable of of filtering and balancing external information about policy preferences that it trades for access to its decision-making powers.

It remains questionable, however, whether EP measures to bolster its capacity suffice to generate enhanced informational autonomy from the European Commission and highly efficient interest groups, in particular. Perhaps most importantly, it remains to be seen whether the European Parliament and the members of the INTA committee can enhance the institutional authority and credibility of the EP in the long run to provide leadership on European public opinion on the Union's external economic governance, rather than merely providing a backstop to CCP governance that – by lowering the cost of political participation – adds institutional representation to mass voter sentiments, diffuse public as well as special interests.

5.2. The European Commission and its Directorate General for External Trade

The capacity of the Commission's bureaucratic machinery, embodied by DG TRADE, to master the challenges of post-Lisbon institutional adjustments, stands in stark contrast to the constraints that Parliament faced in December 2009. DG TRADE benefits from the institutional memory of past decades. It employs about 600 hierarchically organized experts who are specialized in particular subfields of trade and investment matters; maintains functional and long-lasting working relationships with member states represented in the Council as well as trading partners' governments; maintains trusted relationships with high-stake interest groups that supply technically valuable information about policy preferences and instruments; and is directed by relatively uniform preferences that aggregate with DG TRADE's Director General and the Commissioner for External Trade.

DG TRADE officials commenced preparations for Lisbon-era scenarios as early as 2007, when then Director General David O'Sullivan set up a working group, among others, titled 'The Politics of Future EU Trade Policy'. The working group was mandated to brainstorm the implications of parliamentary involvement and increasing institutional competition in the post-Lisbon era.

In light of its deficiencies with regard to transparency and democratic legitimacy as well as its missing link to voters and constituencies, the Lisbon era presents the Commission with challenges of a different quality than the Parliament, quite unrelated to the Commission's organizational capacity. It is its ability to effectively market policy proposals vis-à-vis European civil society that is crucial for the success of the Commission's policy proposals, as public debate naturally constitutes an important influence on MEPs, in addition to discourses evolving in the member states. Thus, if the Commission wished to retain its leadership in formulating CCP, it would have to focus its efforts on those areas where it was perceived to be weakest in past decades, namely in gaining public political support, and thereby legitimacy, for its proposed policy solutions and the conduct of negotiations. In other words, it behoved DG TRADE and the Commissioner to expand its public relations efforts in order to inform and shape public debates on trade and investment issues alongside enhanced transparency of governance conduct.

In anticipation of the new realities, DG TRADE has undertaken to expand its public relations efforts, increasingly seeking civil society views on trade and investment matters and informing the interested public on policy initiatives and progress in negotiations as well as relations with commercial partners. In 2010, DG TRADE conducted nine civil society consultations on specific policy initiatives – by far the most since its establishment. In 2009, it conducted 37 civil society meetings on all aspects of EU trade policy, compared to only 16 meetings in 2001.

The Commission's efforts to visibly anchor its policy proposals in public demands of trade policy in the early post-Lisbon days saw a civil society consultation on The Future of EU Trade Policy, to which it received submissions from 301 organisations and institutions,[213] as well as a special Eurobarometer survey on international trade,[214] requesting more than 23,000 citizens from the then EU27

[213] European Commission (2010): *Public Consultation on a Future EU Trade Policy – Final Report.*
[214] European Commission (2010): *Special Eurobarometer 357, International Trade,* Report.

countries to provide their views on trade policy. The results of both exercises have been utilized to inform the publication of a prominent trade strategy communication on behalf of then External Trade Commissioner De Gucht, entitled 'Trade, Growth, and World Affairs'.[215]

With the growing politicisation of EU trade and investment policy in the advent of the launch of TTIP negotiations, the Commission has reacted to public calls for enhanced transparency, doing away with decades long practice of maintaining secrecy over negotiation texts until the agreement was tabled for signature. "Virtually all" TTIP negotiation documents have been made available on a dedicated website.[216] Breaking even further with past conventions, the Commission, in 2014, opened a public consultation on a chapter of the agreement under negotiation, notably on investment protection and investor-to-state dispute settlement (ISDS) in the TTIP and employed the results to legitimate the reform of the ISDS mechanism into a standing investment court that was first included – in the course of a rather elaborate 'legal scrubbing' process – in the CETA.[217]

In expression of the substantial changes to traditionally confidential negotiation practice, the 2015 'Trade for All' strategy communication promised to render such previously unknown levels of transparency a common habitus. In the communication, the Commission notes that:

"[t]ransparency should apply at all stages of the negotiating cycle from the setting of objectives to the negotiations themselves and during the post-negotiation phase. On top of existing measures, the Commission will:

- at launch, invite the Council to disclose all FTA negotiating directives immediately after their adoption;
- during negotiations, extend TTIP practices of publishing EU texts online for all trade and investment negotiations and make it clear to all new partners that negotiations will have to follow a transparent approach; and

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[215] European Commission (2010): *Trade, Growth, and World Affairs – Trade Policy as a Key Component of the EU 2020 Strategy*.

[216] Malmstrom, Cecilia (21 August 2015): *Transparency in TTIP*.

[217] European Commission (13 July 2014): *Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*.

- after finalising negotiations, publish the text of the agreement immediately, as it stands, without waiting for the legal revision to be completed."[218]

Furthermore, as discussed in the previous sub-section, the Commission has acted proactively in the establishment of direct inter-institutional relations with the INTA Committee. DG TRADE has reportedly welcomed the Committee's capacity constraints as an opportunity to provide technical assistance, shape the discourse among committee members, their assistants and policy advisors, and has thereby initiated the establishment of working relations on a constructive note in its own institutional interest. DG TRADE has implemented its inter-institutional communication strategy through, for instance, informal technical briefings provided to MEPs' assistants and policy advisors, a least-restrictive information and participation policy vis-à-vis Parliament, and high-level official representation in formal INTA sessions. Moreover, DG TRADE officials and the Commissioner have wasted no opportunity to pay respect to the newly acquired parliamentary powers and the importance of parliamentary involvement in public appearances.[219]

The Commission's 'generosity' in facilitating the INTA Committee's operations in the early days of the Lisbon era is unlikely to be of purely philanthropic nature. The better the relationships between the Commission and the Parliament with regard to CCP matters, the better the Commission will be able to crowd out the Council's sphere of influence and counter civil society interest groups' attempts to capture the INTA Committee's agenda. A 'weak' INTA Committee, short of expertise and capacity, should be deemed detrimental to the Commission's interest in a credible, predictable trade and investment policy. Moreover, the Commission's efforts to strengthen the INTA Committee's capacity to transform legal endowments and available information into credible and informed negotiation positions is rendered beneficial to the supranational purposes of the Commission's role in CCP governance by one important fact: it occurs largely at the expense of the Council's and thus the member states' sphere of political influence.

In sum, with the entry into force of the Lisbon Treaty, the Commission has discovered civil society and the general public as both a constituency to which it has to hold itself accountable, and as a vehicle to legitimate its policy proposals and

[218] European Commission (October 2015): *Trade for All – Toward a more responsible trade and investment policy,* October 2015.
[219] de Gucht, Karel (8 October 2010): *The implications of the Lisbon Treaty for EU Trade Policy*.

negotiation conduct vis-à-vis Parliament and the Council. It is safe to say that Commission capacity and effectiveness have suffered as a result of increasing costs of inter-institutional coordination as well as the requirement of marketing its policy initiatives in the public realm. Whether such efforts and 'institutional stress' will be rewarded with increasing legitimacy and public trust in the Commission practice of CCP governance is a question that can only be answered at a later stage.

5.3. The Council of the European Union

In comparison, the Council has shown relatively little flexibility in adapting to Lisbon-era realities, and has, as the SWIFT and ACTA episodes illustrate, entered the institutional competition with Parliament on the worst possible note. The reasons are, as argued below, to be found in structural factors.

Only weeks after being granted the procedural power to consent to international agreements, Parliament voted down the SWIFT Agreement (Society for Worldwide Interbank Financial Telecommunications) between the EU and the United States, which would have governed the exchange of bank data between the two regions with the aim of tracking down sources of terrorist financing. Having experienced Council interactions with Parliament on the SWIFT Agreement as the rapporteur responsible for the file, Dutch MEP Jeanine Hennis-Plasschaert commented: "It's clear that the way the Council, but also the United States authorities, have been treating the European Parliament is just unacceptable."[220] In light of significant media interest and coverage, the incident has informed many observers' views on the inter-institutional relations between Parliament and the Council, the latter of which, as reported to the author in interviews, has ignored, in this particular instance, parliamentary positions and requests for information prior to the plenary vote. INTA Committee Chairman Professor Vital Moreira confirmed that the early days of Lisbon-era relations between the Council and Parliament made for a 'suboptimal' point of departure.[221]

Member states represented in the Council benefit from institutional capacity, embodied by national ministries of economic affairs and expert staff employed in member states' permanent representations to the EU. Moreover, member states hold

[220] Euractiv (11 February 2010): *MEPs say 'no' to SWIFT*.

[221] Moreira, Vital (1 December 2010), Closing Statement by INTA Committee Chairman: *Treaty of Lisbon - Effects on International Trade, first experiences and expectations of stakeholders.*

decades of institutional memory and established working relations with the Commission and governments of trading partners. Nonetheless, the Council naturally have much more difficulty in establishing inter-institutional relations with Parliament and is ill-suited to publicly market its political preferences in order to affect public opinion (and thereby MEPs) beyond national jurisdictions of the member states for three reasons.

The Council is, first, by definition a politically fragmented institution. Member states frequently form varying alliances on the basis of national interests with regard to specific dossiers. This circumstance impedes the development of a unified Council approach to dealing with its new institutional competitor. By and large, it is left up to individual member states to develop relations with key MEPs to lobby for support for governments' political positions.

Second, and by the same token, member state governments have a limited ability to influence public debates on trade and investment policies beyond their national jurisdictions, not least because their efforts are frequently interpreted as exclusively aimed at advancing national in contrast to common European interests.

Finally, the Lisbon reforms of the CCP institutional framework have placed the Council in a defensive position. Most importantly, the Council's influence on the legislative process applicable to trade and investment issues has been significantly constrained, if compared with the pre-Lisbon scenario. Additionally, the adoption of international agreements now eventually depends on parliamentary consent. Finally, the reformed comitology further decreases member states' ability to control the implementation of trade and investment policy by the Commission.

As the SWIFT and ACTA episodes indicate, member states may have initially sought to defend parts of their pre-Lisbon prerogatives through a mixture of ostrich tactics and parliamentary containment rather than engagement. As regards the Council's Trade Policy Committee, then Director General of DG TRADE, David O'Sullivan, repeatedly urged the member states in his committee appearances to face the legal and political realities of the Lisbon era of trade and investment policy formulation.

However, as remarked to the author in personal interviews, ministries of economic affairs and commerce are starting to discover Parliament as a host of unexploited opportunities – particularly with a view to promoting national interests through MEPs of their own national origin – and are increasingly seeking to develop

relationships with the offices of key MEPs in order to promote their political preferences.

6. Conclusions

The constitutional allocation of veto, amendment, delegation, control, and information rights to the European Parliament has, from the outset, increased the transaction costs and thereby reduced the efficiency of CCP governance and implementation in comparison to the pre-Lisbon institutional framework. In response, the three political institutions involved in CCP legislation and implementation have put in place informal institutional arrangements that apply to their legislative cooperation in order to decrease associated transaction costs and respond to problem pressures more efficiently – most prominently through the conduct of trilogue negotiations in the course of the OLP, which enables the institutions to come to first reading agreements on framework legislation and thereby speed up the legislative process. Such informal mechanisms, however, considerably decrease the transparency of this process and reduce the space for policy deliberation despite the calls of the Laeken Declaration for the enhanced transparency of EU institutions.

The empowerment of the EP has, secondly, added an access point for interest representation that is generally receptive for a wider range of policy preferences than its institutional competitors, given the diverse ideological predispositions held by its membership. The EP is, moreover, characterized by relatively little informational capacity, which renders it highly dependent on the acquisition of information about both policy preferences and policy instruments from external private and public sources. This circumstance has significantly lowered the cost of political participation of CCP governance in general, the effects of which work in different ways. For starters, *ceteris paribus*, decreasing costs of political participation generally benefit, in relative terms, diffuse interest representation that is characterized by comparatively low organizational efficiency. In response, efficiently organized competing special interest groups are now highly incentivized to reinforce the efforts that were traditionally directed at the Commission and the Council through information strategies that target MEPs. In the same vein, the EP provides special interest representation with the opportunity to inject preferences into the legislative process that found no ears in the Commission and/or among member states in the Council.

Overall, however, the Commission remains the primary access point for efficiently organized special interests – both because of its constitutional role of an agenda setter and because of its dependence on external technical information about preferences and instruments that are appropriate to achieve respective outcomes. Diffuse interests, on the other hand, have gained enhanced access via the EP, if compared to the pre-Lisbon institutional framework.

But the constitutional empowerment of the EP does not only change the incentive structure of political participation between EU political institutions, on the one side, and private actors, on the other. First, Member States represented in the Council can and do use the dependence of the re-election of MEPs on their placement on national party lists to advance national interests through national MEP delegations in the EP. The Commission, secondly, is now tasked with the proposal of legislation and the negotiation of trade agreements that advance its institutional interests and garner majority support in both the Council and the EP. As a result, the Commission now not only spends a large amount of additional resources on complying with its formal reporting obligations vis-à-vis the EP. It also uses its informational capacities to informally – but systematically - supply the EP's excess demand for information on policy options by educating MEPs, their assistants, and other relevant EP staff on proposed policy instruments, purposes, and effects. Supplying the EP with its most scarce resource early on and continuously in the course of the legislative and negotiation processes arguably aims at ensuring the safe passage of policy proposals and trade agreements through the decision-making process by crowding out information supplied and competing interests voiced by public and private corporate stakeholders that lobby the EP.

The EP itself addresses its informational capacity constraints through a high degree of specialisation and division of labour by means of its committee structure, rapporteur system and monitoring groups, and has markedly increased staff capacity in the area of trade and investment. These organizational measures do reduce internal transaction and information costs associated with decision-making, increase the EP's efficiency in the legislative process in relations with other political institutions and stakeholders.

The prevalent strong dependence of MEPs on external actors who trade information about policy preferences, instruments, and effects against access to decision-making, as well as MEPs dependence on the favourable placement on

national party lists, has largely resulted in a reinforcement of the given interest configuration and policy preferences through the EP. In case of preferences that are not represented by either the Commission or the Council already, the relatively low institutional effectiveness of the EP – if compared to the Council and the Commission – in transforming given policy preferences into legally binding content of framework legislation and trade agreements that the Commission negotiates with external partners have so far led to rather minimal policy changes that are solely inspired by the EP's political activity. The reform of the enforcement of the traditional system of investment protection can be deemed a notable exception to this general image. Other than this instance, the general observation outlined above stems from the fact that existing public (Commission and Member States) and private (special and diffuse interest groups) interest representation in Brussels have responded actively and competitively to the EP's new role and have succeeded to gain influence over the policy preferences voiced by MEPs in proportion to their efficiency in supplying specific and credible information about policy instruments and their effects.

At the same time, the EP has aggressively defended – and in fact informally enhanced – its new constitutional rights in the process of CCP governance and the delegation of policy implementation. To that effect, the EP leadership has hand-picked a number of legislative dossiers (EU-Korea safeguard mechanism; ACTA) with high political profile to display and manifest its institutional activity and impact on CCP formulation to the general public, with, however, minor actual effects on the economic incentive and value structure embedded in CCP legislation.

In sum, it can be concluded that the EP has grown into the role of a functional legislature, which, at this point in time, still lacks the institutional savvy to make a difference for the values embedded in CCP legislation. However, as the EP manages to decrease its internal information costs – through increasing institutional memory, acquisition of independent external expert advice, the establishment of the European Parliamentary Research Service, and long-term relationships with trusted external stakeholders etc. – it is set to increase its institutional effectiveness in translating distinct policy preferences into legislative outcomes and inject its preferences into the substance of EU CCP agreements with third countries. From the outset, the structural features of the EP are conducive to balancing special interest configurations that supply the Commission's and the member states' governments demand for technical information by translating diffuse 'public' interests into negotiable policy

amendments. It should be expected that this potential increasingly translates into tangible outcomes commensurate to the EP's growing institutional capacity in matters CCP.

A tangible outcome of the Lisbon reform of the CCP institutional framework, as discussed above, is EU transparency and public deliberation of governance in this area. The EP has effectuated this change not only by creating a platform for deliberation but has also – albeit indirectly – forced the Commission to seek legitimacy of its policy proposals through an enhanced practice of public consultations, exponentially increasing efforts to explain complex policy instruments to the broader public, and a radical increase of public access to trade negotiation documents. In this way, the emergence of the European Parliament has – overall - directly and indirectly resulted in enhanced transparency and democratic legitimacy of CCP governance through the political institutions of the EU.

The same, however, cannot be said about the third Laeken objective, notably 'more efficient' EU governance. It is beyond doubt that the addition of another political institution to the CCP governance process has increased the costs of coordination and thus the overall level of associated transaction costs.

Do increasing levels of democratic legitimacy and transparency of EU governance thus require additional coordination costs? Do these values necessarily implicate trade-offs amongst each other? Such a conclusion, however, would fall short of taking into account an evaluation of the enhanced scope of EU exclusive CCP competence that the Lisbon Treaty has brought about.

More crucially, it would ignore the role of the member states in the traditional practice of the mixed conclusion of EU trade and investment agreements. Viewed from this broader perspective, it is not the addition of the European Parliament to the institutional framework governing the CCP but the remaining presence of EU member states in EU external economic governance that stands in the way of the complete achievement of the three Laeken objectives.

It is argued, in the remainder of this study, that the enhanced material scope of the CCP provides for ample potential for a change in EU and member states' practice away from mixed and towards 'EU-only' external economic agreements. It is further argued that such practice could result not only in a stark increase of process efficiency and effectiveness of the overall institutional framework but could also further contribute to enhanced democratic legitimacy of CCP governance in the Lisbon era.

V. Opinion 2/15: Litigating Institutional Change in post-Lisbon External Economic Governance

In Opinion 2/15, the Commission, the European Parliament, the Council, and the Member States litigated whether the Union is exclusively competent to conclude the EU-Singapore Free Trade Agreement (EUSFTA) alone, or whether the EU ought to involve the member states as parties in their own right to a 'mixed' agreement. The delineation of the scope of EU Common Commercial Policy following the Lisbon Treaty reform of 2009 is central to this proceeding. The Court's opinion, which stands in the tradition of seminal EU external competence litigation such as Opinion 1/78 and Opinion 1/94, will further clarify the Union's constitutional identity in the area of EU external economic relations and is likely to have vast implications for EU external economic governance. This note, first, reviews the evolution of the Union's Common Commercial Policy in context of the Court's past jurisprudence and, secondly, scrutinizes the relevant methodological approaches and standards of analysis, which the Court employs in its competence enquiry. It is argued that the Court retained ample space for discretionary judicial decision-making, which surfaces, most obviously, at the intersection of the competence enquiry and the necessary determination of the appropriate legal bases. The clarification and further refinement of the Court's analytical standards in its judgment as well as their transparent and consistent application have the potential to substantially reduce incentives for future litigation and inter-institutional political combat. The quarrels over the signing, provisional application, and conclusion of CETA provide sufficient emphasis to this point. Using the legal view of Advocate General as a benchmark, this chapter, third, discusses the practical implications of the Court's decision for EU international trade and investment treaty-making as a matter of comparative institutional analsyis. The chapter, fourth, proposes a number of institutional alternatives that may serve to 'save' EU external economic treaty-making from 'mixity' and the pitfalls of the associated treaty-making procedures in the EU and the member states.

1. Introduction

On December 21, the Court of Justice of the EU (CJEU) published the legal view of CJEU Advocate General (AG) Sharpston as part of the Opinion 2/15 proceedings.[222]

[222] Opinion 2/15: Opinion of Advocate General Sharpston.

AG Sharpston's opinion responds to the question to the Court of whether the EU has the 'requisite competence' to conclude the EU-Singapore Free Trade Agreement (EUSFTA) alone and without including the Member States (MS) as independent parties to the treaty. The Commission had requested the Court's opinion on this matter pursuant to Article 218(11) TFEU in October 2014.[223] More specifically, the Commission asked the Court to clarify which parts of the EUSFTA fall within the realm EU exclusive competence; competences shared with the member states; or even MS exclusive competences, respectively.[224] In her submission to the Court, Advocate General Sharpston argues that certain parts of the EUSFTA fall under EU shared competence – including certain transport services, portfolio investment, labour rights and environmental protection obligations - whereas one provision, in her view, falls within the scope of exclusive competence of the member states. According to AG Sharpston, the EUSFTA ought to be concluded as a 'mixed agreement' by the EU and its member states in their own right. Against this background, this chapter reviews the constitutional fundamentals of the questions that are at stake in this important proceeding and outlines the practical implications of the Court's judgment, which is examined in chapter VI.

This chapter is divided in two parts. The first part scrutinizes the relevant methodological approaches and standards of analysis, which the Court employs in its response to the Commission's competence enquiry. Based on the examination of relevant case law, it is argued that the Court retains ample space for discretionary judicial decision-making, which surfaces in the delimitation of the substantive scope of the Common Commercial Policy; at the intersection of the competence enquiry and the necessary legal basis analysis; as well as in the Court's reading of implied powers. It is desirable, against this background, that the Court renders its choice of analytical parameters and benchmarks transparent – or: inter-subjectively verifiable - so as to advance systemic clarity in regard of the unresolved question over the delimitation of EU external competence for the CCP and other external policies beyond the specific issues addressed in Opinion 2/15. It is in this way that the Court could profoundly

[223] Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU (Opinion 2/15), November 3, 2015.

[224] ibid.: "Question submitted to the Court: Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically: Which provisions of the agreement fall within the Union's exclusive competence? Which provisions of the agreement fall within the Union's shared competence? and Is there any provision of the agreement that falls within the exclusive competence of the Member States?"

minimize the legal-institutional incentives for future litigation and inter-institutional political battles over both external competences and the appropriate legal bases for external economic treaty making.

The remainder of this introductory section reviews the constitutional evolution of the Union's Common Commercial Policy in context of the Court's jurisprudence, as well as changing patterns of international trade and trade regulation. The second section, subsequently, introduces and scrutinizes four main standards of analysis, which the Court and the AG employ in this proceeding to address the Commission's competence enquiry. Section 3 outlines and discusses the specific legal arguments of the AG with respect to those parts of the EUSFTA that fall, in her view, within the scope of exclusive Member States competence, exclusive EU competence, and shared competences, respectively. This section, moreover, outlines institutional alternatives – in terms of the design of EU commercial agreements with third countries – that may avoid the pitfalls of mixed economic treaty-making. Section 4 offers conclusions drawn from the forgoing analysis.[225]

1.1. Background: Institutional Change in EU External Economic Governance

It is clear that the political weight of the question over the existence and nature of EU external competence derives from its link to the procedural modalities of treaty-making in the EU. EU external treaty making procedures are the very function of the answer to the question over the nature of EU competence: If the content of a treaty falls within the scope of EU exclusive competence entirely, the conclusion of the treaty by the EU alone is a legal requirement ('EU-only'). In contrast, where an agreement includes (just) a single provision that falls within the scope of exclusive competences of the member states, the EU must conclude the treaty jointly with the

[225] It is worth taking note of two important issues, at this point, which the AG explicitly carved out from the scope of her analysis. First, the Commission did not ask the Court to assess the compatibility of the EUSFTAs ISDS mechanism with EU law. The Belgian government, however, has recently indicated its intention to ask the Court for clarification of this issue in regard of the investor-state dispute settlement mechanism that forms part of EU-Canada Comprehensive Economic and Trade Agreement (CETA). A second question that remains unaddressed – unfortunately - is whether the Commission would be in breach of its institutional obligations under Article 218(4) TFEU and Article 13(2) TEU by negotiating the EUSFTA as an 'EU-only' agreement despite the fact the Council's negotiation directive called for the negotiation of a mixed agreement. The underlying issue is whether the Council can force the Commission to include treaty content that falls under shared or even MS exclusive competence and thus retains the right or must involve the member states as independent parties to the agreement. For a detailed discussion of this question, see: Kuiper, Pieter-Jan (2016b)

member states (mandatory 'mixed' agreement). If, however, parts of the treaty fall under EU exclusive competence, whereas other parts of the treaty fall under competences shared with the member states, it is left to the political discretion of the EU institutions to involve the member states as parties in their own right or conclude the treaty alone (facultative agreement).[226]

Since the entry into force of the 1957 Treaty of Rome, a number of consecutive treaty amendments have considerably broadened the scope of the primary law provisions governing Common Commercial Policy. The evolution of CCP Article 113 EEC Treaty, over Article 133 EC Treaty to, eventually, Article 207 TFEU reflects the efforts of the treaty drafters to adapt the ambit of the CCP to changing patterns in international trade over the past six decades. The treaty reforms reflect the demand for a sufficiently wide constitutional framework that enables mandated political institutions to respond to opportunities and challenges of what has been prominently termed '21st century trade' by Richard Baldwin. Baldwin notes that, "[in the 20th century], trade mostly meant selling goods made in a factory in one nation to a customer in another. Simple trade needed simple rules. (…) Today's trade is radically more complex. The ICT revolution fostered an internationalization of supply chains, and this in turn created the 'trade-investment-services nexus' at the heart of so much of today's international commerce."[227]

It is by no coincidence, therefore, that the CCP initially only extended to basic border measures for trade in goods.[228] Consecutive reforms of the primary law

[226] In his recent submission in the Opinion 3/15 proceedings, Advocate General Wahl recalled that "the choice between a mixed agreement or an EU-only agreement, when the subject matter of the agreement falls within an area of shared competence (or of parallel competence), is generally a matter for the discretion of the EU legislature. That decision, as it is predominantly political in nature, may be subject to only limited judicial review." (Opinion 3/15: Opinion of the Advocate General Wahl. para 119, 120) Such discretion, however, is subject to procedural rules laid down in Article 218 TFEU: The Commission may propose the signing and conclusion of an external agreement as 'EU-only'. Member states represented in the Council can then decide to authorize the signature and conclude the treaty as an EU-only agreement by qualified majority voting (QMV), if TFEU-based unanimity requirements do not apply. Alternatively, the Council may adopt a unanimous decision to amend the Commission proposal for an 'EU-only' agreement and mandate the independent ratification by each and every member state - in addition to the Council decision on treaty signature and conclusion (Article 293(1) TFEU).

[227] Baldwin, Richard (2011). p3

[228] The original version of CCP Article 113(1) of the 1957 Treaty Establishing the European Community reads: "The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies."

provisions through the treaties of Amsterdam[229], Nice[230], and Lisbon[231] have widened the scope of the CCP to cover a larger amount of policy instruments that affect external trade in goods and services as well as foreign direct investment at the border and beyond. The 1957 Treaty of Rome originally designed the CCP with a view to providing the Community with exclusive powers to establish the Common External Tariff, to enter into external negotiations over obligations that mutually reduce import duties and quantitative import restrictions within the GATT framework, and to adopt autonomous measures that define the framework of its external commercial policy. At the early stage of the evolution of this purely external area of EU competence, the judges in Luxembourg were confronted with the question whether the CCP merely extended to trade liberalization or could also encompass the regulation of international commodity trade.

In Opinion 1/78, the Court opted for a markedly dynamic interpretation of the scope of the CCP. More than two decades after the entry into force of the Treaty of Rome, the Court held that

> "it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of more elaborate means devised with a view to furthering the development of international trade. It is therefore not possible to lay down, for Article 113 of the EEC Treaty, an interpretation the effect of which would be to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanisms such as appear in the agreement envisaged. A "commercial policy" understood in that sense would be destined to become nugatory in the course of time."[232]

[229] For a contextualization of Amsterdam Treaty amendments in ECJ jurisprudence and treaty negotiation see: Cremona, Marise (2001)
[230] For a comprehensive description and discussion of the Nice treaty amendments, see Herrmann, Christoph (2002)
[231] Krajewski, Markus (2012)
[232] Opinion 1/78. para 44

Rather than being subject to a dynamic judge-made expansion, however, it was consecutive treaty amendments, which progressively adapted the CCP to match the needs of EU external action in the WTO and then further broadened its scope to cover 'new generation' trade policy areas. The 1997 Treaty of Amsterdam saw the addition of 'services' and 'commercial aspects of intellectual property rights' to the general scope of the CCP. The 2001 Treaty of Nice placed those concepts within the realm of the Common Commercial Policy competence of the Community, subject to a complex web of restrictions. The latest EU primary law reform - the 2007 Treaty of Lisbon - considerably consolidated and simplified the CCP provisions and amended its scope to include 'foreign direct investment'.[233]

Whether the content of the 'new generation' of external economic agreements matches or exceeds the scope of the CCP and thus Union exclusive powers over treaty-making is the very question that stands at the centre of the Opinion 2/15 proceedings. It is of particular concern here whether the Union's exclusive treaty-making competences extend to the entirety of EUSFTA obligations including portfolio investment, transport services, as well as to the *non-commercial* provisions of the agreement such as 'moral rights' of intellectual property holders and the EUSFTA chapter on 'sustainable development' (labour rights and environment protection).

As predicted by the Court in 1/78 and retrospectively observed by Baldwin, the changing nature and increasing complexity of international trade and investment patterns in the past decades has generated a demand for a constitutional framework that adapts the powers of the Community (and Union) institutions to engage in the regulation of its external economic environment. The profit and net welfare enhancing potential of commercial opportunities inherent to international trade as well as the evolving complementary international legal institutions that have facilitated and regulated international commercial transactions have further driven the demand for reform of primary legal institutions governing the EU's Common Commercial Policy.

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[233] CCP Article 207 (1) TFEU now reads: "The common commercial policy shall be based on uniform principles, particularly with regard to *changes in tariff rates*, the conclusion of tariff and trade agreements *relating to trade in goods* and *services*, and the *commercial aspects of intellectual property*, *foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of *dumping or subsidies*. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."

The otherwise rare exclusive nature of EU competence for the CCP as well as the vagueness of its provisions with respect to its material scope and purpose(s),[234] has, however, provided strong incentives for political and judicial conflict over the operation of the CCP. It is in this context, that the interplay between policy demand generated by international economic and legal institutions; the inter-institutional political process at the Community level; primary law reform; and CJEU litigation has created a dynamic of constructive tension. It is this interplay, which has catalysed as well as constrained incremental progress towards an expansion of the scope within which EU unity in external commercial policy remains an *a priori* possibility, and towards greater legal clarity over the operation of the CCP provisions.

That being said, it is remarkable that the essence of the legal questions over the operation of the CCP has only marginally changed – or rather: been refined - over the past decades. The arguably most important issue for the Court remains the quest for a consistent and coherently applied method that serves to delineate the material scope of the CCP – and thus: Union exclusive competence - in isolation; in relation to other areas of external relations competences; and in relation to areas of EU internal competences.[235] Moreover, the enquiry concerning the Union competences for the conclusion of a comprehensive international trade agreement invites the Court to measure the status quo of the implied exclusive external competences that the Union has acquired as a result of its constantly evolving secondary legislation in areas of shared internal competence. Closely related to competence enquiries, third, stands the question over the choice of appropriate legal basis – or bases - for 'multi-purpose' external agreements. The question over the correct legal basis for the act concluding the EUSFTA has not been posed to the Court in the Commission's request for Opinion 2/15. Nonetheless, the Court ought to address the issue as a matter of practical necessity in order to ground distinctions between exclusive and shared competences on appropriate treaty provisions. Whether the Court, for the purpose of its competence analysis, applies the same analytical standards it employs for pure legal basis cases – and thus advances coherence in this regard – is another question of constitutional significance that could be clarified in this proceeding. Further down the road, it is the scope of responsibilities of the political institutions – or horizontal competences - that will be clarified by implication.

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[234] Cremona, Marise (2001): p6
[235] Cremona, Marise (2001): p6, p20

Against this background, a two decades old observation made by Meinhard Hilf may still be as relevant as ever: "The lack of clarity as to the extent of foreign trade authority could pose the currently most important constitutional problem of the Union" (notwithstanding Brexit).[236] It is, in part, the purpose of this chapter to examine discernable progress that has been made over those two decades and to draw attention to specific and systemic legal questions that the Court ought to address in its Opinion 2/15 decision.

As indicated in the forgoing paragraphs, Opinion 2/15 stands in tradition of the strand of jurisprudence, in which the Commission seeks to clarify the scope of EU (or Community) exclusive competence for its external commercial policy. Most prominently, in Opinion 1/94, the Commission requested a Court opinion on whether the Community was exclusively competent to conclude the WTO Agreement and its annexes under CCP Article 113 EC Treaty.[237] In contrast to the Commission's view, the Court held that trade in certain services and intellectual property rights provisions under the TRIPs agreement were not covered by EU exclusive competence for the CCP but fell under competences shared with the member states. The Court thereby 'enabled mixity' and allowed for the exercise of external competence by member states as parties to the 1994 WTO Agreement, which thus required the ratification of the said agreement by all member states of the Community. In Opinion 1/94, the Court was arguably concerned with setting limits to the CCP in light of the nature of corresponding internal competences and shied away from advancing the dynamic interpretative approach, which the Court had chosen in Opinion 1/78 two decades earlier.

As argued elsewhere in greater detail, the Court's findings in Opinion 2/15 are not only set to authoritatively clarify the *de jure* legitimacy of EU external action in the area of trade and investment and thus provide legal certainty over the treaty-making competences of the Union under the post-Lisbon primary legal framework. Seen in context of past political and judicial battles over competence, the Court's judgment may have a significant bearing on the effectiveness, credibility, and efficiency of multilevel governance of EU external economic relations.[238] What is at stake, to use the language of EU constitutional lawyers, is nothing less than the shape

[236] Cited by Cremona, Marise (2001): p6 Hilf, Meinhard (1997): p437
[237] Opinion 1/94
[238] Kleimann, David and Gesa Kübek (2016b)

and strength of the Union's identity in its external commercial relations and the reach of the member states in EU external economic relations conduct.

Yet, as Advocate General Sharpston recalls, "the need for unity and rapidity of EU external action and the difficulties which might arise if the European Union and the Member States have to participate jointly in the conclusion and implementation of an international agreement cannot affect the question who has competence to conclude it. That question is to be resolved exclusively on the basis of the treaties."[239]

The AG, of course, rightly suggests here that there is only one legitimate answer to the question of competence – notably the one that finds its basis in the authoritative interpretation of EU treaties by the Court. It is similarly obvious, however, that the methodological choices of the Court in interpreting the treaties are inherently normative and therefore political.[240] The more important questions may well be whether such choices are made in an intersubjectively verifiable manner, whether they are systematically coherent within the context of – or in explicit distinction from - the Court's past jurisprudence, and whether they are consistent within themselves.

Whatever the outcome, in any case, the Court's findings will yield important guidance for the treaty-making practice of EU institutions.[241] Whether the judgment serves to reduce or eliminate prevalent legal-institutional incentives for political and judicial combat between those EU institutions and the member states, however, much depends on whether the Court will offer additional clarity over its methodological approaches for the delimitation of the CCP vis-à-vis other external competences and internal competences as well as over the attribution of legal bases for acts concluding EU external economic treaties. It is in this way that the Opinion 2/15 proceedings do not only offer the Court the opportunity to guide the parties involved on the question of competence, but also to update and clarify the methods it employs to address the questions before it.

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[239] Opinion of the AG Sharpston: para 566. This view mirrors the general and natural stance of the ECJ, as expressed elsewhere, such as Opinion 1/94: para 107 and Opinion 2/00: para 41.

[240] There is no need or space to enter into a discussion of this matter here. It may suffice to refer to Koskenniemi, Martti (1999)

[241] For EU Commissioner for External Trade, Cecilia Malmstrom "it's not about winning or loosing in Court. It's about clarification. What is mixed? What is not mixed? And then we can design our trade agreements accordingly." Financial Times (4 December 2016): *Brussels Close to Trade Deal with Japan*.

2. Standards of Analysis: Text, Aims and Content, Predominant Purpose, and Implied Powers

The Court's case law, read in context of the Treaties, provide for four main standards of analysis that are relevant for the determination of the existence and nature of EU competence for the conclusion of external agreements. The application of these interpretative approaches in Opinion 2/15 may or may not result in a finding that the Union has acquired exclusive external competence over the content of the EUSFTA. Conceptual clarity and a consistent application of interpretative modalities to the legal act in question are certainly crucial ingredients for coherent reasoning and legal certainty beyond the legal facts at stake in this proceeding. This section outlines and discusses the main analytical approaches, which the AG and the Court employ. I shall turn to an examination of the key substantive arguments advanced by the AG in section 3.

2.1. Ordinary Meaning of the Terms of Article 207(1) TFEU

The first approach, to be sure, relies on a textual interpretation of the terms of Article 207(1) and Article 206 TFEU read in conjunction with Article 2(1) and Article 3(1)(e) TFEU, which render the EU exclusively competent to adopt legal acts falling within the scope of Common Commercial Policy. Article 207(1) TFEU reads as follows:

> 'The common commercial policy shall be based on uniform principles, particularly with regard to *changes in tariff rates*, the conclusion of tariff and trade agreements *relating to trade in goods* and *services*, and the *commercial aspects of intellectual property*, *foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of *dumping or subsidies*. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action' [emphasis added].

Whether or not treaty content falls within the scope of Article 207 TFEU – and thus EU exclusive competence - depends on the conceptual ambit of these provisions, which is indicated by the ordinary meaning of their terms. It is widely acknowledged, however, that the list of regulatory areas and instruments included in Article 207(1)

TFEU is non-exhaustive. It is, rather, indicative of the scope and limits of the CCP. It is arguably the very vagueness of its terms and the indeterminacy of its limits - in combination with the (otherwise rare) exclusive nature of EU competence - which has provoked the litigious sentiments of EU institutions and member states' governments over the past decades. It is in this context that the CCP has attracted a multitude of CJEU disputes over competence and the choice of appropriate legal bases.

In Opinion 2/15, the Court is asked for the first time – among others - to determine the ordinary meaning of the term 'foreign direct investment' within the context of the CCP, which was added to the scope of Article 207(1) TFEU as a result of the Lisbon Treaty reform of 2009. Moreover, in this proceeding, the Court ought to address the conceptual distinctions between commercial and non-commercial aspects of intellectual property rights and is required to draw a clear line between the wider concept of services trade and the scope of 'transport' services. The latter is explicitly excluded from the scope of Article 207(1) TFEU by means of a carve-out codified in Article 207(5) TFEU.[242] Moreover, the Court will have to examine whether the ordinary meaning of the term 'restrictions' in 206(1) TFEU applies to market access for investment only, or, in line with an inferential reading of the term, encompasses post-admission standards of protection, too.[243]

2.2. 'Aim and Content' of EU External Agreements

A mere textual interpretation of Article 207(1) TFEU in light of any given content of international agreements is, however, not sufficiently conclusive for the delineation of the scope of the CCP and other legal bases. The Court's jurisprudence gives further guidance to the extent that

> "the choice of the legal basis of a European Union act, including an act adopted to conclude an international agreement […], must rest on *objective factors amenable to judicial review*, which include the *aim and content* of that measure" [emphasis added].[244]

[242] Article 207(5) TFEU reads: "The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218."

[243] Article 206 TFEU: "By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive *abolition of restrictions* on international trade and on foreign direct investment, and the lowering of customs and other barriers" [emphasis added].

[244] *Parliament vs. Council* (C-263/14) para 43

The 'aim and content' approach, as further developed by the Court, prescribes a purposive interpretation of the act or measure in question, in light of the material scope of Article 207 TFEU. In elaboration, the Court held that

> "a European Union act falls within the common commercial policy if it *relates specifically to international trade* in that it is *essentially intended to promote, facilitate or govern* trade and has *direct and immediate effects* on trade" [emphasis added].[245]

By distinction, the Court held

> "that the mere fact that an act of the European Union, such as an agreement concluded by it, is liable to have *implications* for international trade is not enough"

for it to fall within the scope of Article 207 TFEU.[246]

The application of the 'immediate and direct effects' standard to post-Lisbon Common Commercial Policy in *Daiichi Sankyo* has been praised as the Court's choice of "clarity over caution".[247] Despite this commendable development in the Court's jurisprudence it remains questionable, however, whether the Court's method for testing 'immediate and direct effects on international trade', in contrast to mere 'implications', does in fact reduce the discretion exercised by the Court to delineate the material scope of CCP Article 207 TFEU. A purely notional examination of the quality of the link between aims and content of an agreement, on the one side, and trade (or foreign direct investment), on the other, may in fact provide for little additional clarity beyond the intrinsic value of authoritative judicial decision-making. The Court's self-imposed requirement to determine the correct legal basis on the grounds of 'objective factors amenable to judicial review' may legitimately generate a demand for empirical evidence that adds meaning to these otherwise abstract relationships.

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[245] *Daiichi Sankyo* (Case C-414/11). para 51; *Commission vs Parliament and Council* (C-411/06) para 71; *Regione autonoma Friuli-Venezia Giulia and ERSA* (C-347/03) para 75

[246] *Daiichi Sankyo,* para. 51

[247] Larik, Joris (2015): p791

It seems that the Court has done little to operationalize – through economics-based analysis - the relationship between the content of an agreement, the specific measures it requires as a function of its obligations, and their effects (whether direct and immediate or by implication) on international trade and investment. This circumstance is problematic for both the determination of the appropriate legal basis for an act concluding an external agreement and, similarly, for the delineation of competence for the CCP, other areas of external action, and fields of internal competence. As demonstrated below, the Court was frequently satisfied by mere reference to preambular language of the agreement in question or objectives set out in its provisions, in order to determine the purpose of the said agreement within the context of the EU primary legal framework – rather than entering into an examination and comparison of actual effects of specific measures on the objectives pursued.

Admittedly, however, this task may make for a mission impossible for the Court. Creating meaningful and empirically robust distinctions between measures that evidently have direct and immediate effects on trade versus measures that affect trade by implication could, given the state of regional and global economic integration and the corresponding regulatory environment, lead to no satisfactory outcome in terms of additional clarity after all. Accepting indeterminacy of the scope of the CCP, however, reveals the discretionary space of manoeuvre of the Court to interpret the notion of 'direct and immediate effects on international trade' as it deems fit on a case-by-case basis.

2.2.1. 'Aim and Content' in Opinion 1/94 versus *Daiichi Sankyo*

To illustrate this point, we can recall the Court's approach and reasoning in Opinion 1/94 on the questions whether the Agreement on Agriculture (AoA), on the one hand, and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), on the other, fall within the scope of (then) CCP Article 113 EC Treaty, and whether these individual parts of the WTO Agreement were thus subject to exclusive treaty-making competence of the Community, or not.

Neither 'agriculture' nor 'intellectual property rights', to begin with, formed part of the terms of Article 113(1) EC Treaty. The Union's internal competences for 'agriculture' and 'intellectual property rights' were (and still are) shared with the member states under the primary law provisions on agriculture (Article 43 EC Treaty) and the internal market (Articles 26, 100; 100a EC Treaty).

Having said this, it is abundantly evident that both the AoA and the TRIPs agreement exert effects on both EU internal and external trade and, moreover, required implementing legislation by the Community on the basis of policies set out in the treaties for which the Community shares competence with the member states. Whether the effects on international trade are deemed to be 'immediate and direct' or merely 'implied' remains, up until to date, a matter contingent upon the precise operationalization of these concepts and are thus subject to discretion exercised by the Court.

The Court – in Opinion 1/94 - came to distinct conclusions in response to the question whether the two distinct annexes fell under Article 113 EC Treaty. Applying a crude 'aims and content' test to the AoA, the Court liberally held that

> "[t]he objective of the Agreement on Agriculture is to establish, on a worldwide basis, 'a fair and market-oriented agricultural trading system' (see the preamble to that Agreement). The fact that the commitments entered into under that Agreement require internal measures to be adopted on the basis of Article 43 of the Treaty does not prevent the international commitments themselves from being entered into pursuant to Article 113 alone."[248]

In its assessment of the TRIPs Agreement, however, the Court came to the opposite conclusion:

> "Admittedly, there is a connection between intellectual property and trade in goods. Intellectually property rights enable those holding them to prevent third parties from carrying out certain acts. (…) That is not enough to bring them within the scope of Article 113. Intellectual property rights do not relate specifically to international trade; they affect internal trade just as much as, if not more than international trade."[249]

The Court further argued that recognizing exclusive competence of the Community

[248] Opinion 1/94: para 29
[249] Opinion 1/94: para 57

> "to enter into agreements with non-member countries to harmonize the protection of intellectual property and, at the same time, to achieve harmonization at Community level, the Community institutions would be able to escape the internal constraints to which they are subject in relation to procedures and to rules as to voting."[250]

These excerpts from Opinion 1/94 are worth highlighting for two reasons. First, they serve to illustrate that the application of the 'effects' criterion employed to further elaborate the 'aims and content' test is not an automatism but provides the Court with ample space for manoeuvre. The application of narrowly understood 'direct and immediate effects on international trade' - a criterion only developed in subsequent case law - to the 1994 Agreement on Agriculture could well result in the conclusion that the core of measures required for implementation of the agreement exerts effects on EU internal trade at least as much as on international trade. In essence, the AoA is an international instrument that prescribes limits for subsidies linked to domestic production, prices, and exporters. Measures implementing EU production subsidy commitments under the AoA - if compared to the reduction of a customs duty or even prohibition of production and circulation of counterfeited goods – exert indirect effects on international trade or only affect international trade by implication. EU subsidy commitments in line with EU obligations under Article 3, 6, and 7 of the AoA only decrease distortions of international trade indirectly by reducing the artificial incentives for domestic supply and export of agricultural produce, rather than regulating external trade directly.[251]

Yet, such a narrow reading of the AoA, in context of Article 207 TFEU (and then Article 113 EC Treaty), would be unwarranted given core objective pursued by the content of the agreement and its inevitable effects on international trade. The Court hence rightly concluded that the aim and content of the AoA relates specifically to international trade in goods. In its examination of the TRIPs agreement in Opinion 1/94, however, the Court appeared to be neither impressed nor convinced by the object and purpose or the direct and immediate effects of TRIPs obligations on

[250] Opinion 1/94: para 60

[251] For a case study on such 'indirect' effects of the WTO Agreement on Agriculture on international trade in agriculture, see: Kleimann, David (2007)

international trade and held that its conclusion is a matter subject to shared internal market competence of the Community.

The Court's finding in Opinion 1/94 with respect to the TRIPs agreement, secondly, is remarkable in that it would appear to undermine the integrity of the substantive scope of the CCP. Rendering CCP applicability – as the correct legal basis for the conclusion of external commercial treaties – contingent on whether internal measures necessary for the implementation of respective international commitments require stricter procedures than the act concluding the agreement under the CCP would hollow out the scope of the Union's exclusive competence allocated for the purpose of external commercial treaty-making from within. It seems nonsensical to subject the material scope of Article 207 TFEU – and measures falling thereunder – to a case-by-case assessment of the procedural requirements for internal legal acts necessary for implementation.

It is commendable, for this very reason, that the Court in *Daiichi Sankyo* effectively reversed its findings in Opinion 1/94. In *Daiichi Sankyo,* the Court held that

> "[t]he primary objective of the TRIPs Agreement is to strengthen and harmonise the protection of intellectual property on a worldwide scale (…). As follows from its preamble, the TRIPs Agreement has the objective of reducing distortions of international trade by ensuring, in the territory of each member of the WTO, the effective and adequate protection of intellectual property rights."[252]

As such, the Court found - almost two decades after its judgment in Opinion 1/94 - that the TRIPs agreement, in its entirety, falls under exclusive competence of EU Common Commercial Policy. It is certainly noteworthy that 'commercial aspect of intellectual property rights' were added to the terms of CCP Article 207(1) TFEU in the course of the Treaty of Lisbon reform. The Court's reasoning in *Daiichi Sankyo*, however, suggests that it is the re-consideration of the aim and content of the TRIPs agreement, and the Court's general approach to the delineation of the scope of the CCP, rather than the reform of the scope of Article 113 EC Treaty, which triggered the Court's change of mind.

[252] *Daiichi Sankyo*: para 58-61

Indeed, giving further way to the Court's approach taken in Opinion 1/94 would have structurally crippled the scope and exercise of Article 207 TFEU and the effectiveness and credibility of EU external action in the area international trade. I will come back to this point at the beginning of Section 3. It remains worth emphasizing, for the purpose of this subsection, that it is the Court's precise analytical approach to, and its understanding of the 'direct and immediate effects' criterion – in addition to the interpretation of superficial objectives set out in preambular language of the agreement in question – that makes for a key determinant of the results of the Court's competence enquiry in general, and in Opinion 2/15 specifically.

2.2.2. 'Aim and content' of 'deep and comprehensive' EU Trade and Investment Agreements

This question is of particular relevance in regard of treaty contents that are associated with the 'new generation' of EU external trade agreements, such as obligations on investment liberalization and protection, competition policy, government procurement, as well as sustainable development (labour rights and environmental protection). In particular, it is worth watching whether the Court is willing to subsume EUSFTA obligations under Article 207 TFEU, which do not form part of the language of that provision but are nevertheless bound to affect international trade in a more or less 'direct and immediate' manner.

If the answer is affirmative across the board, the correct legal basis for the conclusion of the agreement is Article 207 TFEU. Read in conjunction with Article 2(1) TFEU and Article 3(1)(e) TFEU, the Union would thus be exclusively competent to conclude the agreement without participation of the member states.

In her opinion, AG Sharpston deems EUSFTA provisions on transport services, certain aspects of intellectual property rights, portfolio investment, labour rights, and environmental protection obligations to fail the aims and content test with regard to CCP Article 207 TFEU and attributes provisions and components of the agreement to the scope of TFEU provisions for which the Union and member states share external powers.

Without prejudging the reasoning of the AG in response to specific issues, her submission underlines the fact that the question over the correct legal basis for the

conclusion of an international agreement is highly relevant – and inseparable - from the analysis of the existence and nature of competence.[253]

> "In Opinion 1/08, the Court explained that the character, whether exclusive or not, of the European Union's competence to conclude agreements and the legal basis which is to be used for that purpose are two closely linked questions. […] Establishing that the European Union has competence to act at all in a particular field (and thus identifying the legal basis for such action) is therefore a *precondition* to determining the allocation of competences between the European Union and the Member States, in accordance with Articles 3 and 4 TFEU, as regards a specific external action" [emphasis added]."[254]

It is in this context that the Court submitted written questions to the parties - prior to the proceeding's hearing - requesting the parties' opinion on the correct legal bases for the conclusion of the EUSFTA. Their diverse answers to this question shall be highlighted in the next subsection, which examines the Court's jurisprudence with regard to the appropriate legal basis and the question of competence for 'multi-purpose' legal acts.[255]

2.3. 'Predominant' and 'Incidental' Purposes of EU External Agreements

The 'aims and content' test of the Court is not only reflected in its efforts to delineate the ambit of measures that, by their aim and content, fall within the conceptual realm of Article 207 TFEU or, alternatively, other EU policy frameworks. The 'aim and content' attributed to a legal act are similarly decisive criteria for the determination of the correct legal basis – or bases – where that act is found to comprise of *multiple components and purposes*, including objectives other than the CCP. AG Sharpston's analysis and the wealth of Court jurisprudence reflect the fact that such acts can conceivably require reference to more than one legal basis, which may or may not include those for which the Union has not acquired exclusive competence *a priori* or by implication.

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[253] Cremona, Marise (2006): p9
[254] Opinion of AG Sharpston: para 92
[255] Kleimann, David and Gesa Kübek (2016a)

The notion of 'multi-purpose' legal acts is of relevance in cases that involve broader external agreements, which may carry multiple related or unrelated components and purposes and may not only advance external commercial objectives. The Court's case law has addressed the issue of 'multi-purpose' acts and the corresponding question over the appropriate legal basis for the conclusion of such agreements by seeking to identify the 'predominant purpose' of the agreement in question. According to this strand of jurisprudence, the mere fact that an act comprises of two or multiple distinct components and purposes does not justify reference to a legal basis other than – in the present case – Article 207 TFEU:

> "If examination of a European Union measure reveals that it pursues a twofold purpose or that it has a twofold component and *if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental*, the measure must be founded on a single legal basis, namely, that required by the main or predominant purpose or component. By way of exception, if it is established that the measure pursues several objectives, which are *inseparably linked without one being secondary and indirect in relation to the other*, the measure must be founded on the various corresponding legal bases."[emphasis added].[256]

It follows that it is not sufficient to merely identify multiple purposes and components and assign distinct legal bases on that ground. The determination of the correct legal basis for multi-purpose acts requires a second step, notably the analysis of the *relationship* between two or more identifiable components and purposes of the act concluding the international agreement. In order to determine whether the act requires reference to more than one legal basis, the identified components must be qualified as 'predominant', 'incidental', 'secondary', or 'indirect' *in relation to each other*. As such, the Court seems to ask for a qualification of distinct components *in context* of others. In other words: whether an identified objective, purpose, or component of a legal act requires reference to a distinct legal basis does not only depend on the face value attributed to that component in isolation from its legal context, but on its

[256] *Commission vs. Council* (Case C-377/12). para 34

characteristics relative to the characteristics of other components and purposes of the agreement.

Does a methodology exist, which offers objective factors suitable for the qualification of the relationship between different purposes and components of broader external agreements or EU acts in general? Do the AG and the Court employ 'objective factors amenable to judicial review' to that end? More generally, is the Court required to give a definitive answer to the legal basis question in Opinion 2/15 or is the legal basis analysis only a practical necessity for the purposes of the competence enquiry? It is arguable that, as a matter of systemic coherence, the Court's competence analysis and legal basis determination should coincide and apply the same objective factors amenable to judicial review. It appears desirable, at the very least, that the Court's responses to either question should not generate inconsistencies among the two and therefore meet the same standards. This is even more so in light of the fact that the notion of 'predominance' and 'incidentalism' of treaty objectives and components – if applied liberally – carry the risk of judicial overreach, which is inherent in a contextual interpretation of treaty content in exercise of a competence analysis. An important question is hence what kind of characteristics of an identified component would qualify said component as predominant or secondary and incidental relative to others.

A comparison of the quantity of provisions subsumed under distinct objectives associated with identified components could serve as a simplistic indicator of 'predominance'. A more useful indication may be the answer to the question whether a component creates new obligations or merely replicates (or incorporates) obligations that have already been assumed by the parties in context of other international agreements. As such, the enquiry would be directed at whether the treaty content in question has the effect of changing the status quo of EU obligations or not. But even if it does do so in a rudimentary (or incidental?) fashion, it may still be questionable whether such content creates rights and obligations to adopt specific measures. If not, they could be considered as incidental and secondary. More broadly, the Court could compare the effects of the provisions of a non-CCP component on the purpose that it discernibly pursues, on the one hand, with the aims / effects ratio of the CCP component, on the other. A question related to the considerations above is whether the legal quality of provisions subsumed under identified components (e.g. hard law vs. soft law; procedural vs. material obligations) factor into an analysis of

whether a component is considered secondary and incidental. Distinct degrees of 'bindingness' and formal enforceability of provisions could serve as indicators for 'predominance' enquiries. A distinction could also be made in regard of whether the provisions in question establish obligations for the EU treaty partner only, or for all parties likewise.[257]

These considerations suggest that the Court's methodological approach and respective choice of factors to determine the answer to the question of 'predominance' have implications for the overall answer to the question of competence. More specifically, the discretion exercised by the Court in choosing 'objective factors' for the determination of 'predominant' or 'secondary' and 'incidental' components could alter the answer to the question of competence in any given legal context. If the Court identifies components and purposes other than external commerce, but considers these to be incidental (and secondary) in relation to the CCP, those components would still fall under Article 207 TFEU and hence exclusive treaty-making competence of the Union even if they do not satisfy the 'aims and content' test for Article 207 TFEU in the first place. Finding that an act pursues more than one objective and purpose and comprises of more than one component implies that at least one component has failed the aim and content test with respect to the CCP. This objective, purpose, or component is then, notwithstanding the outcome of the 'predominance' analysis, liable to being categorized as secondary and incidental to the CCP component.

That being said, and as mentioned above, permissive criteria for predominance testing are bound to generate considerable tension with the principle of conferral enshrined in Article 5 TEU. An excessively strict methodology, on the other hand, could jeopardize values of effective external treaty-making by requiring reference to multiple legal bases for treaty components (or provisions) that would otherwise be treated as 'incidental' and thus implicate the necessity to invoke multiple legislative procedures, or involve the member states as parties in their own right to an EU external agreement. It remains the task of the Court to resolve this tension by devising 'objective criteria amenable to judicial review' that strike a balance between the need

[257] Lorand Bartels, in a discussion of the limits that apply to what he calls the 'Doctrine of Ancillary Clauses', notes that "[t]his leaves open the question whether agreements which do impose binding and-importantly-enforceable obligations on the parties, especially positive obligations to ensure respect for human rights and democratic principles, can be seen as an obligations merely 'ancillary' to the provisions of the agreement that are legitimately based on the EC Treaty.* It is difficult to answer this question, but the conservative view is that they are not." Bartels, Lorand (2005): p224

to protect the integrity of the principle of conferral, on the one hand, and the need to advance the predominant purposes of EU external economic governance, on the other. The next sub-section reviews the Court's jurisprudence with regard to predominant and incidental treaty objectives, components, and provisions involving treaty content that relates to the CCP.

2.3.1. 'Predominant' and 'Incidental' Purposes, Components, and Provisions in CJEU Case Law

Panos Koutrakos, in 2008, found that it is "apparent from the Court's case law that [the choice of legal basis] may not be determined on the basis of specific and easily identifiable criteria".[258] If further confirmed, this circumstance is regrettable given the Court's self-imposed requirements and the systemic value inherent to coherent judicial reasoning. More generally, it is worth questioning whether the Court applies the same standards and criteria in legal basis cases as in cases where it ought to determine correct legal bases for the purposes of competence analyses.

To shed further light on this question, I examine existing evidence from the Court's jurisprudence below, which illustrates the Court's sentiments with respect to its choice of 'objective factors' for the determination of 'predominance' and 'incidentalism' of external treaty objectives and effects. We can, for this purpose, distinguish between cases, in which the Court was asked to determine whether the object of the external agreement in question pursued commercial vs. non-commercial objectives, on the one hand, and cases where the parties litigated the competence and/or appropriate legal basis for the conclusion of purely commercial agreements. Moreover, we can distinguish between cases where the Court considered incidental treaty *purposes and components* versus cases, in which it considered incidental treaty *provisions*. I start with the category of non-commercial vs. commercial treaty purposes and close with an examination of the Court's case law on 'incidental' provisions.

In the *Energy Star Agreement* case, the key criterion for the Court's predominance analysis was its observation that the agreement did not establish new obligations pursuing environmental objectives whereas its effects were considered to be direct in relation to trade. The Commission and the Council litigated both competence and the appropriate legal basis for the decision concluding an agreement

[258] Koutrakos, Panos (2008): p184

with the United States based on Article 175(1) EC Treaty (environmental policy), which is subject to shared external competence.[259] The Commission argued in favour of the annulment of that decision. In view of the Commission, the decision's correct legal basis was (then) CCP Article 133 EC Treaty and thus subject to exclusive external competence. Following its analysis of the agreement, the Court observed that "the Energy Star Agreement simultaneously pursues a commercial-policy objective and an environmental-protection objective."[260] In this predominance analysis, the Court considered that the treaty was indeed "devised in order to stimulate the supply of, and demand for, energy-efficient products and therefore to promote energy conservation, and second, that its extension to the Community undoubtedly helps to achieve that objective".[261] Nevertheless, the Court deemed decisive the fact that "the Energy Star Agreement itself *does not contain new energy-efficiency requirements*" [emphasis added], whereas it found that "the effect on trade in office equipment […] is direct and immediate."[262] In line with this assessment, the Court held that the "commercial-policy objective pursued by the Energy Star Agreement must therefore be regarded as predominant, so that the decision approving the agreement should have been based on Article 133 EC".[263]

In Opinion 2/00, conversely, the Court held that the specific nature of obligations aimed at environmental protection established the predominant purpose of the Cartagena Protocol, whereas the mere fact that the very same obligations also exerted effects on trade was to be regarded as incidental. The task of the Court in this proceeding was to determine "whether the Protocol, in the light of its context, its aim and its content, constitutes an agreement principally concerning environmental protection which is liable to have incidental effects on trade in [living modified organisms] or whether, conversely, it is principally an agreement concerning international trade policy which incidentally takes account of certain environmental requirements, or whether it is inextricably concerned both with environmental protection and with international trade."[264] While the Commission's proposal for the Council decision was based on CCP Article 133 EC Treaty *and* (environment policy)

[259] *Commission vs. Council* (C-281/01 - *Energy Star Agreement*).
[260] ibid. para 39
[261] ibid. para 41
[262] ibid. para 42
[263] ibid. para 43
[264] Opinion 2/00: para 25

Article 174(4) EC Treaty, the Council unanimously adopted the decision on the basis of Article 175(1) EC Treaty alone. The Court, this time, agreed with the Council in that it considered the essential purpose of the agreement – in light of its aim and content – to concern environmental protection, whereas its effects on trade were found to be only incidental. In view of the Court, "[t]he Commission's interpretation, if accepted, would effectively render the *specific provisions of the [EC] Treaty concerning environmental protection policy largely nugatory*, since, as soon as it was established that Community action was liable to have repercussions on trade, the envisaged agreement would have to be placed in the category of agreements which fall within commercial policy."[265]

As discussed in the previous section, the Court's judgment in the *Daiichi Sankyo* case reflects a significant re-consideration of the aim and content of the TRIPs agreement - in light of its 'direct and immediate effects' -, which the Court now found – in contrast to Opinion 1/94 - to predominantly advance the purposes of international trade rather than the harmonisation of intellectual property rights legislation for the internal market. Having established that the CCP makes for the predominant purpose of the TRIPs agreement, the Court found itself at ease with the notion that

> "[a]dmittedly, it remains altogether open to the European Union (…) to legislate on the subject of intellectual property rights by virtue of [shared] competence relating to the field of the internal market. However, acts adopted on that basis and intended to have validity specifically for the European Union will have to comply with the rules concerning the availability, scope and use of intellectual property rights in the TRIPs Agreement, as those rules are still, as previously, intended to standardise certain rules on the subject at world level and thereby to facilitate international trade."[266]

With this important finding, the Court appears to do nothing less than to disconnect the ambit of the CCP from the scope as well as nature of internal competences and the (potentially stricter) procedural requirements for the implementation of the Union's international obligations. For the purposes of this subsection, however, it relevant to

[265] ibid.: para 40
[266] *Daiichi Sankyo*: para 59

note that the Court, in this case, gives further way to the notion of a 'predominant purpose' of an agreement where that agreement clearly exerts effects on internal market harmonisation *and* international trade regulation.

In the *Conditional Access Convention* case, moreover, the Court found that certain provisions of the Convention, which prescribe confiscation measures, "are also supposed to improve the conditions for the functioning of the internal market. However, […] that objective is *purely incidental* to the primary objective of the contested decision" [emphasis added].[267] The Court hence agreed with the legal view of Advocate General Kokott in that certain confiscation measures included in the Convention, if examined "in isolation, (…) may indeed be classified under the policy area of judicial cooperation in civil and criminal matters."[268] Yet, the AG placed considerable emphasis on the *context* of those rules by arguing that "the confiscation measures and the related international cooperation here are not the primary object of the Convention. Because the focus of the Convention is in the area of commercial policy, the signing of the Convention as a whole must be based solely on Article 207 TFEU."[269]

The Court has also showed itself amenable to a consideration of both incidental and ancillary ('accessory'; 'adjunct') *provisions* that may, in its view, not be capable of affecting the allocation of competences and do not require reference to a distinct legal basis.[270]

In Opinion 1/08, in the negative, the Court held that "the provisions of the agreements at issue relating to trade in transport services cannot be held to constitute *a necessary adjunct* to ensure the effectiveness of the provisions of those agreements

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[267] *Conditional Access Convention* (Case C-137/12). para 71

[268] *Conditional Access Convention*: Opinion of AG Kokott. para 82

[269] The obligations under scrutiny here are extensive. Article 6 of the Convention: "The Parties shall adopt such appropriate measures as may be necessary to enable it to seize and confiscate illicit devices or the promotional, marketing or advertising material used in the commission of an offence, as well as the forfeiture of any profits or financial gains resulting from the unlawful activity." Article 8 of the Convention, moreover: "The Parties undertake to render each other mutual assistance in order to implement this Convention. The Parties shall afford each other, in accordance with the provisions of relevant international instruments on international co-operation in criminal or administrative matters and with their domestic law, the widest measure of co-operation in investigations and judicial proceedings relating to criminal or administrative offences established in accordance with this Convention."

[270] It appears that the meaning of the term 'ancillary' used to be applied, in older judgements such as *Portugal vs Council* (C-268/94), to both 'incidental' provisions and provisions that are 'accessory' or 'adjunct', whereas the more recent case law, such as Opinion 1/08, clearly distinguishes between autonomous incidental provisions (as in 'extremely limited in scope') and provisions that are considered to be adjunct, ancillary, or accessory to an identified main component.

concerning other service sectors […] or to be *extremely limited in scope*" [emphasis added].[271] The Court based its finding on the consideration of both the *quantity* of provisions and their *effect* in modifying the parties obligations compared to the status quo. Considering the scope of the provisions under scrutiny, the Court observed that the "agreements at issue include, in this instance, a *relatively high number of provisions* whose *effect is to modify both horizontal and sectoral commitments* made by the Community and its Member States under the GATS, as regards the terms, conditions and limitations on which the Member States grant (i) access to transport services markets, in particular air or maritime, to suppliers of services from other WTO members and (ii) national treatment" [emphasis added].[272] The Court consequently found that those provisions could neither be considered ancillary nor incidental to the Common Commercial Policy component.

In Opinion 1/94 and *Portugal vs. Council*, conversely, the Court found that "the Community is entitled to include in external agreements otherwise falling within the ambit of [CCP] Article 113 ancillary provisions for the organization of *purely consultative procedures* or *clauses calling on the other party* to raise the level of protection of intellectual property rights" [emphasis added].[273] In Opinion 1/94, the Court had deemed a provision as 'extremely limited in scope', which obliged third treaty parties to improve domestic IPR standards to the extent that 'a level of protection similar to that provided in the Community' was achieved.[274] The Court's finding stands in contrast to the fact that the Community – according to the Court's findings in Opinion 1/94 – was not exclusively competent to conclude an international agreement of the type and scope of the WTO TRIPs Agreement at the time. The said provision, in view of the Court, however, did neither affect the allocation of competence or deserved reference to a legal basis other than (CCP) Article 113 EC Treaty.[275]

To broadly summarize the findings of the above examination of the Court's case law: the Court has, in its consideration of incidental treaty components and provisions in past jurisprudence, considered factors such as objectives set out in the preamble; the quantity of potentially 'incidental' provisions in relation to the main

[271] Opinion 1/08: para 166
[272] idid.: para.168
[273] Opinion 1/94: para. 68; *Portugal vs Council* (C-268/94): para 77
[274] Opinion 1/94: para 67
[275] Opinion 1/94: paras 67, 68

component; the effects of provisions on the modification of the *status quo* of EU obligations; legal quality (prescriptive vs. aspirational provisions) and enforceability; as well as EU extra-territoriality of obligations. In one case reviewed here, the Court held that hard legal and enforceable treaty provisions make for a distinct treaty component, which is, however, incidental and secondary to the main component. Most significantly, the Court has, in some instances, deemed treaty purposes, components, and provisions to be incidental, notwithstanding the distinct nature of competence that would be attributed to them if assessed in isolation from its legal context in the specific case.

The Court has, in other words, showed itself ready to attribute legal bases to acts concluding an international agreement following a contextual interpretation of its aims and content - irrespective of the face-value purpose of 'incidental' treaty components and the associated nature of EU competence that would, if read in isolation, otherwise govern such content. At the very minimum, it seems clear that the mere coverage of a policy area by the content of an external agreement does not suffice to affect the Court's conclusions on the appropriate legal basis for the conclusion of that agreement and the existence and nature of EU competences. The findings demonstrate that the Court has taken seriously the notions of predominance and incidentalism for the determination of the appropriate legal basis of an act concluding an external agreement. It remains questionable, however, whether the factors that the Court considered on a case-by-case basis can serve as credible guidance for future judgments. This is particular so with regard to the highly politicized decision in Opinion 2/15 where the legal context – and thus the scope of analysis - extends to a uniquely large amount of specific legal obligations of heterogeneous character.

These considerations suggest, in any case, that the Court retains ample space for discretionary decision-making, precisely as a result of having – deliberately or not - avoided the design of a clear methodology, which sets out 'objective factors amenable to judicial review' for the determination of the appropriate legal bases for acts concluding agreements that comprise of multiple components and pursue more than one objective. This finding holds true for both legal basis cases and competence enquiries that require the determination of legal bases.

The legal view of Advocate General Sharpston has set a strict benchmark for a possible contextual attribution of legal bases for the conclusion of the EUSFTA. Very

much in contrast to AG Kokott in the *Conditional Access Convention* case, for instance, AG Sharpston advances a restrictive approach to a contextual examination of treaty aims and content. Irrespective of the proportion of the agreement under scrutiny, the AG attributes 'constituent' purposes and legal bases grounded on a mere face-value assessment of the most miniscule treaty components, which she evaluates in isolation from, rather than in context of each other.

2.3.2. 'Predominance' and 'Incidentalism' in View of Advocate General Sharpston

In the preliminary considerations of her legal opinion, AG Sharpston appears to square the circle by recognizing the possibility of 'predominant' and 'incidental' treaty components, on the one hand, but limiting the realm of 'secondary' or 'incidental' treaty purposes *ex ante* to components that are 'extremely limited in scope'.

> "In identifying the legal basis, it follows from well-settled case-law that, where an agreement of the European Union pursues more than one purpose or comprises two or more components of which one is identifiable as the main or predominant purpose or component, whereas the other(s) is (or are) merely incidental *or extremely limited in scope*, the European Union has to conclude that agreement based on a single legal basis, namely that required by the main or predominant purpose or component. Thus, if the predominant purpose of the EUSFTA is that of pursuing the common commercial policy and other aspects of it are *properly* to be regarded *either as constituting a necessary adjunct* to that main component or as *being extremely limited in scope*, the substantive legal basis for concluding that agreement would be Article 207(1) TFEU. It would then follow from Article 3(1)(e) TFEU that the European Union has exclusive competence to conclude the EUSFTA."[276]

It is true that AG Sharpston applies the semantics of this standard throughout her legal opinion. In practice, however, the AG does not test predominance or 'incidentalism'

[276] Opinion of AG Sharpston: para 93

of identified components in context of each other but is strictly guided by a face-value analysis of the content of the EUSFTA.

In the AG's submission in Opinion 2/15, the notion of 'incidental' or 'secondary' components and purposes – understood as relational concepts – appears to fall victim to her readiness to make reference to different legal bases wherever aims and content of the provisions of the EUSFTA can be distinguished from the CCP and discernibly attributed to the scope of other competence conferring EU treaty provisions. This preliminary observation raises the question what it would take, in view of the AG (and the Court), to qualify an identified component of an external economic agreement as 'incidental' in relation to other treaty components. For AG Sharpston – as further demonstrated in the next section – this analytical category does not to exist.

Analytically, the AG proceeds as follows: In a first step, the AG identifies the content of the EUSFTA that falls within the scope of the CCP; qualifies an array of provisions as accessory, ancillary and adjunct to the CCP aims and content if they are deemed to support the effectiveness of substantive provisions falling under Article 207(1) TFEU; and identifies components that otherwise fall under exclusive competence of the EU via other legal bases associated with *a priori* exclusive competences under Article 3(1) TFEU or as an implied treaty-making power via Article 3(2) TFEU.[277]

In a second step, the AG identifies distinct EUSFTA components that, in her view, fall outside of the scope of the CCP and do not otherwise fall under exclusive EU competence.[278] Moreover, the AG determines the realm of provisions that she finds to make for a necessary adjunct or to be accessory to the substantive provisions of those components. The AG proceeds by proposing suitable legal bases, according to the presumed aims and content of those components, for which the Union and the member states share competence. In one instance, as further discussed in the next section, the AG finds that EU member states are exclusively competent to enter into the obligation under scrutiny.

[277] Certain transport services (by implication) and the conservation of marine biological resources under the common fisheries policy (*a priori*). See Opinion of AG Sharpston: para 570

[278] Certain transport services; portfolio investment; moral intellectual property rights; and labour and environmental standards. See Opinion of AG Sharpston: para 570

Restricted by the analytical focus on the nature of external competences, the AG determines that "none of those parts can be identified as either the main or predominant component of the EUSFTA or as being 'merely incidental' or 'extremely limited in scope."[279]

In a third step, the AG identifies a very limited number of incidental *provisions*, which, in her view, do not pass the threshold for being characterized as distinct components or purposes of the agreement and are "autonomous in relation to other provisions of the EUSFTA" yet 'extremely' or 'very limited in scope'.[280] Other provisions are regarded to be 'accessory' to the agreement as a whole where they exempt certain regulatory areas from the application of the EUSFTA.[281]

As mentioned above, the AG *de facto* does not consider the possibility of incidental components of the EUSFTA once she has determined that a component in question does not fall within the scope of a Union policy, which is subject to EU exclusive competence. It is at this juncture that the legal basis test for predominance and incidentalism – as restrictively applied by the AG - finds practical and - in her view - constitutional limits in the quest for an answer to the Commission's enquiry over the existence and nature of competence for the conclusion of the EUSFTA.

2.3.3. Revisiting 'Gravity' - The Predominant Purpose and Incidental Components of the EUSFTA

The AG and the Court eventually have to determine the primary law provisions under which EUSFTA content can be concluded in order to determine the existence and nature of EU competences. It is debatable, however, whether the AG and the Court are required to provide a definitive answer to the question over the appropriate legal basis (or bases) for the adoption of the act concluding the EUSFTA. The Court may

[279] Opinion of AG Sharpston: para 550

[280] Opinion of AG Sharpston: para 552, 553. "Finally, Articles 17.7 (current account and capital movements) and 17.8 (sovereign wealth funds) contain rules which are autonomous in relation to the other provisions of the EUSFTA. However, those provisions are very limited in scope and therefore cannot be regarded as a distinct component of the EUSFTA. I therefore conclude that (…) for those reasons, they are not capable of altering the allocation of competences between the European Union and the Member State as regards the various components of the EUSFTA" Among these otherwise aspirational clauses, Article 17.7 EUSFTA prescribes, in hard legal language, that "[t]he Parties shall authorise, in freely convertible currency and in accordance with the provisions of Article VIII of the Articles of Agreement of the International Monetary Fund, any payments and transfers on the current account of the balance-of-payments between the Parties."

[281] Clauses exempting taxation and balance of payments, for instance, are regarded as accessory to the agreement in that they preserve competences of the parties. Opinion of AG Sharpston: para 550

treat the legal basis determination as solely relevant for the purposes of competence analysis. The more important question is whether the Court applies the same analytical standards in legal basis cases when compared to competence cases that necessarily require the determination of legal bases.

The parties, in the proceedings, have provided widely diverging answers to the Court's question over the appropriate legal basis. This circumstance reflects diverging political predispositions, which are mirrored in respective legal arguments. Disagreement among the member states, however, also surfaces the lack of clarity about the (existence of a) difference between the determination of legal basis for the purposes of competence analysis, on the one hand, and the question over the appropriate legal basis for the formal adoption of the act concluding an international agreement.

In response to the Court's enquiry, in the oral phase of the proceeding, the Commission cited Articles 207, 63, 91, 100(2), 216 (1) TFEU as the correct legal bases for the conclusion of the EUSFTA.[282] There was no disagreement between the parties over the fact that the CCP and transport policy (Articles 207, 91, 100(2) TFEU) constituted correct legal bases. In addition, however, the Council referred to Articles 43(2), 153, and 192 TFEU as necessary legal bases to cover EUSFTA obligations on agriculture, as well as labour and environmental protection. While some member states wished to add further legal bases, others promoted a more restrictive approach. Germany, France, and Finland expressed the opinion that Articles 207, 91, and 100(2) TFEU sufficed. These parties, however, placed great emphasis on their view that the choice of legal bases for the act concluding the EUSFTA does not need to reflect the vertical division of competences between the Union and the member states.

The projection of this apparent state of confusion over the relationship between the analysis of the conferral of competence and the attribution of the appropriate legal basis could provide for emphasis to the conclusions drawn by Panos Koutrakos: "In the multilayered system of EU external relations, it is necessary that the notion of the balance of competence should become central in the choice of the appropriate legal basis and the delimitation of competence. Attention should be paid to drawing the outer limits of not only the CCP but also the other external relations

[282] The Commission used the opportunity to emphasize its view that transport services covered by Article 91 TFEU fall under implied exclusive Union competence.

legal bases in a way which would ensure that the conditions for their application do not become irrelevant."[283]

Drawing the outer limits of the CCP, to be sure, requires a robust operationalization of the conceptual link between treaty content, the specific measures that its obligations set forth, and the quality of their effects on international trade. The Opinion 2/15 proceeding offers a unique yet challenging opportunity for the Court to enhance clarity on this matter. The same applies to the aims and content of obligations that pursue EU treaty objectives, which are distinct from, but stand in context of the CCP. Attributing multiple legal bases to a Union act on the grounds of treaty content that is *de facto* ineffective in achieving the aims it superficially pursues (and exerts no direct and immediate effects to those ends) would result in a distorted image of the nature of external competence for the adoption of the respective legal act. It is for this reason that multiple identified treaty components and purposes should be assessed and weighed in context of and in relation to each other, based on objective factors, rather than in clinical isolation. If however, the Court's analysis omits a rigorous predominance test and is, rather, purely grounded on a face value assessment of competences for the conclusion of external treaty content (and attributes legal bases respectively) this choice should be made in a clear and transparent manner.

The following two paragraphs set out an alternative working hypothesis for the purpose of analyzing AG Sharpston's and – eventually - the Court's Opinion. This hypothesis proposes a contextual and effects-based interpretation of the aim and content of the EUSFTA in light of EU primary law. The Court's jurisprudence, as shown above, prescribes a contextual reading of the aims and content of the EUSFTA in order to determine the 'centre of gravity' of the act concluding the agreement. Such a contextual interpretation should take account of the discernable main objective, distinct components, and their effects on the purposes they pursue.

This analysis, in application of the criteria considered by the Court as outlined above, could result in the conclusion that the primary objective and the direct and immediate effects of EUSFTA obligations extend to the promotion of *international commerce* by and between the European Union and Singapore. It is clear, however, that there is no single legal basis in EU law, which governs the Union's external economic relations. The EUSFTA, in particular, contains three distinct components to

[283] Koutrakos, Panos (2008): p198

that end, notably a CCP component, a transport services component, and one component that governs investment other than foreign direct investment (portfolio).

Drawing a distinction between the commercial objectives of the EUSFTA and potentially residual non-commercial elements is not to suggest that the EU is exclusively competent to conclude the components that advance the EUSFTA's predominant commercial purpose. To the contrary, EU competence for the EUSFTA's predominant objective and the distinct components that exert effects to that end are divided in EU exclusive competence for the CCP, shared external competence for certain transport services, and member states' exclusive competence for the termination of member states bilateral investment treaties. Whether or not provisions governing portfolio investment liberalization and protection fall within the scope of EU exclusive competence or shared competence, finally, depends on whether or not the Court is willing to consider Article 63(1) TFEU as a 'common rule' within the meaning of the third ground of Article 3(2) – an issue that will be raised briefly in the next subsection before entering into an examination and discussion of AG Sharpston's analysis and findings.

The EUSFTA's *non-commercial* treaty objectives and components ('moral rights'; labour and environmental protection) may be deemed purely incidental to the main purpose of the agreement and very limited in scope - if properly assessed in context of treaty components governing commerce between the EU and Singapore. Testing for incidentalism of identified non-commercial components of the EUSFTA requires analysis that is based on objective factors. The Court, in its jurisprudence, has not set out such factors in a comprehensive or general manner. Rather, such analysis ought to be guided by the factors the Court has considered on a case-by-case basis in its past jurisprudence, which I have examined above. I shall discuss the question of incidentalism of non-commercial provisions and components of the EUSFTA in context of the analysis of AG Sharpston's opinion in Section 3.

2.4. Implied Powers under Article 3(2) TFEU

Finally, in addition to and distinction from *a priori* exclusivity of external competence under Article 3(1) TFEU, the Union may have acquired exclusive external competence for the conclusion of international agreements *by implication* via Article 3(2) TFEU when

1) "its conclusion is provided for in a legislative act of the Union"
2) "or is necessary to enable the Union to exercise its internal competence,"
3) "or in so far as its conclusion [by the member states independently] may affect *common rules* or alter their scope" [emphasis added]

Beyond the apparent clarity of the first ground set out by Article 3(2) TFEU[284], the second ground of the provision prescribes EU exclusive competence, according to the Court, where the "attainment of the Community objective [is] inextricably linked to the conclusion of the international agreement."[285]

The third ground of Article 3(2), moreover, makes for a significant codification of the Court's ERTA case law[286] and prescribes EU exclusivity when "the scope of EU rules may be affected or altered by international [member state] commitments where such commitments are concerned with an area which is *already covered to a large extent* by such rules"[emphasis added].[287] It suffices to say, at this point, that both the ERTA jurisprudence and its codification in Article 3(2) TFEU through the Treaty of Lisbon amendments have become a frequently used vehicle to advance exclusivity of external competence in regulatory areas where the Union has already exercised – or is in the process of exercising - its shared internal competence to an equivalent degree. In her submission to the Court, AG Sharpston advances a detailed analysis of the status quo of EU secondary legislation in areas where the Commission has alleged the existence of 'ERTA-effects'. A comprehensive examination of AG Sharpston's precise method for identifying implied exclusivity on the basis of existing secondary legislation, however, goes beyond the scope of this chapter. Suffices to note, in any case, that the Opinion 2/15 proceeding provides a unique opportunity for the Court to assess the effect – at this very moment in time - of constantly evolving EU secondary legislation on the state of implied EU exclusive external competence.

This chapter focuses on another question relating to implied exclusivity of external competence. The Commission, in the proceedings, advanced a novel

[284] This trigger, in view of Krajewski (2012) finds its origin in Opinion 1/94: para 94
[285] Opinion 1/03, para 37. Opinion 1/94. para 86
[286] *Commission vs Council* (C-22-70 *ERTA*): para 22
[287] Opinion 1/13. para 73 and cited case law

argument with respect to the third ground of Article 3(2) TFEU. In view of the Commission, exclusive external competence based on the Article 3(2), third ground, does not, in the specific case of EU internal competence for the movement of capital, require the exercise of internal competence (i.e. exercise of internal shared competence and – thus - existence of secondary legislation) but can be triggered by the mere existence of the 'common rule' codified Article 63(1) TFEU. In other words, the Commission argues that implied exclusive external competence for portfolio investment is established by reference to a primary law provision, without necessitating the exercise of the Union's (allegedly existent) internal competence. The question that inevitably arises is the following: Can EU primary law, in this specific case, trigger an 'ERTA-effect'? I will come back to a discussion of this issue in the final part of the next section.

3. The Legal Opinion of Advocate General Sharpston

In AG Sharpston's words, the questions addressed to the Court in the Opinion 2/15 proceeding are about "the core constitutional issue of the division of power between the European Union and its constituent member states – the principle of conferral of powers. It is about striking the desired balance between the unifying (supra-national) central authority set up under the Treaties and the European Union's constituent, still sovereign, Member States. Who is competent to act within the territory of the European Union: the EU or the Member States?"[288]

3.1. Exclusive Member States' Competences

In the written and oral submissions to the Court, the Council and several member states had claimed that 'mixity is a must'. To that end, member states and Council argued that various provisions of the EUSFTA fall under exclusive member states' competence.[289] These include the agreement's rules on the expropriation of foreign direct and portfolio investment; the liberalization of portfolio investment[290]; diplomatic protection of investors in arbitration proceedings[291]; moral rights related to

[288] Opinion of AG Sharpston: para 57
[289] For a legal opinion requested by the German Ministry for Economic Affairs and Energy, arguing along these lines, see: Mayer, Franz (2014)
[290] Opinion of AG Sharpston: para 338
[291] ibid.: para 518

intellectual property protection[292]; certain provisions relating to environmental protection[293]; as well as one individual rule governing the termination of member states' bilateral investment treaties (BITs) with Singapore.[294]

AG Sharpston dismisses all of these 'attempts of mixity' – except one. The AG opines that "the European Union has no competence to agree to Article 9.10(1) of the EUSFTA", which provides that existing EU Member States' bilateral investment treaties with Singapore "cease to have effect and shall be replaced and superseded" by the EUSFTA. The EU cannot agree to an obligation that requires the termination of international agreements of its member states if these are not parties to the agreement containing the said obligation. Doing so would violate "the fundamental rule of consent in international law-making".[295] As for this single provision of the EUSFTA, in consequence, "mixity is a must".

However, there does not seem to be a good enough reason why EU trade and investment agreements ought to include a BIT termination clause in the first place. The assumption that underlies its inclusion in the EUSFTA is to treat the termination of member states' BITs as a collary of entering into obligations providing for a regime that succeeds member states BITs. EU secondary legislation, however, already requires that member states' BITs may only maintain in force "until a bilateral agreement between the Union and the same third country enters into force".[296] A reference to this rule in EU trade and investment agreements may suffice to assure a third country of the EU member state obligation that follows from the entry into force of the EUSFTA under EU law. The termination clause of Article 9.10(1) EUSFTA is arguably redundant with respect to future EU treaties with third parties. The Union institutions could, in practice, rely on the duty of sincere cooperation, which requires that the member states "shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union."[297]

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[292] ibid.: para 420

[293] In the oral phase of the proceeding, a number of member states argued that the member states remained exclusively competent to enter into the obligation arising from Article 13.7(b) EUSFTA on Trade in Timber and Timber Products.

[294] Opinion of AG Sharpston: para 303

[295] ibid: para 396

[296] Article 3, *Regulation No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.*

[297] Article 4(3) TEU

As a result, EU exclusive member states competence identified by the AG in this particular instance, by itself, does not make for an unmovable obstacle to the signing and conclusion of 'EU-only' agreements in the future.

3.2. The Scope of EU Exclusive External Competence for the Common Commercial Policy under Article 207 TFEU

3.2.1. The Nature of EU External versus Internal Competence for Market Integration

The European Union enjoys exclusive competence over Common Commercial Policy (CCP), which is governed by the provisions of Article 207 TFEU.[298] Some member states, however, claimed in their written submissions that Article 207(6) TFEU[299] renders the exclusivity of EU competence in the area of the CCP contingent upon the existence of parallel – or corresponding - exclusive *internal* competence for the same substantive policy areas.[300] The Advocate General, however, dismisses this notion, which would indeed significantly limit the exercise of exclusive CCP powers: the scope of EU exclusive competence for external commercial treaty-making, she finds, is separate and broader than internal EU exclusive competence for market integration. EU competence for internal market integration, notably, is shared between the EU and the member states.[301] Article 207(6) TFEU should, moreover, not be read to require the exercise of internal shared competence as a precondition for the exercise of external exclusive competence. Rather, the AG deems Article 207(6) TFEU to make for a twofold expression of the principle of conferral, which is set out in Article 2(1) and 2(2) TFEU. Article 207(6) TFEU is therefore redundant. As a result, the member states' claim of perfect parallelism between internal and external exclusivity of competence does not find the AG's support and leaves the integrity of EU competence for the CCP intact.[302] The AG thereby follows the important conclusions of the Court in *Daichii Sankyo*, which made for a significant and commendable

[298] Article 2(1) TFEU in conjunction with Article 2(1) TFEU and Article 3(1)(e) TFEU

[299] Article 207(6) TFEU: "The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation."

[300] Opinion of AG Sharpston: For a general account on this issue, see: paras 105-110. In regard of intellectual property rights: para 440

[301] Article 2(2) TFEU in conjunction with Article 4 (2)(a) TFEU

[302] Opinion of AG Sharpston: para 109

departure from the Court's original position, as expressed in Opinion 1/94. I have provided a more detailed discussion of this issue in section 2.2.2 above.[303]

3.2.2. The Common Commercial Policy Component of the EUSFTA

AG Sharpston's response to the questions put before the Court generally and unsurprisingly confirms the expansion of the material scope of EU exclusive external competence in the area of its Common Commercial Policy under Article 207(1) TFEU.[304] The entry into force of the Treaty of Lisbon in 2009 has considerably widened the scope of the said provision by removing the distinction between trade in goods and services. Moreover, the treaty added 'foreign direct investment' to the realm of the Common Commercial Policy set out in Article 207(1) TFEU.

In *Daiichi Sankyo,* on the basis of pre-Lisbon case law, the Court applied the aims and content test to identify measures that fall within the scope of Article 207(1) TFEU. As discussed in the previous section, the Court subsumes content of EU legal acts under Article 207(1) TFEU if they *'specifically relate to international trade in that they are essentially intended to promote, facilitate or govern trade and have direct and immediate effects on trade'*.[305] The AG opines that this standard applies to EUSFTA rules and commitments on trade in goods and services indiscriminately, as well as to foreign direct investment[306] and commercial aspects of intellectual property rights[307]. Moreover, AG Sharpston finds that EUSFTA commitments on public procurement[308], competition policy[309], the mutual recognition of professional qualifications[310], and non-tariff barriers to trade and investment in renewable energy generation[311] are all 'specifically related' to international trade or FDI by means of governance, promotion, or exerting direct effects.

Notwithstanding fierce political and public debates over investment protection standards, it is unsurprising that Article 207(1) TFEU covers, in AG Sharpston's view, both market access *liberalisation* and standards applying to the *protection* of foreign

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[303] During the hearing, the AG asked the member states representatives and the Council: "How many hoops does the EU have to jump through to exercise exclusive external competence?" In her view, we now know, it is just one.
[304] Formerly Article 133(1) EC Treaty
[305] *Daiichi Sankyo*: para 51
[306] Opinion of AG Sharpston: para 328
[307] ibid.: para 435
[308] ibid.: para 399
[309] ibid.: para 408
[310] ibid.: paras 205, 207
[311] ibid.: para 484-488

investors and their investments ex post-admission. Her opinion confirms an inferential reading of the term 'abolition of restrictions' in Article 206(1) so as to encompass both 'restrictions' and standards of protection likewise.[312] With reference to the Court's jurisprudence on this question[313], the AG dismisses member states' claims for an exclusive or shared external power to regulate property and its expropriation, which they based on Article 345 TFEU.

Both liberalization and treatment of FDI consequently fall within the ambit of EU exclusive competence.[314] The dispute settlement mechanisms enforcing liberalization commitments and protection standards, moreover, "are accessory to the allocation of substantive competences" – including the politically contentious Investor-to-State-Dispute-Settlement (ISDS) mechanism of the EUSFTA.[315]

To establish that the provisions in question do in fact exert direct effects on international trade, the AG does not review available empirical evidence of such effects but is satisfied by examining whether a notional link can be established between the content of the EUSFTA and its potential to exert 'immediate and direct effects on international trade'. In context of her examination of chapter 12 on competition policy, for instance, the AG observes that

> "[the EUSFTA] requires each party to maintain and enforce in its respective territories comprehensive legislation governing agreements between undertakings, abuses of a dominant position and concentrations between undertakings which result in a substantial lessening of competition or which significantly impede competition, provided they affect trade between the European Union and Singapore. Those types of anti-competitive conduct are considered to be liable to undermine the benefits of trade liberalisation which the EUSFTA aims to achieve, either by rendering rules on market access nugatory or by reducing the economic benefits which undertakings of one Party may hope to obtain by trading their goods or services in the territory of the other Party."[316]

[312] ibid.: para 331
[313] *Commission vs Portugal* (Case C-367/98). para 48
[314] Opinion of AG Sharpston: paras 324-343
[315] ibid.: paras 523-535
[316] ibid.: para 460

Such reasoning is as intuitively persuasive, as it is permissive and discretionary. It reveals, in this instance, that the AG is, in her analysis, not guided by a rigorous examination of the 'direct and immediate effects on international trade' criterion. It is sufficient for the AG that the content "[aims] at promoting, facilitating or governing trade and *thus* has direct and immediate effects on trade in goods and services." The 'aims and effects' test applied in *Daichii Sankyo* and previous cases, however, seems to require that both conditions - aims *and* direct effects – are satisfied. It appears, however, that AG Sharpston's threshold is more generous in that direct effects are assumed to logically follow from codified intentions and objectives. The AG, in this instance, does consider the context of EUSFTA rules on competition matters – which is the liberalization of international trade – identifies the parties' intention to exert direct and immediate effects on international trade through rules and cooperation on competition policy matters. This circumstance is noteworthy to the extent that the AG's application of the 'aims and content' test places considerably more emphasis on the analysis of treaty objectives than on treaty effects. While commendable on substance in this particular instance, it is questionable at least whether this methodological nuance is conducive to achieving a clearer and more definitive delimitation of the CCP and whether the Court will engage in a more elaborate operationalization of the 'direct effects' test.

In sum, the overwhelming share of EUSFTA commitments, according to AG Sharpston's view, falls within the realm of EU exclusive competence for Common Commercial Policy. These conclusions are significant because they would – if upheld – subject a wide range of contemporary EU external economic policies to exclusive EU competence. The scope of the CCP, in her view, goes far beyond the legal framework of the WTO and is much wider than the limited scope proposed by EU member states, the Council, and numerous legal scholars.

The CCP content of the EUSFTA, in sum, makes for the by far largest component that aims at achieving the predominant objective of the EUSFTA, notably the promotion and governance of commerce between the EU and Singapore.

The following sections discuss components of the agreement, which, according to AG Sharpston's interpretation of the delineation of competences, would give member states represented in the Council the right to insist on 'mixity'.

3.3. The Transport Exception under Article 207(5) TFEU

AG Sharpston's reading of Article 207(5) TFEU (re)confirms the general exclusion of international agreements in the field of transport from EU Common Commercial Policy under Article 207 TFEU. "*As regards international trade in transport services*, the Treaties therefore seek to maintain a fundamental parallelism between internal competence and external competence. [emphasis added]" Those parts of the EUSFTA that concern transport services and services ancillary to transport *a priori* fall under EU shared competence for transport under Article 4(2) (g) and Title VI of Part III of the TFEU.[317]

The EU can only acquire *implied* exclusive competence in the field of transport if one of the three conditions of Article 3(2) TFEU is satisfied.[318] The third – and most frequently employed - ground of Article 3(2) TFEU triggers implied exclusive competence if the content of an external treaty is largely covered by EU common rules by means of the exercise of EU internal shared competence. EU common rules pre-empt the exercise of shared competences on behalf of the Member States.[319] Once common rules are adopted in a specific area, only the EU is competent to act externally. External member state action in that specific area would otherwise risk affecting or altering the scope of internal rules.[320] AG Sharpston thus confirms the established Court's ERTA jurisprudence and its codification in Article 3(2) TFEU.[321]

In light of corresponding EU secondary legislation, the AG finds that the Union has acquired implied exclusive competence on this basis over EUSFTA provisions on rail and road transport services. The Commission, in her view, failed to demonstrate, however, that the necessary conditions for conferral of implied exclusive competence in respect to air transport, maritime transport, and inland waterway transport services had been met.[322] They remain subject to shared external competence under Article 4 (2)(g) TFEU in conjunction with Title VI of Part Three TFEU. The transport component of the EUSFTA is thus partly covered by exclusive external competence as well as shared competence.

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317 ibid.: paras 208-215
318 ibid.: paras 221-269
319 Article 2(2) TFEU
320 Opinion of AG Sharpston: paras 117-131, 220
321 *Commission vs Council* (Case 22-70): para 22, 29-31; Opinion 1/94: para 96
322 Opinion of AG Sharpston: para. 268

Following the logic of the transport exception of Article 207(5) TFEU, EU public procurement commitments in the field of transport services also fall outside the scope EU Common Commercial Policy and are thus subject to shared competence.[323]

In order to avoid 'mixity' in future EU trade and investment agreements, such treaties would hence have to exclude maritime, air, and inland waterway transport, as well as transport services commitments in the public procurement chapter.

Splitting transport policy commitments, in theory, by separating provisions falling under EU exclusive and shared competence respectively would likely change the balance of negotiated concessions among the parties to the agreement and thus affect negotiated content. Doing so, however, appears to be unproblematic in practice. The EU has negotiated stand-alone – 'mixed' - transport agreements with third countries in the past.[324]

3.4. (Non-)Commercial Aspects of Intellectual Property Rights: 'Moral Rights'

As noted above, the Advocate General agrees with the Commission that essentially all EUSFTA provisions on intellectual property rights and their protection fall within the scope of Article 207(1) TFEU and thus EU exclusive competence.[325] In the opinion of the AG, however, EUSFTA provisions governing 'moral rights' of authors and performers are 'non-commercial' in their nature and thus cannot form part of the material scope of the protection of 'commercial aspects of intellectual property rights' under Article 207(1) TFEU. Rules on the protection of authors' and performers' moral rights would thus not be covered by EU exclusive competence.[326] Rather, in her view, *non*-commercial aspects of intellectual property rights "can be regarded as necessary to achieve the objectives of the internal market" and hence fall within shared competence of the European Union and the Member States on the basis of Articles 4(2)(a), 26(1), and 216(1), second ground, TFEU.[327]

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[323] ibid.: paras 404-408. The AG opinion, however, falls short of distinguishing between public procurement commitments that are linked to different types of transport services and may thus ignore implied exclusive competence for the negotiation of public purchases of rail and road transport services.

[324] See, for instance, 2002 EU-China Agreement on Maritime Transport; 2007 EU-US Air Transport Agreement

[325] Opinion of AG Sharpston: para 446-450

[326] ibid.: paras 451-454

[327] Opinion of AG Sharpston: para 456

This view deserves further scrutiny. The discretion exercised by the Court in past judgments appears to allow for conclusions that would render the EUSFTA provisions in question subject to Article 207 TFEU - either on the basis of their effects on trade, or on the basis of their purely incidental character. The following elaborations briefly examine the provisions at stake and discuss the two lines of reasoning for their (direct or contextual) inclusion within the scope of Article 207 (1) TFEU.

Chapter 11 of the EUSFTA on Intellectual Property sets out minimum standards for the protection of copyrights; patents; trademarks; designs; topographics; geographical indications; undisclosed information; and plant variety rights.[328] The objective of the respective rules is to facilitate the production and commercialization of products and services and to increase the benefits from trade and investment through the adequate and effective level of protection of intellectual property rights and the provision of measures for the effective enforcement of such rights.[329] To that end, Article 11.4 EUSFTA also incorporates the Berne Convention on Literary and Artistic Works as well as the WIPO Treaty on Performances and Phonograms. Article 6bis of the former and Article 5 of the latter agreement contain two largely identical provisions on the protection of 'moral rights' of authors and performers respectively - 'independently of their economic rights'. In essence, the two provisions protect authors' and performers' rights to be identified with the work or performance in question after economic rights have been transferred, even post-mortem, and the right to object to distortions or modifications of that work or performance if these would be prejudicial to his/her reputation. As such, the identifiable aim of the provisions is to protect author and performer rights where their economic rights, which are protected under these very treaties, have ceased to be effective.

The first consideration is whether such rights do – or have the potential to – exert direct and immediate effects on trade and therefore fall within the scope of Article 207(1) TFEU. While the rights protected here are inherently 'independent of economic rights', they do place a restriction on the exercise of commercial activities involving the use of the work or performance. It is the purpose of such rights to qualify the exercise of commercial property rights to the extent that those engaging in commercial activity involving the work or performance in question must respect

[328] Article 11.2(2) EUSFTA
[329] Article 11.1(1) EUSFTA

certain rights of the author or performer. In this way, 'moral rights' – conceptually - exert a direct effect on trade and make for a significant 'aspect' or restriction of commercial intellectual property rights. This point may serve to illustrate the difficulty to distinguish between commercial and non-commercial aspects of intellectual property rights – and direct versus implied effects on trade - in practice.

The provisions in question are, moreover, enforceable under the dispute settlement provisions of the EUSFTA. Remedies for the violation of a EUSFTA obligation include trade sanctions. It is in this (second) way that moral rights in the EUSFTA context are specifically related to international trade and have the potential to exert direct and immediate effects. This circumstance may make for a decisive difference if compared to the Court's agreement with Advocate General Wahl's view expressed in the Opinion 3/15 proceeding where he states that "[a]n example of a non-trade-related aspect of intellectual property is that relating to moral rights."[330]

But even if the Court finds moral rights provisions to fall outside the scope of Article 207(1) TFEU the Court ought to consider whether the parties' obligations concerning the protection of such rights make for an incidental and secondary objective and component of the EUSFTA Chapter 11 in relation to the EUSFTA's predominant commercial objective; in context of the CCP component of the EUSFTA; and/or in context of EUSFTA Chapter 11 on commercial aspects of intellectual property rights protection. A respective test could examine whether the EUSFTA obligations have the effect of changing the parties' obligations; if yes, whether the new status quo of obligations would require the EU to take specific measures; and whether such measures would have the effect of achieving an objective alternate to the external commercial objectives of the EUSFTA, such as the functioning of the internal market.

The Berne Convention has been ratified by all EU member states.[331] Accession to the EU requires accession to the Berne Convention.[332] Compliance of national laws with the provisions of the Convention thus makes for an obligation

[330] Opinion 3/15: Opinion of the Advocate General Wahl, p56; Opinion of the Court, p85. For a summary and discussion of the findings of the AG and the Court, see: Kübek, Gesa (February 17, 2017).

[331] List of signatories of the Berne Convention.

[332] Article 5 of Protocol 28 of the EEA Agreement requires accession of EEA contracting parties'. This provision has also been read as an obligation to accede to the international Conventions listed there. The Court, in *Berne Convention Case* (Commission vs Ireland, C-13/00) confirmed this view. On this subject, see also Cremona, Marise (2008): p147

under EU law. The WIPO Treaty, moreover, has been ratified by the EU and its member states.[333] Singapore, moreover, is a party to both Conventions.

The obligations on 'moral rights' accruing to authors and performers are harmonized by EU law - in case of the WIPO Treaty - and across member states, in case of the Berne Convention. Through the incorporation – or: replication - in the EUSFTA chapter on intellectual property the EU assumes a new obligation to protect moral rights in accordance with the Berne Convention vis-à-vis Singapore. The EU institutions, however, are arguably already bound to protect such rights under EU law.[334] EUSFTA moral rights obligations thus arguably do not require specific EU measures. Against this background, and viewed in context of the Court's jurisprudence on 'incidentalism', the 'moral rights' obligations in the EUSFTA could be deemed purely incidental and secondary to the predominant commercial objectives of the comprehensive economic rights, which are codified in the two conventions and incorporated in Chapter 11 EUSFTA on Intellectual Property. EUSFTA obligations on 'moral rights' are, at the same time, not 'necessary to achieve the objective of the internal market', as asserted by the AG. The provisions could, rather, be deemed as very limited in their scope and effects and thus make for an incidental non-commercial objective that is related but clearly secondary to the extension of external rights and obligations on commercial aspects of IPR protection.

In sum, it is arguable that 'moral rights' within the meaning of the EUSFTA fall within the scope of Article 207(1) TFEU due to the possibility to enforce such rights by means of trade sanctions. In the alternative, the examination of the relationship between the commercial and non-commercial aspects of intellectual property rights protection under EUSFTA Chapter 11, read in context of the CCP component of the EUSFTA, can result in the conclusion that the incidental character of the moral rights provisions does not affect the allocation of competences between the EU and the member states and thus does not merit reference to a legal basis other than Article 207 TFEU.

[333] List of signatories of the WIPO Treaty.
[334] *Commission vs Ireland* (C-13/00): para 19,20

3.5. Sustainable Development – Labour and Environmental Aspects

In the opinion of the AG, five individual articles of Chapter 13 EUSFTA on Trade and Sustainable Development (Art. 13.3.1, 13.3.3, 13.4, 13.6.2 and 13.6.3 EUSFTA) fall within the scope of EU shared competences.[335] These provisions concern aspects of labour and environmental policy.

In essence, the five articles reaffirm already existing international law commitments of the parties in these areas (ILO Conventions, Kyoto Protocol, UNFCCC) and broadly commit the parties to dialogue, consultations, and cooperation in this regard. Chapter 13, moreover, is excluded from the agreements dispute settlement provisions but provides for government consultations and expert panels to solve disagreements over the implementation of the chapter.[336]

According to the Advocate General, these five articles "essentially seek to achieve (…) minimum standards of labour protection and environmental protection, *in isolation* from their possible effects on trade." Mrs. Sharpston observes, moreover, that Chapter 13 "*neither impose[s] a form of trade conditionality* (by enabling the other party to adopt trade sanctions in case of non-compliance or by making a specific trade benefit dependent on compliance with labour and environmental standards) nor *otherwise regulate the use of commercial policy instruments* as means to promote sustainable development".[337] As a result, they do not fall within the scope of Common Commercial Policy, but should be based on social policy objectives[338] and environmental policy[339] – i.e. competences shared with the member states.[340]

This finding is striking in at least three regards. First, it is worth recalling that the AG applied a low threshold for the establishment of a 'immediate and direct effect on international trade' for the purposes of the EUSFTA chapter on competition policy. As outlined above, the notional link between anti-competitive practices and trade between the parties sufficed for the AG to deem EUSFTA competition provisions to fall within the scope of the CCP. The AG, however, does not follow the same logic in context the EUSFTA's chapter on sustainable development. This is despite the fact that the parties, in Article 13.1(3) EUSFTA,

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335 Opinion of AG Sharpston: para 502
336 Articles 13.15 - 13.17 EUSFTA
337 Opinion of AG Sharpston: para 496
338 Article 151 TFEU
339 Article 191(4) TFEU
340 Articles 4(2)(b), 4(2)(e) TFEU

> "recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labour and environment laws."

Arguably, the EUSFTA provisions on labour and environmental protection – by setting out minimum standards to which the parties have already committed themselves in context of other multilateral agreements – aim at reaffirming the parties' commitment not to lower the protections afforded to labour and the environment in order to gain a competitive commercial advantage. It is in this instance, again, that the legal facts before the Court in application of its own standards of analysis surface its considerable discretion. A final decision as to whether the provisions in question, read in context of the entire agreement, are sufficiently related to trade and investment in order to fall under the CCP is hardly restricted by the Court's own – rather liberal - standards of analysis. A requirement to employ empirical evidence for the 'direct and immediate effects' criterion may remedy this circumstance in the future and render respective decisions less unpredictable.

Secondly, notwithstanding the procedural obligations on cooperation and bilateral dialogue, it is worth emphasizing that the EUSFTA does not oblige the parties to implement commitments that they have not already assumed under other international agreements. Thus, the EUSFTA only reaffirms such substantive commitments. Moreover, the provisions make for largely unenforceable soft law. It could be argued, in light of the Court's past jurisprudence outlined further above, that the provisions in question are incidental and secondary to the main commercial purpose of the agreement and do not require reference to legal basis other than 207 TFEU. During the hearing of the proceedings, Rapporteur Judge Ilešič in fact enquired whether it is the Commission's intention to advance this argument.

Third, the AG appears to suggest that labour and environmental protection clauses could fall within the ambit of EU exclusive competence of Article 207 TFEU if they were linked to trade conditionality. By inference, the AG's finding – if upheld by the Court - could inspire issue linkages for the future design of agreements, i.e. the establishment of an enforcement mechanism that renders benefits accruing to the third party contingent upon compliance on labour and environment commitments. It is conceivable that it suffices, for that purpose, to render the sustainable development

chapter subject to the dispute mechanism of the respective agreement – assuming the possibility of authorized retaliation in case of non-compliance.

If upheld by the Court, the Advocate General's 'hint' at trade conditionality could thus still provide useful guidance for future 'EU-only' treaty-design. It is noteworthy, in this context, that the Joint Interpretative Instrument on CETA committed the parties "to initiating an early review of these provisions, including with a view to the effective enforceability of CETA provisions on trade and labour and trade and the environment".[341]

3.6. Portfolio Investment and the Prohibition of Restrictions on Capital Movement under Article 63(1) TFEU: 'Treaty Objective' or 'Common Rule'?

A question crucial for the mode of conclusion of EU external trade and investment treaties is whether the EU enjoys external competence over portfolio investment at all. If so, what is the nature of that competence?

The EUSFTA provisions on investment liberalization and protection follow a broad asset based definition of 'investment' and encompasses both direct and portfolio investments.[342] Liberalisation, standards of post-entry treatment, and the dispute settlement mechanism under the EUSFTA apply to all investments covered by that definition. The design of the EUSFTA, in this way, corresponds to international practice. Both economically and in legal-technical terms, portfolio investment liberalization and protection standards are closely interlinked with market access and protection standards for foreign direct investment. Whether the EU enjoys exclusive, shared, or no competence at all to enter into obligations on portfolio investment thus has a great bearing for 'EU-only' vs. 'mixed' treaty design and the invocation of respective internal procedures.

It is clear from the reading of 207(1) TFEU that the CCP covers 'foreign direct investment'. Relevant CJEU case law, moreover offers a conceptually clear distinction between foreign direct investment and portfolio investment. In view of the Court, a direct investment is characterized by lasting economic links that confer

[341] Paragraph 10(a), Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, October 27, 2016.
[342] Article 9.1(1) EUSFTA

managerial control over an undertaking upon an investor.[343] Indirect - or portfolio investments - in contrast are made "solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking".[344] Given the omission of portfolio – or indirect - investment from the wording of Article 207(1) TFEU, it clearly remains outside of the scope of the CCP.[345] EUSFTA provisions governing portfolio investment could hence only fall under implied exclusive competence or EU competence shared with the member states, if at all.

In the written and oral submissions, the parties consequently litigated whether and what nature of competence the EU enjoys over portfolio investment. The arguments focus on whether Article 63(1) TFEU can give rise to EU exclusive or shared competence. Article 63(1) provides that "all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited". In past jurisprudence, the Court held that movement of capital, within the meaning of Article 63(1), applies to both direct and portfolio investments.[346]

The Commission expressed the view that the EU holds implied exclusive competence on the basis of Article 3(2), third ground, in conjunction with Article 63(1) and 216(1), fourth ground. Alternatively, the Commission argued that the EU shares competence over portfolio investment with the Member States.

The AG's analysis and conclusion on this question, however, is rather puzzling both in terms of structure and substance. To begin at the end, AG Sharpston concludes that portfolio investment "falls within the shared competences of the European Union and the Member States, on the basis of Article 4(2) (a) and the *first* ground under Article 216(1) TFEU, in conjunction with Article 63 TFEU [emphasis added]".[347]

It appears that AG Sharpston (accidentally) errs here by invoking the first ground of Article 216(1) TFEU. Article 216(1) TFEU provides that "[t]he Union may conclude an agreement with one or more third countries or international organisations *where the treaties so provide* (…) [emphasis added]". The first ground of Article

[343] *Test Claimants in the FII Group Litigation vs Commissioners of Inland Revenue* (Case C-446/04) paras 180-183
[344] *European Commission vs Portuguese Republic* (Case C-212/09), para 48
[345] Opinion of AG Sharpston: paras 319-321
[346] *European Commission vs Portuguese Republic* (Case C-212/09) para 48
[347] Opinion of AG Sharpston: para 370

216(1) TFEU thus gives the Union treaty-making powers where the treaty *explicitly* allows for or mandates the conclusion of international agreements.[348] The norm governing the internal and external prohibition on restrictions to capital movements, as codified in Article 63(1) TFEU, however, clearly does not *provide* for the conclusion of international agreements.

AG Sharpston's reference to the first ground of Article 216(1) TFEU also seems to contradict the argument she advances in the previous paragraphs. Here, the AG builds a case for invoking the Union's shared treaty-making competence on the basis of the *second ground* of the same provision in conjunction with Article 63(1) TFEU.[349] The second ground of Article 216(1) TFEU renders the Union competent to conclude an agreement with third countries "where the conclusion of an agreement is *necessary in order to achieve*, within the framework of the Union's policies, *one of the objectives* referred to in the treaties [emphasis added]". AG Sharpston contends that "all the conditions for applying the *second ground* under Article 216(1) TFEU are satisfied here", notably, first, the existence of the treaty objective to remove external capital restrictions, and of, secondly, a competence to do so.[350]

The conferral of competence to this end is a necessary condition for the applicability of Article 216(1) TFEU, second ground. In fact, it makes for the only difference to the rule of Article 352 TFEU. Article 352 TFEU refers to the attainment of treaty objectives where the treaties do not provide for powers to do so. For Article 216(1) TFEU to be applicable, by inference, the necessity to achieve a treaty objective must coincide with the conferral of competence. The attainment of treaty objectives within the meaning of Article 21 TEU, via Article 352 TFEU, in contrast, would arguably not need to satisfy this condition.

The AG does indeed find that, "[p]ursuant to Article 63 TFEU, the European Union *clearly* has competence over the liberalization and protection of types of investment other than foreign direct investment (…) [emphasis added]".[351] But does it?

Chapter 4 of Title IV TFEU does in fact not provide for a Union competence for the adoption of secondary legislation on portfolio investment liberalization or protection, nor for the conclusion of external agreements to that end. It is worth

[348] For comparison: Article 207(3) or Article 191(4) TFEU explicitly provide for the conclusion of international agreements.
[349] Opinion of AG Sharpston: para 365-368
[350] ibid.: para 366
[351] ibid.: para 367

recalling, too – as the AG reminds us in her introductory remarks - that "[t]he European Union enjoys conferred powers only. It must therefore link a measure which it adopts to *a Treaty provision empowering it to approve that measure* [emphasis added]."[352] In regard of Article 63(1) TFEU, however, the AG treats the existence of competence and the treaty-given possibility to exercise that competence as a distinct matter: "[i]t is not necessary that the European Union be competent to adopt secondary law." For the purposes of external treaty conclusion within the scope of the second ground of Article 216(1) TFEU a matter must merely "fall within the scope of EU law and thus its competence".[353]

As such, the Advocate General interprets Article 63(1) TFEU as a treaty objective that aims at removing internal and external restrictions of capital movements *in the future* - rather than a rule prohibiting such restrictions *per se.* To achieve the objective inherent to the external dimension of the freedom of capital movements, it "may be necessary", in her view, to conclude international agreements.

In sum, AG Sharpston deems the rule prohibiting internal and external restrictions on capital movement in Article 63(1) TFEU to confer EU competence; codify a treaty-objective; and, in conjunction with the second ground of Article 216(1), provide for a legal basis for the exercise of EU external competence.

By inference, the AG appears to argue that the corresponding internal objective codified in the same provision could be achieved by resorting to internal harmonization measures adopted under on Article 114 TFEU as well as liberalization and protection measures adopted under Article 352 TFEU. Indeed, these two articles are the only treaty provisions that allow for the exercise of a competence conferred on the basis of Article 63(1) TFEU and would thus make for a necessary logical mirror of the attainment of the so-deemed external objective.

AG Sharpston's position presents an arguable yet debatable interpretation of Article 63(1) TFEU in conjunction with Article 216(1) TFEU. She concludes her analysis, however, with reference to the *first* rather than the *second ground* of Article 216(1), which is where the coherence of her argument, in my view, dissolves.

[352] ibid.: para 90
[353] ibid.: para 265

3.6.1. ERTA-plus? EU Competence for Portfolio Investment Liberalisation and Protection

Assuming that the AG, in fact, intended to advance an argument on the basis of the second ground of Article 216(1) TFEU from the beginning to the end of her analysis, it remains nonetheless questionable whether Article 63(1) TFEU should be interpreted as constituting a 'treaty objective' – within the meaning of the second ground of Article 216(1) TFEU - or a 'common rule', within the meaning of the third ground of Article 3(2) TFEU and the fourth ground of Article 216(1) TFEU.

It is worth noting, that Article 3(2) TFEU was only added to the treaty text with the entry into force of the Treaty of Lisbon in 2009 and makes for 'summary codification' of the Court's jurisprudence on implied powers. Senior connoisseurs of the Court's ERTA jurisprudence have thus wondered whether the Court, in light of this codification, would give new meaning to its terms or "shrug its shoulders" and continue to apply a conventional reading of the ERTA case law post-Lisbon on a case-by-case basis.[354]

In the proceedings, the Commission did indeed argue that the prohibition of restrictions on internal capital movements in Article 63(1) makes for a 'common rule' within the meaning Article 3(2) TFEU and pre-empted member states' exercise of external competence in the area of portfolio investment. The conclusion of member states agreements in that specific area would risk affecting the uniform application of the general rule prohibiting internal restrictions on capital movements codified in Article 63(1) TFEU. Article 63(1) TFEU in conjunction with Article 3(2) TFEU thus implied exclusive EU external competence over portfolio investment liberalization and protection.

In her argument, the Commission departs from the conventional application of the ERTA jurisprudence, which renders the conferral of implied exclusive external competence contingent on the *exercise* of an internal competence and adoption of secondary legislation. In Opinion 2/92, for instance, the Court reaffirmed the conventional ERTA contingencies in that "internal competence can give rise to exclusive external competence only if it is exercised."[355]

The Commission argues, in contrast, that 'common rules', within the meaning of Article 3(2) third ground TFEU, do not require the exercise of an internal

[354] Kuijper, Pieter Jan (2016a): p3
[355] Opinion 2/92. para 36

competence in this specific case, but take the shape of EU *primary* law.[356] In the opinion of the Commission, the treaty-prescribed prohibition of capital movement restrictions between member states in Article 63(1) TFEU constitutes a 'common rule' within the meaning of Article 3(2) TFEU. The conclusion of international agreements by the Member States would risk *affecting* the uniform application of the prohibition and thus implied EU exclusive external powers in this area. The Commission did not, however, argue that Member States' external action could *alter the scope* of primary law. The Union was therefore exclusively competent for the negotiation and conclusion of agreements covering rules on portfolio investment liberalization and the protection of such investments.

AG Sharpston acknowledges the novelty of the argument that the Commission puts forward and agrees that "the text of Article 3(2) TFEU itself does not offer decisive guidance."[357] Yet, she finds that "the parties' arguments regarding what common rules are relevant to the application of the ERTA principle to the area (…) of investment other than foreign direct investment suggest that there are various misunderstandings about 'common rules'. The present proceedings offer an opportunity for the Court to provide the necessary clarification".[358]

The AG questions why - if the Commission's argument was correct - the treaty-drafters did not provide for an *a priori* exclusive external competence over portfolio investment in Article 3(1) TFEU.[359]

Perhaps more importantly, the AG insists that implied exclusive competence can only derive from common rules that result from the exercise of internal competence.[360] Hence, "in the light of the judgment in ERTA and subsequent case law (…) it is clear that the Commission's broad interpretation of 'common rules' cannot be accepted."[361] Rather than examining the purpose inherent to this strand of jurisprudence in light of the specific question before the Court, AG Sharpston strictly rejects the applicability of the implied powers doctrine to primary law provisions and holds onto the formal elements of the ERTA doctrine.[362]

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[356] Opinion of AG Sharpston: paras 120, 276, 277
[357] ibid.: para 351
[358] ibid.: para 127
[359] ibid.: para 358
[360] ibid.: para 353
[361] ibid.: para 352
[362] For analysis resembling this view, yet questioning the conferral of shared competence for portfolio investment, see: Ortino, Federico and Piet Eeckhout (2012): pp 315-318

The objective of the ERTA jurisprudence, it appears, is to establish whether the exercise of Member States' competence - by concluding external agreements in a specific area - is "capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system, which they establish".[363] The AG, however, does not examine whether the conclusion of member states' agreements with third countries have the potential to affect the treaty based prohibition of restrictions on capital movement as codified in Article 63(1) TFEU. The AG refrains from doing so because she treats the norm as a treaty objective, rather than a prescription.

The AG also does not seek to explain the unique character and the (presumably existent) logic inherent to the treaty provisions on the freedom of capital movement: the treaty does provide for the exercise of Union competence under Article 63(1) in regard of the harmonization of EU legislation via Article 114 TFEU. Yet, the exercise of a competence to liberalize or protect portfolio investments, notwithstanding its conferral via Article 63(1) TFEU, is not provided for in the TFEU - neither in regard of the internal market nor vis-à-vis third countries. The Commission, in contrast, had explained this circumstance by stating that the comprehensive scope of the 'common rule' of Article 63(1) TFEU does not further require the adoption of secondary legislation.

It seems, moreover, that the AG may overstate the potential systemic implication of the Court's response to the question of 'common rules'. The Commission did not request clarification over whether primary law provisions, in general, can confer implied exclusive competence. Rather, the Commission advanced an argument that would, if affirmed, only set a precedent in regard of the nature of EU competence for portfolio investment, based on implied powers deriving from Article 3(2) TFEU in conjunction with Article 63(1) TFEU.

In light of these considerations, it appears that the Advocate General leaves considerable space for the Court to clarify the existence and nature of EU competence over the liberalization and protection of portfolio investment. Doubts pertain in regard of the correct legal basis for both shared or EU implied exclusive competence as well as the even more fundamental questions over implied powers on the basis of Article 3(2) in conjunction with Article 63(1) TFEU.

[363] Opinion 2/13. para 74

A Court Opinion that followed the conclusions of the AG and deems both EU and member states competent to conclude agreements covering portfolio investment owns a strong potential to complicate the effective exercise of EU *exclusive* competence over foreign direct investment. The economic and legal-technical link between direct and indirect investment does not seem to offer easy solutions for the separation of the two areas of regulation into distinct external agreements.

The EU could thus seek to conclude 'EU-only' agreements including investment provisions as a whole, subject to the political discretion of EU institutions, or accept a conclusion of future EU trade and investment treaties as mixed agreements. In the alternative, exclusive CCP agreements, on the one hand, and 'mixed' agreements on investment, on the other, could be concluded separately.

4. Conclusions

The Opinion 2/15 proceedings surface the vast amount of general and issue specific legal questions that lay beneath the request of the Commission for the Court to clarify EU competence for the conclusion of the EUSFTA. Some of these questions are of methodological character and demand a clarification of the Court's general approaches to competence and legal basis enquiries, as well as of its precise understanding of the relationship between the two. A considerable number of issues can be considered as genuinely novel, however, as they arise as a result of the Lisbon Treaty reform of 2009.

The examination of the Court's analytical approaches to the delimitation of exclusive vs. shared external Union competences, in general, and the CCP, more specifically, results in the conclusion that the Court has exercised and retains considerable discretion in deciding on competence and legal basis enquiries regarding acts concluding EU external agreements. The parameters, which the Court has considered or emphasized in its past reviews cannot be said to have advanced significant clarity or predictability of their appropriate application on a case-by-case basis. The Opinion 2/15 proceeding may offer a unique yet challenging opportunity for the Court to refine its analytical standards and approaches with a view to generating legal certainty beyond the ambit of facts specific to the case. The Court's judgment in Opinion 2/15 thus has a significant potential to reduce the incentives for litigation and decrease transaction costs of governance, which derive from

uncertainties inherent to EU primary legal institutions as well as from uncertainty over the Court's analytical focus.

Such clarifications could, first, include a more refined operationalization of the 'direct and immediate effects on international trade' criterion of the CCP 'aims and content' test, which should arguably require reference to empirical evidence – in contrast to establishing mere notional links - in order to guarantee a more consistent, coherent, and hence valuable application. The fluidity of the concept of 'trade effects' of treaty content, admittedly, renders such an exercise particularly difficult.

Secondly, it seems that the Court's past jurisprudence has not served to systematically clarify the precise relationship between external competences and the attribution the appropriate legal basis – or bases - for acts concluding EU external agreements, which pursue multiple purposes and/or encompass more than one discernable component. The Court's jurisprudence provides for anecdotal evidence of factors employed in the determination of the main or predominant purpose of the acts in question. It cannot be said, however, that the Court has set out 'objective factors amenable to judicial review' for the determination of predominant vs. incidental objectives and components of such acts. It is at the intersection of the legal basis test and the competence enquiry where the Court's judgment could and should provide for enhanced clarity so as to avoid the sort of confusion that is reflected in the diverging member states' responses to the legal basis enquiry placed before them by the Court in this proceeding.

Third, Opinion 2/15 generates an important opportunity for the Court to clarify the codification of implied powers under Article 3(2) TFEU in light of its ERTA jurisprudence, with specific and lasting relevance for the answer to the question whether the Union is externally competent – and if so, in what nature – to conclude external agreements covering portfolio investment liberalization and protection.

AG Sharpston's legal view affirms the tectonic shifts of competence, which the Lisbon Treaty reform has advanced and the Court's judgment in *Daiichi Sankyo* has begun to confirm. The vast majority of EUSFTA provisions and commitments will fall to EU exclusive competence, including the contentious investment dispute settlement mechanism. Her submission, however, also indicates that the EUSFTA and other 'new generation' FTAs, in the current form, could not be concluded as mandatory 'EU-only' agreements. Provisions on the termination of member states'

BITs as well as air, maritime, and inland-waterway transport services commitments are, in her view, not included in the scope of EU exclusive competence. Deleting the redundant 'BIT termination clause' and the negotiation of separate 'mixed' transport agreements could, if necessary, remedy this circumstance in a technically facile and politically uncontentious manner.

The same, however, cannot be said about the agreement's *non-commercial* provisions on labour and environmental protection standards, which the AG deems to fall under competences shared with the member states. It is questionable at least, however, whether the Court will eventually side with the AG on this matter. Both the precise application of the 'direct effects on international trade' criterion and the determination of 'incidental' treaty components could conceivably move the needle on the scope of exclusive external competence for these provisions. Be that as it may, the AG's opinion does suggest another remedy to avoid mixity in this instance, notably by linking compliance to the availability of trade benefits under future agreements. The availability of trade sanctions would establish a sufficiently specific relationship to trade and thus move labour and environmental protection provisions within the exclusive scope of EU Common Commercial Policy. It is noteworthy that this process is – at the political level – already underway with respect to the CETA.[364]

The Court may apply similar considerations to the issue of 'moral rights' for intellectual property, which makes for another area where the Court may exercise the discretion it retains with respect to the analytical approaches it employs. The AG, in this instance, found that moral rights, in context of the EUSFTA would serve to harmonize the laws of the member states to improve the functioning of the internal market, rather than being sufficiently related to trade to enter the realm of the CCP; or rather than making for an incidental component of the act concluding the EUSFTA.

Portfolio investment, which the AG deems to fall under EU shared competence, may create the greatest challenge for the future design of EU-only trade and investment agreements. It appears, however, that the Advocate General has left considerable space for authoritative clarification in regard of the existence and nature of EU competence in this area. The opinion of AG does not seem to eliminate doubts

[364] See Paragraph 10(a) of the Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States (13541/16), 27 October 2016.

over the correct legal basis for both conceivable scenarios, i.e. shared or implied EU exclusive competence over portfolio investment on the basis of Article 63(1) TFEU.

A Court Opinion that follows the conclusions of the AG and deems both EU and member states competent to conclude agreements covering portfolio investment would heavily complicate the effective exercise of EU exclusive competence over foreign direct investment. The economic and legal-institutional links between direct and indirect investments does not seem to offer an opportunity for the separation of the two regulatory areas into distinct external agreements. The EU could seek to conclude 'EU-only' agreements including investment provisions as a whole, subject to the political discretion of EU institutions, or accept the conclusion of mixed agreements. In the alternative, the Union could opt for the separate conclusion of exclusive CCP agreements, on the one hand, and 'mixed' agreements on investment and transport, on the other.

Only the Court's final verdict ended the legal uncertainty over the existence and nature of EU competences in these areas and gave authoritative guidelines for the design of EU external trade and investment agreements. It is true that the Court tends to follow the legal views expressed by the respective AG. Yet, the sheer number, complexity, novelty, and systemic significance of the issues at stake, as well as the rare sitting of the Court in full session of 28 judges may have arguably rendered this proceeding unlike others. The subsequent chapter provides for an assessment of the Court's opinion in light of the forgoing analysis and in context of the most recent inter-institutional contestation of EU competence for external economic governance in CCP practice.

VI. The 'Wallonian Saga' and Opinion 2/15: The Case for 'EU-Only' External Economic Agreements

1. Introduction

On 1st August 2014, negotiations of a free trade agreement between the EU and Canada, known as the CETA were completed. The signature, provisional application, and conclusion of CETA have sparked a fierce political debate across the Union and its member states. At the centre of this debate stood the question whether the EU has the legal competence to conclude CETA as an 'EU-only' agreement, i.e. in participation of its own institutions alone. A negative answer would have implied the conclusion of CETA as a so-called 'mixed agreement'. Mixed agreements, in turn, require joint unanimous signing and ratification by the EU and the member states in their own right. In practice, the conclusion of mixed agreements currently triggers the participation of at least 38 national and regional parliaments in the EU.

In light of the considerable expansion of the scope of EU Common Commercial Policy following the entry into force of the Lisbon Treaty, the European Commission emphasized that it legally views CETA as an 'EU-only' agreement. The Commission's plan to propose CETA as such was, however, vigorously opposed by the member states represented in the Council.[365] In 2014 already, a majority of national parliaments urged then EU Trade Commissioner Karel De Gucht to propose the conclusion of contemporary EU trade and investment treaties as mixed agreements as they feared that an 'EU-only' conclusion would compromise their legitimacy 'in view of the important role national parliaments have in the democratic decision making process in the EU'.[366] On July 5th 2016, in the eleventh hour, the Commission caved in to mounting political pressure in the Council and proposed the signing, provisional application, and conclusion of CETA as a mixed agreement. The consequences of that decision were not long in coming: In October 2016, the regional parliament of Wallonia voted against the Belgian signature of CETA. Its approval is a legal pre-requisite for the signature and ratification of commercial agreements under Belgian constitutional law. Notwithstanding the Belgian government's approval of CETA, the EU's treaty-making capacity therefore hinged upon the Wallonian veto. On 27 October 2016, in the nick of time, the Belgian government reached an

[365] Council of the European Union (13 May 2016): *Outcome of the Council Meeting*. p 4

[366] Tweede Kamer (25 April 2014): *Letter to Mr. de Gucht in the framework of the political dialogue: the role of national parliaments in free Trade agreements*.

agreement on the 'conditions under which the federal State and the federated entities exercise their full authority to sign CETA'[367], which paved the way for the agreement's subsequent signature by Canada and the EU.[368]

With its decision in Opinion 2/15 on the Union's competence to conclude 'new generation' EU trade and investment agreements in May 2017, the Court of Justice of the European Union (CJEU) provided ultimate clarity as to which institutions may legitimately pursue the Union's external objectives in its commercial relations.[369] As reflected by the inter-institutional political debate on the legal status of CETA as well as the subsequent Wallonian drama, the outcome of Opinion 2/15 has important implications for EU trade and investment policy formulation as well as the *de jure* legitimacy of multi-level economic governance in the European Union. In its 2/15 decision, the Court held that - with the exception of provisions relating to portfolio investment and the contentious ISDS mechanism - all components of the agreement can be concluded by the EU alone and without the approval of the member states in their own right.[370] Opinion 2/15 therefore confirms the tectonic shifts of competence that the Lisbon Treaty has brought about in the area of EU Common Commercial Policy. Overall, as argued below, the Court provided permissive guidelines as to how mixed treaty-making can be avoided through alternative design of EU trade and investment agreements. In doing so, Opinion 2/15 created the conditions for more effective, efficient, and politically legitimate EU external economic action.

It is the general enquiry over the legitimacy, efficiency, and effectiveness of EU Common Commercial Policy that informs the legal questions that are raised and discussed in this chapter. The underlying purpose is to emphasize the need for a more nuanced and constructive debate about the *de jure* legitimacy and quality of alternate democratic processes that apply to the signing, provisional application, and conclusion of 21st century trade and investment agreements in the EU. It is true that distinct modalities of treaty conclusion in the EU allocate different participatory rights among the political institutions of the Union and its member states in the decision-making process. Yet, the difference between member state parliamentary participation

[367] *Déclaration du Royaume de Belgique relative aux conditions de pleins pouvoirs par l'Etat fédéral et les Entités fédérées pour la signature du CETA* (27 October 2016).
[368] European Commission (30 October 2016): *EU-Canada summit: newly signed trade agreement sets high standards for global trade*.
[369] Opinion 2/15
[370] ibid, para 305

in the conclusion of 'EU-only' or, in the alternative, 'mixed' agreements is not a choice between involvement and exclusion. Rather, the procedures that apply to the conclusion of 'EU-only' and 'mixed' agreements provide for a qualitatively different involvement of Member State parliaments in the ratification process. In a mode of vertical integration in multi-level EU governance, parliamentary control rights at the national level shape the voting behaviour of member states' governments in the Council during the making of 'EU-only' agreements. At the same time, the 'EU-only' procedure elevates the role of the European Parliament (EP), which holds a veto right, in the democratic process. The conclusion of mixed agreements, in contrast, requires the horizontal participation of member states' political institutions. Mixed agreements endow all member state parliaments with decision-making rights that can, under certain circumstances, resemble the veto right of the EP and thus result in an extremely cumbersome and lengthy political process that sets inefficient incentives for political blackmail and paralysis.

Against this background, this chapter discusses and examines four related issues that are pertinent to the process and substance of the application and conclusion of contemporary trade and investment agreements in the EU. Section 2 builds the foundation for a discussion by providing for an explanatory account of the division and nature of treaty-making competences in the EU. Section 3 outlines the distinct modalities and procedures that the conclusion of international treaties as 'EU-only' or 'mixed' requires respectively. Section 4 examines the purpose, law, and practice of the provisional application of international treaties by the EU and embeds the Council decision on the provisional application of CETA into this context. Section 5 analyses the implications for future EU trade and investment treaty-making in light of the Court's decision on Opinion 2/15. Section 6 concludes this chapter with an outline of EU Common Commercial Policy governance in 2020 that would render external treaty-making more democratic, more effective, more efficient, and more reliable.

This chapter argues in favour of adjusting the scope of future EU trade and investment agreements to the realm of EU exclusive competences as clarified by the CJEU in order to remedy the functional deficiencies of EU treaty-making that were exposed in the 'CETA-drama'. At the same time, the chapter emphasizes the need for – and outlines a path towards - a qualitative change in EU and member state institutional practice that fully employs the channels of vertical political participation in the Union's multilevel governance structures and thereby strengthens the

legitimacy of EU economic treaty-making in its substance beyond formal rights of political participation.

2. 'EU-only' vs. 'Mixed' Trade and Investment Agreements: A Question of Competence

This aim of this section is to build a foundation for a more nuanced examination of constitutional questions surrounding the signature, provisional application, and conclusion of external economic agreements in the EU. For this purpose, the chapter first provides for a basic discussion of the scope of codified – or *a priori* - and implicit EU exclusive competences for trade and investment treaty making, in general, and CETA in particular. Drawing upon the notional distinction between EU exclusive, shared, and member state exclusive competences, the chapter discusses three categories of EU external agreements, notably 'EU-only', 'mixed' agreements, and 'facultative' mixed/EU-only agreements.

2.1. The Scope of Article 207 TFEU and the EU's otherwise Implied Exclusive Powers

Legally, the decision as to whether an agreement is concluded as 'EU-only' or 'mixed' depends on the scope and nature of EU external treaty-making competences. If the EU holds an exclusive competence, the member states are prevented from legislating internally and may not negotiate and enter into international commitments.

Exclusive competences are listed in Article 3(1) TFEU. This list includes the Common Commercial Policy (CCP) – i.e. the EU external trade competence –, which is codified in Article 206 and 207 TFEU. The scope of the CCP has been expanded in several treaty reforms over the last decades in adaptation to the requirements of the negotiation and conclusion of multilateral and bilateral trade and investment treaties as well as implementing legislation. The inclusion of services, trade related intellectual property rights, and foreign direct investment in the scope of exclusive EU competence as a result of the 2009 Treaty of Lisbon was arguably intended to adjust the scope of CCP exclusivity to the content of contemporary EU trade policy in general and EU preferential trade and investment agreements with third countries in particular.

2.1.1. The Scope of Article 207 TFEU

Prior to the CJEU's decision in Opinion 2/15, the exact scope of Article 207 and the question whether the entire content of CETA falls under this legal basis, has been subject to much debate among legal scholars and practitioners. Generally speaking, the choice of legal basis, according to settled case law, 'must rest on objective factors (…), which include the aim and content of that measure.'[371] To facilitate the determination of the legal basis for measures which may touch upon the scope of more than one of the legal bases of the TFEU, the Court developed the 'centre of gravity' theory, which entails an 'aims-test' that determines the predominant purpose of the measure in question. The Court, in its earlier judgments, held that '[i]f [the] examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant aim or component.'[372]

In application of the 'centre of gravity' theory post-Lisbon case-law, the Court has held that '[a] European Union act falls within the common commercial policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade'. As further discussed in Section VI, the Court advanced a wide application of the 'immediate and direct effects on trade' criterion in Opinion 2/15, which enabled it to subsume, in comparison, a broader range of EUSFTA content under Article 207 TFEU than Advocate General Eleonor Sharpston.

Yet, some elements of the modern generation of EU trade and investment agreements still fall within the realm of EU shared competences (Article 4 (2) TFEU). This notion has inspired much of the inter-institutional legal conflict over EU treaty-making powers and the conclusion of CETA. It is important to note, in this regard, that the internal exercise of a shared competence on behalf of the Union may, under certain conditions, imply exclusive external EU competence. As such, parts of trade and investment agreements that correspond to uniform EU rules resulting from the internal exercise of shared competences may thus broaden the scope of EU exclusive

[371] See, for instance *Parliament v. Council* (C-130/10), para 42 or *Commission v. Council* Case (C-377/12) para 34.

[372] *Commission v. Council* (C-377/12) para 34. See also ***Parliament v. Council*** **(C-155/07)** para 34-37; *Commission vs. Council (*C-300/89), para 17 – 21; *Commission v. Parliament and Council* (C-411/06) para 45 -47; *Parliament vs. Council* (C-130/19) para 43-45.

treaty-making competences by implication and, in turn, narrow the substantive scope of treaty parts that require EU member states to become independent parties to the agreement. The following section turns to the question of implied exclusive EU competences.

2.1.2. Implied Exclusive EU Competences

In addition to the *a priori* exclusive competences that are explicitly listed in the TFEU, EU exclusive treaty-making powers can be *implied*. Article 3 (2) TFEU provides for three situations where '[t]he Union shall also have [implied] exclusive competence for the conclusion of an international agreement'. First, the EU acts alone externally when an EU legislative act requires the Union to do so. The EU may, secondly, obtain exclusive implied exclusive powers to conclude international agreements when this is necessary for the exercise and achievement of the objectives of its otherwise internal competences.[373] Finally, the Union may act alone externally where the exercise of national member states' competence could affect common rules or alter their scope.[374]

In practice, implied exclusivity of external treaty-making powers under Article 3(2) TFEU is often a result of the adoption of EU internal legislation in an area of shared competence (Article 3 (2) (3) TFEU). EU legislation in an area of shared competence, first, pre-empts independent Member State action (Article 2 (2) TFEU). A sufficient degree of internal harmonisation via EU legislation may then imply an EU exclusive power to act externally. The rationale behind this trigger of implied exclusivity of treaty-making powers, as mentioned above, is to prevent that Member State agreements with external partners affect or alter the scope of common Union rules (Article 3 (2) (3) TFEU). In contrast to the remaining two conditions for implied exclusivity, this legal paradigm – the so-called ERTA doctrine as developed in the case law of the CJEU –requires that the EU exercises its competence in the policy area in question *to a large extent*. Yet, the Court has progressively developed a lenient interpretation of the ERTA test's 'largely covered' criterion. In its most recent decisions in Green Network and Opinion 3/15, the Court underlined that considerable

[373] Opinion 1/76, *Inland Waterways,* para 3-4 as clarified in in the '*Open Skies'* judgments, in particular, *Commission* v. *Denmark* (C-467/98) para 56; in this respect, see also Opinion 1/03, *Lugano Convention.* para 36.

[374] Commission vs. Council, *AERTA/ERTA* (Case 22/70) para 17; as clarified in Opinion 1/03, para 116.

Member State discretion in the implementation of EU legislation does not exclude findings of implied exclusivity.[375]

The precise ambit of implied exclusive powers, therefore, evolves over time either in parallel or complementary to the scope of the exercise of shared competences by the EU. The Court's authoritative interpretation of the reach of the CCP and the EU's otherwise implied exclusive powers in Opinion 2/15 finally provided clarity over the status quo of EU commercial treaty-making power in the Lisbon era. Opinion 2/15 is thus concerned with the precise delineation of the scope of a priori and implied exclusive competences in contrast to shared competences. It is this very question, which stands at the beginning of the current legal, political, and broader public debate about the two alternative democratic processes that apply to the ratification of EU trade and investment agreements.

2.1.3. Opinion 2/15 – The Crux of the Case

The Commission, in its preliminary questions to the Court in Opinion 2/15, asked the CJEU to clarify the scope of EU implied exclusive powers, in particular, and the legal status of EU trade and investment agreements that include provisions falling under shared EU competences, in general. In contrast to previous cases (e.g. in *Opinion 1/94* [376]) the Commission does not only inquire whether it has the exclusive competence to conclude the international agreement in question alone. Instead, the Commission asked whether the Union possesses the 'requisite competence' to conclude the EU-Singapore FTA (EUSFTA) by itself.[377] In its written submission in the *Opinion 2/15* proceedings, the Commission, 'has expressed the view that the Union has exclusive competence to conclude the EUSFTA alone and, in the alternative, that it has at least shared competence in those areas where the Union's

[375] *Green Network* (Case C-66/13), para 41-49 and Opinion 3/15, para 126 – 128

[376] Prior to the 2009 Lisbon Treaty reforms, the Court of Justice has facilitated the recourse to mixed agreements as soon as the Community's competences were non-exclusive. In the proceedings of Opinion 1/94, some member states argued that the TRIPS agreement concerned exclusive national competences. The ECJ, however, held that the Community was competent to harmonise national legislation in the field of trade related intellectual property rights. The Community had, however, refrained from exercising its shared competence. Member State action was thus not pre-empted. Without implied exclusivity, the community and the member states were, as the CJEU put it, 'jointly competent' to conclude the TRIPS agreement (Opinion 1/94, para 99 – 105). On Opinion 1/94 see also: Pescatore, Pierre (1999).

[377] Opinion 2/15, *Request for an opinion submitted by the European Commission* pursuant *to Art. 218(11) TFEU*.

competence is not exclusive.'[378] The member states 'have expressed a different opinion'.[379]

Indeed, in its written and oral submissions to the Court, the Commission questions whether the member states ought to become parties to an EU trade and investment agreement, which partly falls within the ambit of shared EU competences that are *not* implicitly exclusive in the sense of Article 3(2) TFEU. In other words, the Commission argued that the member states are not required to become parties to an agreement that covers non-exclusive shared competences, it is then left to the political discretion of the responsible EU institutions – here: the Council on proposal by the Commission – to allow the member states to become parties to the agreement, or not. 'Mixity' of an EU trade and investment agreement, in this case, would not be mandatory but *facultative.* By inference, treaty disciplines that fall into areas of shared competence still permit an EU-only conclusion of the agreement. For the purposes of this paper, it is sufficient to distinguish between three different categories of external agreements.

2.1.4. Mandatory 'EU-only' vs. Mandatory 'mixed' Agreements

First, the content of an EU trade and investment agreement with third countries may fall within the scope of EU (*a priori* and *implied*) exclusive treaty-making powers in its entirety. The main question that arises here regards the exact scope of exclusivity. While the Commission and the EP frequently argue for a broader scope, the member states tend to interpret the scope of exclusive EU competence narrowly. EU exclusivity of competences prevents member states from acting in the respective policy area. The conclusion of the treaty as 'EU-only' is mandatory.[380] The member states must not become parties to the agreement.

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[378] European Commission (2016), *Proposal for a Council Decision on the conclusion of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its member states, of the other part*; European Commission (2016), *Proposal for a Council Decision on the provisional application of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its member states, of the other part*; European Commission (2016): *Proposal for a Council Decision on the signature of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its member states, of the other part*.

[379] Ibid, p. 4.

[380] The EU may, however, for practical or political reasons, decide to delegate such treaty powers back to the MS. The 2012 Investment Regulation (Regulation No 1219/2012, O.J. 2012. L 351/40), to name one, grants the European Commission the right to authorize individual MS, upon request and on a case-by-case basis, to negotiate and conclude bilateral investment treaties with third countries.

The conclusion of an agreement as 'mixed' is mandatory when a treaty, in addition to content covered by EU exclusive competence or shared competences, includes rules that fall within the exclusive competence of the member states. In this case, the member states must act as independent parties to the treaty in order to assume the legal obligations of the external agreement that are not covered by any EU competence. In Court, EU institutions and the member states traditionally disagree as to whether certain treaty rules fall within the scope of exclusive member states competences, or not.

2.1.5. At Political Discretion: Facultative Agreements

A third and more contentious category concerns EU external agreements that cover rules, which fall under (*a priori* or *implied*) exclusive as well as non-exclusive EU competences without touching upon exclusive member states competences. In this case, legal scholars find themselves in fundamental disagreement over the appropriate and necessary legal consequence in regard of member states participation. Some argue that 'mixity' is mandatory as soon as only miniscule parts of an external agreement fall outside the scope of EU exclusive competence.[381] This would imply that a single treaty provision that falls within the ambit of shared EU competences triggers mandatory member states participation in the treaty conclusion and national ratification procedures in 28 member states in addition to the Commission, the Council, and the EP.

This view, however, is unconvincing. The broad scope of EU treaty-making powers under Article 216 (1) TFEU contradicts arguments in favour of mandatory Member State participation where the content of a treaty is covered by Union competences in its entirety. As long as treaty content falls within the scope of EU competences, whether exclusive or non-exclusive, there is no discernible legal obligation to include member states as independent parties to the agreement.[382] However, there is no requirement that would prevent EU institutions from including

[381] In his position as advisory expert for the German Party "Die Linke" as well as the NGO's "Foodwatch" and "Mehr Demokratie",Wolfgang Weiß, for instance, argued that "[a] treaty is necessarily a mixed agreement as soon as only one of its provisions falls outside of the scope of EU exclusive competences, even if that provision is of marginal importance seen in context of the entire agreement". See Weiß, Wolfgang (2017) *Verfassungsprobleme des Abschlusses und der vorläufigen Anwendung des CETA Freihandelsabkommens mit Kanada*, Stellungnahme zur Öffentlichen Anhörung des Ausschusses für Wirtschaft und Energie des Deutschen Bundestages.

[382] The majority of academic literature appears to agree with this point. See, for instance, Ehlermann, Claus-Dieter 1983); Heliskoski, Joni (2001). Eckhout, Piet (2011).

member states as parties to such an agreement either. As was recently argued by AG Wahl, 't]he choice between a mixed agreement or an EU-only agreement, when the subject matter of the agreement falls within an area of shared competence (..), is generally a matter for the discretion of the EU legislature'[383]– i.e. the Council on proposal of the Commission - subject to the procedural requirements of Article 218 TFEU.

3. Procedures: Signing and Conclusion of Trade and Investment Agreements in the EU

Having provided an introduction to the nature of EU external economic competences and the substantive prerequisites for 'EU-only' and mixed agreements, the chapter now turns to a examination of the procedural requirements for the signature and conclusion of both types of agreements respectively and briefly examine associated caveats. From a member states' perspective, it may be useful to conceptualize the participatory rights and obligations accruing to them in the 'EU-only' democratic process as a vertical relationship with the mandated EU institutions, whereas all member states governments stand, in their own right, in a horizontal relationship with EU governing institutions in case of the 'mixed' procedural *modus operandi*.

3.1. Signature and Conclusion of 'EU-only' Agreements

As explained above, 'EU-only' trade agreements are signed and concluded in sole participation of the Union's principal institutions – the Commission, the Council and the EP – without formally requiring national parliamentary approval as part of the ratification process. EU primary law prescribes that the Council adopts decisions both on the signing and the subsequent conclusion of trade agreements on the basis of proposals made by the Commission.[384] The Council may choose to amend the proposals. Such an amendment, however, is subject to a unanimity requirement.[385] The conclusion of a trade agreement (but not its signature[386]) further necessitates the consent of the EP.[387] Assuming that the EP gives its consent for the conclusion, the proposals for both signature and conclusion can be adopted in the Council by

[383] Opinion of AG Wahl, *Opinion 3/15,* para 119. See also Opinion of AG Sharpston, *Opinion 2/15,* para 74
[384] Article 218 TFEU, read in conjunction with Art. 207 TFEU
[385] Article 293 (1) TFEU
[386] Article 218 (5) TFEU
[387] Article 218 (6) (a) (v) TFEU

qualified majority vote (QMV), notwithstanding policy-specific unanimity requirements spelled out in Article 207 TFEU and elsewhere in the treaties.[388] From signature to conclusion of the respective treaty, the ratification period may only last a few months. 'EU-only' agreements, therefore, are likely to ensure a speedy entry into force of an agreement that has been negotiated over years. Legal certainty for governments, citizens, and businesses, a fast and predictable implementation of the agreement with a view of reaping commercial benefits, as well as the efficiency of the public decision-making process, are some of the advantages that the 'EU-only' ratification track carries with it.

Contrary to the views held by some commentators, the conclusion of 'EU only' agreements does anything but preclude national parliamentary participation in the ratification process. EU law does not prevent national governments from requesting or requiring a national parliamentary vote on an executive proposal to adopt an international agreement in the Council. Member State constitutions frequently contain provisions that allow for the parliamentary control rights or even render respective votes mandatory. For instance, Germany's Chancellor Angela Merkel, one day in advance of the Commission's CETA proposals, clarified that '[t]he participatory rights of the German Bundestag allow that we, as the federal government, will, of course, involve the Bundestag. The parliamentary vote will play an important role in the German voting behaviour [in the Council] in Brussels'.[389] The German Bundestag has indeed weighed in on the matter expeditiously and voted – with a majority of more than two thirds – in favour of a pertinent motion by the governing party factions. The motion demands that the German representative in the Council votes in favour of the EU signature and provisional application of CETA if the provisional application of the agreement does not encroach upon potential exclusive Member State competences.[390] For the signing, provisional application, and conclusion of EU-only agreements, such modalities of national parliamentary participation may serve as an example *par excellence*.

At the EU level, the Lisbon Treaty of 2009 has greatly enhanced the participatory, information and control rights of the EP in the process of concluding Common Commercial Policy agreements with third countries. Most importantly, the

[388] Article 207(4) and 218 (8) TFEU
[389] Deutsche Bundesregierung (30 Juni 2016): *Freihandelsabkommen CETA. Merkel: Bundestag muss mitstimmen*.
[390] Deutscher Bundestag (20 September 2016) *Antrag der Fraktionen der CDU/CSU und SPD*.

EP is equipped with a right to veto international trade and investment agreements and receives regular reports on the progress of negotiations from the Commission.[391] Members of the EP, and its Committee for International Trade (INTA), have made extensive use of the newly acquired rights and responsibilities throughout the past years. The EP is arguably most responsive to the political participation of European citizens in respect of Common Commercial Policy issues and is characterized by great proximity to the policy-making processes. These two factors alone may – over time - render the EP the best-suited EU institution to provide EU trade agreement ratification procedures with the necessary democratic legitimacy in accordance with the high standards of European parliamentary democracies. For EU-only agreements, in any case, it is the EP that is *de jure* responsible to guarantee democratic control and legitimacy.

3.2. Signature and Conclusion of 'Mixed' Agreements in the EU

Procedurally, the conclusion of a mixed agreement requires two parallel ratification processes that are of paramount significance. Ratification by both EU and Member State institutions gives justice to the fact that both the EU and the member states become parties to the treaty under international law in their own right. On the EU-side, the above-mentioned procedures for the signature and conclusion of trade and investment agreements apply. In addition, in case of a mixed treaty, the agreement ought to be ratified by each Member State in accordance with the respective national constitutional requirements. At the time of writing, the constitutions of the EU-28 prescribe, in sum, affirmative votes by at least 38 national and regional parliaments. Some member states may even require national referenda. Mixed agreements hence significantly prolong the duration of the ratification process that starts with the signature and ends with the entry into force of an agreement.[392] Given the duration necessary to acquire the consent of all chambers and notification thereof by all governments, the ratification of mixed agreements causes a great amount of legal uncertainty for both governments and businesses in the EU and for EU treaty partners. The ratification period of the EU Free Trade Agreement (FTA) with Korea (KOREU),

[391] Article 207 (3) TFEU in conjuncture with Article 218 (6) TFEU.
[392] To name but one example: The EEC-San Marino Agreement on Cooperation and Customs took 11 years to enter into force (OJ L 84/43). It was signed in 1991 and concluded in 2002 (Council Decision 2002/245/EC, OJ L 84/41 of 28/03/2002). See Rosas, Alan (1998): pp 125, 134.

for instance, lasted no less than five years.[393] The conclusion of an 'EU-only' agreement in contrast, as noted above, may only take a few months.

The answer to the question of whether a treaty's content qualifies as 'EU-only' or 'mixed' thus has important implications for the efficiency and effectiveness of public decision-making in the EU system of multi-level governance and the procedures that are employed to endow the conclusion of the treaty with democratic legitimacy – in addition to the approval through elected governments represented in the Council. 'Efficiency and effectiveness of governance', in case of 'EU-only' treaties, however, does not implicate a trade-off with the value of 'democratic legitimacy'. As noted above, member state parliaments may well - and should indeed - play an important role in the national deliberation process that determines a member state's vote in the Council, in accordance with participatory rights granted to a national parliament under the constitution of the respective Member State. Moreover, the central role of the EP in the process of concluding EU trade and investment agreements gives justice to the inherently *collective* nature of the EU's external trade and investment policy and the need for a *common* democratic process that legitimizes and exercises control over policy-formulation in the area of the Union's Common Commercial Policy.

Arguments in favour or against 'efficiency of governance' as well as vertical vs. horizontal modes of parliamentary participation in multi-level governance decision-making reflect individual normative preferences and political interest configurations. Respective public or inter-institutional debates, however, need to be separated from a positive legal analysis of how EU member states have decided to answer these questions in the EU treaties and member states' constitutions. Legitimacy, above all, can only be derived from a democratic process that abides by the rule of the law, which is codified in the EU Treaties and Member State constitutions. To settle respective political differences over the question of the appropriate applicable procedure for the conclusion of CETA and EU trade and investment agreements in general, we ought to return to the legal question of whether the member states have conferred treaty-making powers to the Union that are sufficient for an 'EU-only' conclusion of 21st century trade agreements, or not. The ongoing legal and scholarly debate on this issue - as well as the political positions of

[393] Council of the European Union (1 October 2015): *EU-South Korea free trade agreement concluded*.

different institutions - can give important insights. In the end, however, only the Court of Justice of the European Union can decide upon such matters authoritatively and has done so in its Opinion 2/15 decision in May 2017, which are outlined and discussed briefly in Section VI.

4. Provisional Application: EU Practice, Termination, and the Council Decision on CETA

This section examines a cornerstone of EU treaty application practice, which is of crucial importance for EU external relations conduct where the conclusion of mixed agreements would otherwise considerably delay the application of the respective treaty. It is for this reason that the provisional application of external treaties has become a commonplace and indispensible instrument of EU external relations. At the same time, the scope of EU competences vis-à-vis its member states as well as the scope of the Union power – in time and substance – to apply treaties provisionally without acting *ultra vires* has been subject to intensive scrutiny and declaratory precautions on behalf of the member states. This section hence serves to identify the relevant legal questions, outline past EU practice, and discuss – against this background – the Council decision on the provisional application of CETA. Finally, this section debunks a myth over the legal requirements for the termination of provisional application in the EU.

The provisional application of international agreements is a frequently used instrument of international law. It is vaguely regulated in Article 25 of the Vienna Convention of the Law of the Treaties (VCLT) of 1969, which codifies longstanding international legal customs.[394] Provisional application describes a situation where the governments of the states that sign an international agreement decide to give effect to the rights and obligations of the said agreement as a whole or in parts, upon signature or on an agreed date, pending the entry into force of the treaty. Hence, provisional application bridges the time period that passes between the signature of a treaty and its entry into force.

[394] Article 25 VCLT: 1. 'A treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) The treaty itself so provides; or (b) The negotiating States have in some other manner so agreed. 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.' For a detailed overview on the provision see Dörr, Oliver and Kerstin Schmalenbach (2012): pp.407-421.

Provisional treaty application has been an effective instrument in the context of mixed agreements where national parliamentary participation substantially prolongs the ratification process. The effectiveness of EU external action, and the effectiveness of international relations more generally much hinge upon the provisional application of international treaties.[395] Yet, despite the heavy reliance of the international community on this tool of customary legal practice, it remains a legal instrument of choice: neither EU law nor international law provide for any obligation to apply intergovernmental agreements provisionally before ratification procedures have been completed.

The VCLT provides that the 'negotiating States' may agree to apply a treaty, in view of pending ratification procedures, provisionally in its entirety or in parts. As such, Article 25 VCLT ought to be understood to recognize and codify an executive prerogative of nation states' governments to apply international treaties upon or after signature until their entry into force. Given the circumstance that neither the European Community nor its successor, the European Union, can formally be regarded as a 'State' under the VCLT it remained unclear, for a long time, whether the Community had the powers to apply external treaties provisionally. It was only with the EC treaty reform of Amsterdam in 1997 that the member states delegated a power of provisional application to the Community institutions.[396]

Up until to date, the EU treaties still give little guidance as to the permissible substantive scope, duration - or conditions for the end of - provisional treaty application. Article 218(5) TFEU stipulates that '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.'[397] By omitting a reference to EP approval or consent, the provision arguably still reflects the notion of an executive prerogative of nation state governments, as provided for in Article 25

[395] The likely most prominent example of the provisional application of a trade agreement is the 1947 General Agreement on Tariffs and Trade (GATT). The 1947 GATT was applied provisionally right until the foundation of the World Trade Organisation in 1995. The Protocol of Provisional Application of the General Agreement on Tariffs and Trade (PPA) was drafted to bring GATT provisions into effect whilst negotiations over the establishment of an ITO were on-going. Eight GATT contracting parties signed the PPA on 30 October 1947, with the remaining fifteen original contracting parties agreeing soon thereafter.

[396] Article 228 (2) of the Treaty of Rome did not include a respective provision. The Treaty of Amsterdam replaced Article 228 (2) by Article 300 (2) TEC, which introduces the power of provisional treaty application for the Community institutions. Article 218 (5) TFEU now contains revised wording.

[397] Article 218(5) TFEU

VCLT. It is the 'EU executive' - the European Commission – and the EU chamber representing the executives of EU member states' - the Council -, which determine the scope of provisional application in substance and time, subject to the permissive guiding principle set out in Article 25 VCLT and mutual agreement with the external party to the agreement.

4.1. EU Practice

Past EU practice has reflected a broad and permissive interpretation of Article 218 (5) TFEU on behalf of the Commission and the member states represented in the Council. The ('mixed') EU-Korea FTA serves as an example *par excellence*. The EU ratification period, as noted above, lasted no less than five years, whilst the parties provisionally applied the agreement six months after its signature. The Commission initially proposed to provisionally apply the agreement in its entirety.[398] The Council decision, however, excluded two miniscule parts of the treaty, notably provisions relating to the criminal enforcement of intellectual property rights and cultural cooperation, which, according to some member states, touched upon exclusive Member State competences.[399]

It is important to note, however, that the Council decision did not exclude other provisions that fall within the scope of competence areas that were now contested in Opinion 2/15, such as portfolio investment,[400] or maritime transport services.[401] In the proceeding, several member states argued that maritime transport made for a shared competence whereas portfolio investment remained an exclusive member states competence.[402] Yet, the delegation of the power to provisionally apply EU external agreements as foreseen in the Council decision 'does not prejudge the allocation of competences between the Union and its member states in accordance with the Treaties'.[403] It remains noteworthy, however, that the Council appeared to be of the legal opinion, reflected in its decision on the provisional application of the EU-

[398] European Commission (2010): *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*.
[399] *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.
[400] Article 8.2 (2) (c) EU-Korea FTA
[401] Article 7.47 EU-Korea FTA
[402] Kleimann, David and Gesa Kübek (2016a)
[403] Council Decision of 16 September 2010: Recital (9)

Korea FTA, that it is empowered to apply treaty parts provisionally, which, according to the views expressed by the member states in the Opinion 2/15 proceedings, fall outside of the scope of EU exclusive competences (such as maritime transport) or even fall within the scope of Member States exclusive competence (e.g. portfolio investment).

In sum, member states have, in past practice, evidently supported and enabled the provisional application of treaty parts, which they otherwise consider to fall within the scope of shared or exclusive member states competences. This fact seems to underline the nature of provisional application as an international legal instrument, which is distinct from EU treaty conclusion. Decisions of the Council under Article 218 (5) TFEU, in accordance with EU law and practice, may give effect to any substantive treaty provision.

Some legal scholars and practitioners have argued, however, that EU institutions act *ultra vires* if they give provisional effect to parts of modern trade agreements that fall within the exclusive scope of member states' competences or even competences shared with the Union.[404] This argument stands at odds with consistent Member State practice in the Council as well as the provisions of EU primary law. The Council may decide to limit the scope of provisional application proposed by the Commission as it deems fit by amending the Commission proposal unanimously. Moreover, as noted above, Council decisions on a treaty's provisional application frequently entail disclaimers stipulating that such legal acts do not reflect the division of competences as between the EU and the member states. The inclusion of treaty content falling under shared competences is thus entirely unproblematic. Yet, the inclusion of issues which fall within exclusive Member State competence, however, require a reference to Article 352 (1) TFEU to complement the procedural legal basis of Article 218(5) TFEU with a substantive legal basis. In accordance with the rules specified in the Article 352 (1) TFEU, unanimous Council voting and mandatory EP consent would be required to adopt the respective decision.

As noted above, Article 218 (5) TFEU does not attribute - in the decision as to whether and to what extent a treaty may be given effect on a provisional basis - any role to the EP. In post-Lisbon practice, however, the EP has been informally granted the right to give formal consent to EU trade agreements before an agreement is

[404] Foodwatch e.V. (24 March 2016) *CETA durch die Hintertür: Wirtschaftsminister Gabriel plant Entmachtung des Bundestages,* p.21-13.

applied. The modality to achieve this end was, so far, to coordinate the date of provisional application, as decided by the Council, with the voting schedule of the EP. The EU-Korea FTA set an important precedent in this regard. With respect to CETA, EU Trade Commissioner Malmström has similarly assured the EP that the agreement 'will not be applied until after the EP has voted on it'.[405] This practice is set to continue if, and once, contemporary EU trade and investment agreements are signed and concluded as 'EU-only' agreements in the future. Among EU institutions and the member states, there is a broad consensus on the view that EP consent prior to provisional application of a treaty provides necessary democratic anchor to executive decision-making at the EU level that affects the livelihoods of European citizens. Respective intra- and inter-institutional discussions, at this point in time, aim at clarifying whether such practice could be formalized and required by including a respective provision on the necessity of EP consent prior to provisional application in the Council decisions on the signature and provisional application of the future respective treaties.

Having examined the relevant law and practice relevant for the provisional application of EU external economic agreements in the previous paragraphs, the next section endeavours to debunk a persistent myth that arose in regard of the procedure applying to the termination of the provisional application of EU external treaties.

4.3. Terminating CETA Provisional Application (in Berlin?)

Prior to the signature of CETA on October 28, 2016, the German Federal Constitutional Court (*Bundesverfassungsgericht* (BVerfG)) adopted a decision that encouraged the German government to ensure that 'it has, as a final resort, the possibility of terminating the provisional application of the Agreement for the Federal Republic of Germany by means of written notification'.[406] On the occasion of the adoption by the Council of the decision authorizing the signing of CETA, Germany, Austria and Poland declared - in two separate statements - that 'as Parties to CETA

[405] European Parliament (18 July 2016): *Parliamentary Questions: Answer given by Ms Malmström on behalf of the Commission*.

[406] Bundesverfassungsgericht (Press Release of 13 October 2016): *Applications for a Preliminary Injunction in the "CETA" Proceedings Unsuccessful*, para 3. For an analysis of the BverfG decision on CETA see: Nowrot, Karsten and Christian Tietje (2017)

they can exercise their rights which derive from Article 30.7(3)(c) of CETA. The necessary steps will be taken in accordance with EU procedures.'[407]

However, it is questionable, to say the least, whether an individual Member State can in fact terminate the provisional application of CETA unilaterally. It is true, to begin with, that all member states act as independent contracting parties to CETA. The BVerfG therefore seems to believe that Germany, as a party to the agreement, has the right to unilaterally terminate the provisional application of the agreement. Neither the BVerfG, nor the German, Austrian or Polish representative, however, elaborated on the question of how an individual Member State could single-handedly terminate the provisional application of a treaty that is applicable to the Union in its entirety via a legal act adopted by the Council.

There are two ways to think about the Germano-Austrian and Polish positions: First, it may presume the right of full or partial termination of the provisional application of CETA on the territory of that respective Member State only. In the alternative, it may presume that a Member State has the right to terminate the provisional application of CETA on behalf of the EU and the remaining member states.

The BVerfG guideline for the German government, first, seems to suggest that each Member State remains competent to terminate the application of CETA in its own territory vis-à-vis the EU, Canada and the remaining member states. As a member of the EU's single market and customs union, it is, however, technically impossible for a Member State to unilaterally terminate the application of CETA in its territory without terminating the provisional application of the treaty in its entirety for all contracting parties.[408] CETA does allow for a partial provisional application through mutual consultation between the parties prior to the date of provisional application (Article 30. 7 (b) CETA).[409] A partial termination of the agreement's application by one contracting party, at a later stage, is not foreseen in CETA.

[407] Council of the European Union (27 October 2016), *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part*, statements to the Council minutes, statement 21-22. The quote refers to statement 21 by Germany and Austria.

[408] To name just one example: A Member State may not individually decide to charge tariffs and quotas on imports from third countries while the rest of the EU agreed to abolish custom duties (Article 3(1) TFEU in conjuncture with Article 206 and 207 TFEU).

[409] As outlined in the following section, the Council decided to exempt a number of substantive provisions from the scope of the provisional application of CETA – notably in the provisions on investor-state dispute settlement and provisions applying to investments other than 'direct' investments.

According to the text of the agreement, the signing member states may therefore not unilaterally terminate the provisional application of CETA in their respective territories, irrespective of whether such exemptions would be technically feasible or not.

In the alternative, does the BVerfG - as well as the Germano-Austrian and Polish position - indicate that a single Member State, by acting as an independent party to the agreement may terminate the provisional application of CETA on behalf of the EU and all remaining member states? As stated above, it is the Council that decides on the provisional application of a treaty following on a proposal by the Commission. Article 218 (9) TFEU stipulates that the decision to suspend the application of an agreement shall be proposed by the Commission and then adopted by the Council. Hence, the decision to end the provisional application of an agreement under EU law cannot be adopted by an individual Member State alone. Instead, the suspension, and, likewise, termination of an agreement's (provisional) application has to mirror the required voting rules for treaty adoption in the Council. For the majority of agreements that implies EU decision-making by QMV. As a result, the decision to terminate the provisional application of an agreement ought to be taken by the Union in accordance with Article 218 (9) TFEU - and not by individual member states.

4.4. Provisional Application of CETA – The Council Decision

The EP's approval of CETA on February 15, 2017, paved the way to apply the vast majority of CETA rules provisionally.[410] The Council decision on the provisional application of CETA, as adopted on October 28, 2016,[411] reflects an intricate legal - political compromise among the member states, which was negotiated under the impression of legal uncertainty in anticipation of the Opinion 2/15 CJEU decision. The Commission formally proposed the provisional application of CETA in its entirety.[412] The CETA text itself explicitly provides for either full or partial provisional application of its provisions.[413] After intensive discussion in the Council's

[410] European Commission (2017): *European Commission welcomes Parliament's support of trade deal with Canada*.
[411] Council Decision (2016), *Provisional Application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part*.
[412] European Commission (2016): *Proposal for a Council Decision on the provisional application of CETA*.
[413] Article 30.7(3)(a), (b) CETA.

Trade Policy Committee (TPC) on July 15th 2016, the Commission agreed with the member states on the exclusion of certain parts of CETA from provisional application.[414]

The substance of the Council decision is characterized by both an attempt to maximize the scope of partial application of the agreement, on the one hand, and the Council's reluctance to apply CETA provisions provisionally that may potentially – pending the CJEU's judgment in Opinion 2/15 - fall within the ambit of member states' competences. This observation indicates that member states, contrary to some past practice, move towards more nuanced employment of the instrument in order to limit its scope to treaty parts falling under EU exclusive and shared competences. To that end, the Council states that 'only matters within the scope of EU competence will be subject to provisional application.'[415] Hence, the Council decision mirrors a great sense of caution among the member states. Given the legal uncertainty over the exact delineation of EU exclusive, shared, and MS exclusive competences at the time, the decision and 38 attached statements and declarations repeatedly emphasize that the scope of provisional application of CETA 'shall respect the allocation of competences between the European Union and the member states'[416] and 'does not prejudge the allocation of competences between the EU and the member states.'[417]

In addition to the legal uncertainty over the division of competences, the decision appears to reflect greater member states caution in regard of CETA provisions that are, also politically contentious. The decision, first, excludes all investment protection disciplines from provisional application. Secondly, CETA's provisional application carves out the Investment Court System. Third, the Council shied away from including portfolio investment liberalisation in the scope of provisional application. The decision hence provides for an application of CETA investment liberalisation provisions 'only in so far as foreign direct investment is concerned.'[418] Moreover, the financial services chapter of CETA (Chapter 13) 'shall not be provisionally applied in so far as [it] concern[s] portfolio investment,

[414] European Commission (15 July 2016) [Unofficial]: *Notes on the Meeting of the Trade Policy Committee (members)*.
[415] Council of the European Union (27 October 2016): statement to the Council Minutes, statement 2.
[416] Council of the European Union (27 October 2016): *Council Decision on the provisional application of CETA*, Article 1 (1) (d).
[417] Council of the European Union (27 October 2016): statements to the Council Minutes, statements 2-4.
[418] Council of the European Union, *Council Decision on the provisional application of CETA*, Article 1(1)(a).

protection of investment or the resolution of investment disputes between investors and states'.[419] In contrast, the Council decision provides for the application of CETA's sustainable development chapters (Chapters 22-24), which 'shall respect the allocation of competences between the EU and the member states'[420], and provisions on moral rights protection in the agreement's IPR chapter. Other legally contentious policy areas, such as the agreement's transport services disciplines as well as the mutual recognition of professional qualifications will also be applied provisionally. With the exception of substantive disciplines governing FDI protection, the carve outs from CETA's provisional application therefore seemingly mirror the Court's decision in Opinion 2/15, which solely excluded portfolio investment and ISDS from the scope of the EU's exclusive competence. The shared nature of EU competence for portfolio investment and ISDS, however, give much room for political discretion to the EU institutions as regards the provisional application of future EU trade and investment agreements.

As much as the decision of the Council marks a legal-political compromise that will give effect to the overwhelming majority of CETA rules and provisions, it also casts doubts over issues of implementation of the agreement. Contemporary EU trade agreements employ a broad asset-based definition of 'investment' that covers both FDI and portfolio investment obligations. In the practice of the design of EU external economic agreements, it is technically challenging to separate foreign direct from portfolio investments, given such a broad asset based definition of investment – unless future trade agreements were to exclude investment policy provisions in their entirety. A separation of investment protection rules from liberalisation disciplines would cause much less of a technical problem for the design of EU external agreements. The Council decision of October 27, 2016, clarifies, however, that the application of CETA must distinguish between foreign direct and portfolio investment liberalisation and exclude the latter from implementation prior to the entry into force of the agreement. The decision, however, remains remarkably silent on how this separation should be conducted in commercial practice and thus defers decisions about the technical implementation of this political choice to the EU executive arm – the European Commission.

[419] Ibid. Article 1(1) (b).
[420] Ibid. Article 1 (1) (d).

The next section addresses the question over the legal consequences of the non-ratification of a mixed agreement by a national (or regional) parliament and a consequential 'veto' casted by that Member State's government – a question that has risen to unprecedented prominence in the course of the 'Wallonian Saga'.

5. Opinion 2/15 and the Future of EU Common Commercial Policy

On 16 May 2017, with its decision in Opinion 2/15 on the Union's competence to conclude FTA with Singapore (EUSFTA), the Court dropped a bombshell.[421] The Court's ruling is set to significantly simplify the EU's economic relations with third countries. If the Commission, the Council and the member states had demanded clarity as to which institutions may legitimately pursue the Union's external action objectives in its commercial relations: clarity is what they earned. The decision has the strong potential to facilitate an 'EU-only' signing and conclusion of future EU trade agreements considerably. At the same time, as argued below, the Court's reasoning entails a number of contradicting elements that may add confusion over the legal parameters of post-Lisbon EU external relations conduct.

Given the broad and deep material coverage of the EUSFTA, the decision will serve as a precedent for the conclusion of the vast majority of future EU trade and investment agreements. The Court provides permissive guidelines as to how the EU member states lengthy parallel ratification procedures required by 'mixity' can be avoided in the design of future EU free trade agreements. By the same token, the CJEU thereby provides credible legal benchmarks that may inform the political discourse within and amongst the member states with a view to safeguarding the effectiveness of the CCP and the credibility of the EU as an international actor in economic affairs.

The Court's decision in *Opinion 2/15* stands in context of a number of pertinent CJEU decisions, in which the Court provided answers to some of the questions at stake. Overall, Opinion 2/15 further confirms the 2009 Lisbon Treaty reform of the Common Commercial Policy provisions and continues to walk on the path it had chosen in its post-Lisbon judgments. In this spirit, the Court reaffirms that 'the FEU Treaty differs appreciably from the EC Treaty previously in force, in that it includes new aspects of contemporary international trade in that policy. The extension

[421] Opinion 2/15

of the field of the [CCP] by the FEU Treaty constitutes a significant development of primary EU law'.[422]

The following subsections outline the core case law, which sets out the legal reasoning that the Court has advanced in prior disputes and provide a brief overview and discussion of the Court's main findings in Opinion 2/15.

5.1. Relevant Jurisprudence of the Court of Justice of the European Union

Prior to the entry into force of the Treaty of Lisbon, the Court emphasized the mixed nature of contemporary trade agreements. In its famous *Opinion 1/94*, the Court clarified that the European Community lacked the exclusive powers necessary for an 'EC-only' conclusion of the agreements that resulted from the Uruguay Round of multilateral trade negotiations, in general, and the General Agreements on Trade in Services (GATS) and Trade Related Aspects of Intellectual Property (TRIPs), in particular.[423] Moreover, the Court held that without the internal exercise of shared competence, e.g. in the area of trade related intellectual property rights protection, external Community action in that area could not be deemed exclusive by implication. In absence of an ERTA-effect, the Court considered both the Community and the member states competent to conclude the WTO agreements in areas of shared competences. The 2009 Treaty of Lisbon, however, expanded the exclusive scope of Common Commercial Policy considerably by adding these two policy areas as well as foreign direct investment (FDI) to the realm of CCP exclusivity.[424]

Two recent CJEU judgements have confirmed the extended scope of the CCP post-Lisbon and may give a first indication of how far the CJEU may go in its interpretation of *Opinion 2/15*. In *Daiichi Sankyo*, the Court placed the entire TRIPs agreement under the CCP.[425] In *Commission vs. Council (Conditional Access Convention)* the Court, in application of its gravity theory, held that Article 207 TFEU is the sole and correct legal basis of a treaty if the 'main purpose' of an international agreement is the external harmonisation of EU norms that intend 'to promote, facilitate or govern trade' and has 'direct and immediate effects on trade'.[426] 'Incidental' internal harmonisation (of trade in services in this case) did not require

[422] ibid, para 141.
[423] Opinion 1/94
[424] Article 207(1) TFEU.
[425] *Daiichi Sankyo v DEMO* (C-414/11), para 49
[426] *Commission v. Council (Conditional Access Convention)* (C-137/12), para 57. On *Daiichi Sankyo* and *Conditional Access* cases see also: Larik, Joris (2015)

reference to another legal basis, according to the Court. The decisions thus consolidate EU exclusivity of trade related policies and significantly reduce the potential for 'mixity' of EU trade and investment agreements in the future.

5.2. The Opinion of the Court in *Avis 2/15*

With the exception of provisions relating to portfolio investment and the contentious ISDS mechanism, the Court now held that all components of the agreement can be concluded by the EU alone and without the approval of the member states in their own right.[427] In December 2016, Advocate General Eleonor Sharpston had advanced a considerably more restrictive reading of the EUSFTA in light of the EU treaties. In her view, EUSFTA provisions governing non-commercial aspects of intellectual property rights, certain transport services, portfolio investment, as well as the agreement's sustainable development provisions (labour rights; environmental protection) made for competences shared with the member states. According to the AG, moreover, a single provision obliging the member states to terminate their bilateral investment treaties with Singapore upon entry into force made for an MS exclusive competence.[428]

The key to understanding the Court's conclusions and its ability to clear the way for effective and efficient Union external economic action derives from an examination of the applicable standards of analysis and respective benchmarks.[429] The Court used all the discretion available to it to produce a 'middle way' result with a view to enabling more effective, efficient, and legitimate governance of the Union's external economic relations. However, as argued below, it appears that the coherence of the Court's legal reasoning, in some instances, has fallen victim to the purposes this decision seemingly attempts to advance.

First, in comparison to AG Sharpston's legal view, the Court applies a more inclusive 'aim and content' test to the EUSFTA in light of CCP Article 207 TFEU, which enables it to subsume EUSFTA content under the said provision in a more 'generous' manner. More precisely, the Court advances a wider application of the 'immediate and direct effects on trade' criterion, which it had developed in its past

[427] Opinion 2/15: para 305.
[428] AG Sharpston, Opinion 2/15, para 570.
[429] Kleimann, David (2017).

jurisprudence.[430] By the same token, the Court's reasoning embeds the CCP into the context of EU external action objectives and thus gives full effect to the Lisbon reform in this regard. The combination of these two contingencies led the Court to the rather historic conclusion that the EUSFTA provisions on labour rights and environmental protection fall under the EU exclusive competence attributed to the CCP.[431] In Article 13.1(3) EUSFTA, notably, the parties 'recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labour and environment laws.' In view of the Court, the EUSFTA provisions – by setting out minimum standards to which the parties are committed in context of other multilateral agreements – reaffirm the parties' commitment not to lower the protections afforded to labour and the environment in order to gain a competitive commercial advantage. Such provisions, according to the Court, hence sufficiently affect trade among the parties to fall within the ambit of the CCP.[432]

Secondly, the Court casts a significantly wider web for 'incidental' treaty content than the Advocate General. Incidental treaty components or provisions, according to the Court's jurisprudence, are subordinated to the agreement's predominant purpose (i.e. commerce within the meaning of the CCP Article 207 TFEU) if they are 'extremely limited in scope' and thus do not have the potential to affect the allocation of competences.[433] In application of a markedly more generous understanding of what is 'extremely limited in scope', the Court dismisses the AG's findings that 'moral rights' and 'inland waterway transport' could make for autonomous EUSFTA components.[434] The Court hence does not require reference to legal bases for which the Union shares competence with the member states.

Third, the Court, if compared to the AG's opinion, advances a considerably more lenient interpretation of implied exclusive powers with respect to its ERTA case law, which results in a broader shelter for EUSFTA transport services commitments. As explained above, the EU may, according to the ERTA jurisprudence, obtain exclusive external powers if an area is covered to a large extent by common internal

[430] For an explanatory account see section II of this article. See further *Daiichi Sankyo* (C-414/11), para 51; *Commission vs Parliament and Council* (C-411/06) para 71; *Regione autonoma Friuli-Venezia Giulia and ERSA* (C-347/03) para 75.
[431] Opinion 2/15, paras 166-167.
[432] Ibid para 147, 157.
[433] *Commission vs. Council (Conditional Access Convention)* C-137/12, para 41.
[434] Opinion 2/15, para 129; 216-217.

rules, which may be altered or affected by the conclusion of an international agreement (Article 3(2)(3) TFEU).[435] While the Court confirms the validity of the transport services carve-out from the scope of the CCP (Article 207(5) TFEU), it found that exclusive EU powers for maritime, road and rail transport services could in fact be implied via Article 3 (2)(3) TFEU. Building on its reasoning in Green Network and Opinion 3/15, the Court adopted a permissive application of the ERTA test's 'largely covered' criterion: even if EU legislation leaves considerable legislative powers to the member states, it may still be affected or even altered by the conclusion of an international agreement.[436] Complete internal harmonization is thus not required to trigger the ERTA effect. Indeed, the Court argued that any material overlap between EU internal and international commitments automatically 'must be regarded as capable of affecting or altering the scope of those common rules'.[437]

Fourth, the Court does not, in contrast to the AG, deem the termination of the member states' bilateral investment treaties as a competence falling within exclusive national prerogatives. Foreign Direct Investment (FDI) liberalisation and protection form part the EU's exclusive CCP competence.[438] Accordingly, the EU superseded the member states for FDI and may approve, by itself, a provision in an international agreement with a third party that replaces the member states' prior bilateral FDI commitments with Singapore. Rather than engaging in the discussion of treaty termination provisions of the VCLT, the Court highlights that the EU's exclusive competence to terminate prior Member State FDI commitments with Singapore derives from to the doctrine of functional succession.[439] Accordingly, 'the European Union can succeed the member states in their international commitments when the member states have transferred to it […] their competences relating to those commitments and it exercises those competences'.[440] The Court left unaddressed, however, how such reasoning would bode with its finding that the Union shares competence with the member states in respect to portfolio investment.[441]

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[435] See section II.
[436] *Green Network* (C-66/13), para 41-49 and *Opinion 3/15*, para 126 – 128.
[437] Opinion 2/15, *supra* n. 4, para 201.
[438] ibid, para 87.
[439] Ibid, para 249.
[440] *International Fruit Company* (C-21/72), para 248.
[441] Opinion 2/15. The Court addressed the issue of terminating the member states pre-existing portfolio investment obligations with Singapore in less than two paragraphs (255-256). The Court underlines that the termination of Member State BITs does not fall within exclusive Member State competence

Fifth, the Court's decision, in this instance, affirms AG Sharpston's finding on portfolio investment. The text of Article 207 TFEU explicitly refers to foreign direct investments (FDI) only.[442] In a prior judgement, the Court had clarified the conceptual difference between FDI and portfolio investment. FDI, according to the Court, presupposes lasting and direct economic links that enable the investor's effective participation in the management of a company. Conversely, portfolio investments merely transfer equity securities without implicating managerial control.[443] In Opinion 2/15, the Court therefore confirmed the textual interpretation of Article 207 TFEU that portfolio investment falls outside the scope of the CCP. Moreover, the Court – and AG Sharpston - dismissed the more artistic arguments of the Commission in favour of implied ERTA exclusivity on the basis of a primary law provision, notably Article 63(1) TFEU. In doing so, the Court sets an important boundary for the ERTA doctrine: Triggering Article 3 (2)(3) TFEU pre-supposes the existence of internal EU legislation. Primary law provisions cannot be altered or affected by international EU agreements.[444] Yet, the Court found that the EU and the member states share the power to conclude non-direct investment agreements (Article 216 (1) TFEU). In addition, the Court points out that, 'as EU law currently stands', there is no internal legislation that endows the EU with the power to conclude international agreements in the field of portfolio investment.[445] As a consequence, Article 3(2)(1) TFEU is currently not applicable, but may trigger exclusive competence once such legislation will have been adopted. In contrast to treaty amendments, a respective secondary legal act may be adopted by QMV, depending on the political will of the member states.

Sixth, in a finding that is set to disturb the international investment arbitration community, the Court rules that the EUSFTA's ISDS mechanism falls within a competence shared between the EU and the member states and thereby objects to AG Sharpston's reasoning. The AG had considered that the investor-state dispute settlement mechanism is accessory to the substantive investment protection

(para 256). Yet, it does not explain how the EU may use its shared competence to terminate Member State BITs as regards portfolio investment.

[442] Article 207(1) TFFU.

[443] *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue* (C-446/04), para 181-182.

[444] Opinion 2/15, para 235.

[445] Ibid. para 236.

obligations of the EUSFTA.[446] According to the Court, however, a regime that removes disputes from the jurisdiction of domestic courts may not be regarded as ancillary (or: accessory) to such substantive obligations.[447] Consequently, it 'cannot be established without the member states' consent'.[448] It is puzzling, to say the least, that the Court does not endeavour to ground this finding on an appropriate legal basis. Which legal basis, indeed, would confer a shared competence for the establishment of an ISDS regime?

Finally, and most surprisingly, the final paragraph of Opinion 2/15 does not fully answer the preliminary question posed by the Commission. The Court's response does set out the division and nature of competences between the EU and the member states. But it does not answer the question whether 'the EU has the *requisite competence* to sign and conclude alone the Free Trade Agreement with Singapore'. AG Wahl and AG Sharpston, in respective recent opinions, considered that the EU has the requisite power to conclude agreements that fall under EU exclusive as well as shared powers.[449] If an agreement contains content covered by exclusive and shared competence, the choice of procedure is subject to the political discretion of the EU institutions and, ultimately, the Council. In past commercial treaty-making practice, the EU institutions indeed opted for facultative mixity. However, facultative 'EU-only' agreements do exist, too. To name but one recent example: The Stabilisation and Association Agreement with Kosovo was concluded by the Union alone.[450] The Court, however, appears to eliminate the possibility of facultative 'EU-only' treaty-making. In various paragraphs of its decision, it concludes that the EUSFTA 'cannot be approved by the EU alone' because it contains substantive areas that fall under shared competence. The Court therefore appears to equalise the effect of non-exclusive and non-existing EU external competence. What does this finding mean for existing facultative EU-only agreements? And what is the value inherent to shared external EU competence in the first place, if the Union cannot exercise such competence without the consent of the member states in their own right?

[446] AG Sharpston, *Opinion 2/15*, para 523.
[447] Opinion 2/15, para 292.
[448] Ibid. para 292.
[449] AG Wahl, Opinion 3/15, para 119 and AG Sharpston, Opinion 2/15, para 74
[450] *Stabilisation and Association agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part*, 2015/0095 (NLE).

The interested observer is therefore left with puzzling questions with regard to the future of facultative 'EU-only' treaty-making and the choice of a shared legal basis for the ISDS mechanism. Despite providing for much needed clarity as to the scope of the CCP in light of 'new generation' of EU trade and investment agreements, Opinion 2/15 therefore preliminarily adds new questions over the legal parameters applying to the substance and process of EU trade and investment treaty-making.[451]

6. Conclusions and Outlook: EU Common Commercial Policy 2020

The 'Wallonian Saga' has laid bare a twofold structural weakness of the European Union as an external actor. It is when the Union includes the member states as independent contractors in the process of international treaty-making that the Achilles heel of European external action is fully exposed to attempts of political blackmail, rent-seeking, and self-interested opposition of small political fractions.

Europe's first weakness is one of democratic representation. The fact that a constituency of 3.5 million inhabitants is able to credibly threaten to bloc the signature of a treaty otherwise supported by the political representatives of 500 million EU citizens has reinforced already existing incentives for political paralysis of EU multi-level economic governance. The current form of 'mixed' treaty-making puts the fate of the European Union as an international actor into the hands of individual members states or even regional governments rather than European Union citizens and the Union's legitimate political institutions.

Europe's second weakness is mirrored in the results that stem from such an inward-oriented notion of the European project and its political process: the Union increasingly suffers from a creeping ineffectiveness of its policy formulation process and paralysis of its multi-level governance polity, a loss of its credibility as an international actor, and policy outcomes that are distorted and rendered inefficient as private or public rent-seekers are given overly generous institutional access or power in the decision-making process. The EU, in its current mode of governance, will remain inapt to tackle the vast amount of economic and political challenges that it is confronted with in the early years of the 21st century. Democratic governance of EU external trade and investment policy needs to sharply reduce the amount of veto-

[451] See also: Kleimann, David and Gesa Kübek (2017)

players and render remaining veto-rights commensurate to proportional democratic representation.

In the wake of the CETA-crisis, some commentators were quick to advocate for 'EU-only' treaty-making as the appropriate alternative to 'mixity' in order to mend the second category of problems outlined above. 'EU-only' agreements, indeed, would do away with the lengthy parallel ratification procedures on the Member State level and subject national democratic deliberations and decisions on the approval of EU external treaties to voting in the Council. As demonstrated in this chapter, however, treaty-making in the 'EU-only' procedure is, in the first instance, not a question of political preference, but a question of legal competence. It is the exact delineation of EU exclusive competences – codified in EU primary law and mirrored in constantly evolving EU secondary legislation - that determines whether the content of a treaty mandates 'EU-only' conclusion, or not.

With its decision in Opinion 2/15, the Court finally ended the legal uncertainty over EU trade and investment competence and provided authoritative guidelines to the policy-makers responsible for the design of preferential trade agreements. Opinion 2/15 confirms the tectonic shifts of competence that the Lisbon Treaty has brought about in the area of EU Common Commercial Policy. International treaty components governing trade in goods, services, commercial aspects of intellectual property, government procurement, competition policy, FDI admission and protection, transport services, e-commerce, and sustainable development provisions related to trade may be concluded by the EU without the participation of the member states in their own right. As such, broad 'EU-only' economic agreements are now on the verge of becoming the new normal of EU external economic action, if such agreements were to exclude portfolio and ISDS and conclude such components separately as mixed agreements. These conclusions, admittedly, cast dark clouds over the future of the EU investment policy and, at the very least, the Commission's endeavour to reform the current BIT system by means of a multilateral investment Court. In this area, the Court places the member states in the driver's seat. The Court's decision, nonetheless, places considerable pressure on the member states to end the legal-political combat with the Commission over their involvement. With respect to portfolio investment, they may, eventually, wish to hand over exclusive external competence over that second-to-last bastion of shared competence via the legal avenue of Article 3(2)(1) TFEU. Moreover, should the

member states eventually come to the conclusion that they ought to advance a sensible reform of their old BIT regime, it is now up to national governments to take ownership and explain and sell the proposed Investment Court System to their domestic constituencies.

Overall, Opinion 2/15 therefore created the conditions for more effective, efficient, and politically legitimate EU external economic action. Although it placed a good amount of investment related homework on the desks of the member states, the Court has done no less than giving a clear mandate to the institutions of the EU. A shift to 'EU-only' treaty conclusion of the exclusive trade and FDI parts of contemporary trade and investment agreements would indeed address the issues associated with European 'vetocracy' by reducing the amount of veto-players to no more than two: A blocking minority in the Council and a simple majority of Members in the European Parliament.

Such a significant change of formal institutional practice, however, must not come at the expense of democratic accountability and representation. To the contrary, EU 2020 institutional practice needs to strengthen democratic governance of EU external trade and investment policy and reconnect to citizens' concerns over economic policies in a representative, visible, and functional manner.

The achievement of this objective, however, requires a considerable re-think, adaptation, and a sense of ownership of national parliaments regarding the economic policy-making process in the EU. In pre-Lisbon institutional practice, national parliaments often only engaged in the political process long time after a respective mixed agreement was signed by national governments and, essentially, rubber-stamped agreements that were put before them for ratification. The run-up to the CETA signature has, somewhat ironically, shown early signs of the necessary and desirable shift of member states' parliaments political engagement to the phase of the process where it is most needed for EU-only treaty-making. Prior to the signing of CETA, indeed, national parliaments have now made more extensive use of their constitutionally guaranteed role in national decision-making processes in a visible fashion. In context of 'EU-only' agreements, national parliamentary deliberation, scrutiny, and control of executive decisions ought to shift to the (pre-)negotation stage of the treaty-making process in order to endow QMV Council decisions on the signature and provisional application of EU economic agreements with democratic legitimacy. Vertical inter-parliamentary co-operation can help to build trust in EU

commercial policy making. The EP INTA committee, for instance, is frequently informed about on-going policy and negotiation developments, holds similar information rights to those of the Council, has built an intra-institutional infrastructure for an efficient division of labour, and has greatly improved its informational capacity over the last years. The development of vertical - formal or informal - links between the economic affairs committees of national parliaments and the INTA committee in the EP can facilitate issue specific problem-solving, build mutual trust, and function as an early warning system in regard of potential political or technical roadblocks.

Beyond the change of national institutional practice, secondly 'EU-only' treaty-making must go hand in hand with a notional and practical elevation of the EP, in addition to its acquisition of information, control, and veto-rights via the Lisbon Treaty of 2009. Addressing a long-standing deficiency, public perception of the EP as a significant governing institution ought to be enhanced and fostered. National electoral reforms that do away with party lists and allow for direct elections of MEPs in regional districts of the member states can contribute to the achievement of this objective. Moreover, the central role of the EP as the democratic institution that effectively controls EU external economic policy making should be reinforced by a further strengthening of the EPs technical, research, and staff capacity in regard of EU trade and investment policy matters.

Finally, member states governments and the EP ought to actively engage in restoring the public trust in and political support for the European Commission, which is functionally necessary for it to continue to serve as the agent of the Council and the EP in negotiating EU external economic agreements. Since the inception of TTIP negotiations, the Commission has become the main target of post-factual political campaigns that aim at imposing a digital dominance of fundamental opposition and targeted misinformation of citizens rather than contributing to democratic deliberation processes or technical debates in a constructive manner. It is the member states' governments as represented in the Council, the EP, and eventually the national parliaments that are equipped with the communication channels that are necessary to counter post-truth political campaigns and win public support for EU economic policies through political leadership.

Political change towards an institutional practice that affirms the Union's multilevel governance structures; that buys into the legally viable European democratic process; and that builds on the design of EU-only economic agreements

can remedy the two main structural weaknesses that the recent CETA episode has exposed. The notion of the EU Common Commercial Policy governance in 2020, as outlined above, would render EU external treaty-making more democratic, more effective, more efficient, and more reliable.

VII. Conclusions

The Laeken Council Declaration of 2001 committed the European Union to a constitutional reform that aimed at enhancing the legitimacy of EU governance through "more democracy, transparency, and efficiency". In the area of EU Common Commercial Policy (CCP), the coming into force of the Treaty of Lisbon on December 1, 2009, responded to the Laeken Declaration with the most extensive reform in history, substantially amending applicable provisions on decision-making, scope of EU exclusive competence, objectives, and principles. Against the benchmark set out by the Laeken Council objectives, this study examineed the law, practice, and quality of institutional change in CCP governance after Lisbon. To this end, the study advanceed a twofold comparative institutional analysis that is based on a transaction-cost approach to the understanding of legal, political, and informal institutions that govern the CCP and EU external economic relations more broadly.

The study finds that the *reallocation of horizontal competences* among EU institutions through the empowerment of the European Parliament has generally decreased the process efficiency of the CCP. At the same time, it has markedly decreased the cost of political participation for public and private stakeholders and introduced increasingly effective democratic control to the now bicameral system that governs the CCP in the Lisbon era. Parliamentary involvement, moreover, has radically enhanced process and substantive transparency and opened a space for public deliberation of external economic policy. Opinion 2/15 of the Court of Justice of the European Union has, secondly, confirmed the Treaty-induced tectonic shifts in the *allocation of vertical competences*. It argued that the Court's Opinion sets incentives for a fundamental change of the institutional practice that governs the conclusion of EU external economic agreements. Ending the tradition of 'mixed' agreements in favor of 'EU-only' treaty conclusion would further approximate the achievement of all three Laeken Council objectives and render EU external economic governance more efficient, effective, representative, and hence more legitimate. In order to fully employ the democratic potential of 'EU-only' CCP governance, however, such practice requires a strengthened engagement of national parliaments in that process.

The constitutional allocation of veto, amendment, delegation, control, and information rights to the European Parliament has, in the outset, increased the

transaction costs and thereby reduced the efficiency of CCP governance and implementation in comparison to the pre-Lisbon institutional framework. In response, the three political institutions involved in CCP legislation and implementation have put in place informal institutional arrangements that apply to their legislative cooperation in order to decrease associated transaction costs and respond to problem pressures more efficiently – most prominently through the conduct of trilogue negotiations in the course of the OLP, which enables the institutions to come to first reading agreements on framework legislation and thereby speed up the legislative process. Such informal mechanisms, however, considerably decrease the transparency of this process and reduce the space for policy deliberation despite the calls of the Laeken Declaration for the enhanced transparency of EU institutions.

The empowerment of the EP has, moreover, added an access point for interest representation that is generally receptive for a wider range of policy preferences than its institutional competitors, given the diverse ideological predispositions held by its membership. The EP is, moreover, characterized by relatively little informational capacity, which renders it highly dependent on the acquisition of information about both policy preferences and policy instruments from external private and public sources. This circumstance has significantly lowered the cost of political participation of CCP governance in general, the effects of which work in different ways. For starters, *ceteris paribus*, decreasing costs of political participation generally benefit, in relative terms, diffuse interest representation that is characterized by comparatively low organizational efficiency. In response, efficiently organized competing special interest groups are now highly incentivized to reinforce the efforts that were traditionally directed at the Commission and the Council through information strategies that target MEPs. In the same vein, the EP provides special interest representation with the opportunity to inject preferences into the legislative process that found no ears in the Commission and/or among Member States in the Council.
Overall, however, the Commission remains the primary access point for efficiently organized special interests – both because of its constitutional role of an agenda setter and because of its dependence on external technical information about preferences and instruments that are appropriate to achieve respective outcomes. Diffuse interests, on the other hand, have gained enhanced access via the EP, if compared to the pre-Lisbon institutional framework.

But the constitutional empowerment of the EP does not only change the incentive structure of political participation between EU political institutions, on the one side, and private actors, on the other. First, Member States represented in the Council can and do use the dependence of the re-election of MEPs on their placement on national party lists to advance national interests through national MEP delegations in the EP. The Commission, secondly, is now tasked with the proposal of legislation and the negotiation of trade agreements that advance its institutional interests and garner majority support in both the Council and the EP. As a result, the Commission now not only spends a large amount of additional resources on complying with its formal reporting obligations vis-à-vis the EP. It also uses its informational capacities to informally – but systematically - supply the EP's excess demand for information on policy options by educating MEPs, their assistants, and other relevant EP staff on proposed policy instruments, purposes, and effects. Supplying the EP with its most scarce resource early on and continuously in the course of the legislative and negotiation processes arguably aims at ensuring the safe passage of policy proposals and trade agreements through the decision-making process by crowding out information supplied and competing interests voiced by public and private corporate stakeholders that lobby the EP.

The EP itself addresses its informational capacity constraints through a high degree of specialisation and division of labour by means of its committee structure, rapporteur system and monitoring groups, and has markedly increased staff capacity in the area of trade and investment. These organizational measures do reduce internal transaction and information costs associated with decision-making, increase the EP's efficiency in the legislative process in relations with other political institutions and stakeholders.

The prevalent strong dependence of MEPs on external actors who trade information about policy preferences, instruments, and effects against access to decision-making, as well as MEPs dependence on the favourable placement on national party lists, has largely resulted in a reinforcement of the given interest configuration and policy preferences through the EP. In case of preferences that are not represented by either the Commission or the Council already, the relatively low institutional effectiveness of the EP – if compared to the Council and the Commission – in transforming given policy preferences into legally binding content of framework legislation and trade agreements that the Commission negotiates with external

partners have so far led to rather minimal policy changes that are solely inspired by the EP's political activity. The reform traditional system of investment protection enforcement can be deemed a notable exception to this general finding. The general observation outlined above stems from the fact that existing public (Commission and Member States) and private (special and diffuse interest groups) interest representation in Brussels have responded actively and competitively to the EP's new role and have succeeded to gain influence over the policy preferences voiced by MEPs in proportion to their efficiency in supplying specific and credible information about policy instruments and their effects.

At the same time, the EP has forcefully defended – and in fact informally enhanced – its new constitutional rights in the process of CCP governance and the delegation of policy implementation. To that effect, the EP leadership has hand-picked a number of legislative dossiers (EU-Korea safeguard mechanism; ACTA) with high political profile to display and manifest its institutional activity and impact on CCP formulation to the general public, with, however, minor actual effects on the economic incentive and value structure embedded in CCP legislation.

In sum, we can conclude that the EP has grown into the role of a functional legislature, which, at this point in time, still lacks the institutional savvy to make a difference for the values embedded in CCP legislation. However, as the EP manages to decrease its internal information costs – through increasing institutional memory, acquisition of independent external expert advice, the establishment of the European Parliamentary Research Service, and long-term relationships with trusted external stakeholders etc. – it is set to increase its institutional effectiveness in translating distinct policy preferences into legislative outcomes and inject its preferences into the substance of EU CCP agreements with third countries. From the outset, the structural features of the EP are conducive to balancing special interest configurations that supply the Commission's and the member states' governments demand for technical information by translating diffuse 'public' interests into negotiable policy amendments. It should be expected that this potential increasingly translates into tangible outcomes commensurate to the EP's growing institutional capacity in matters CCP.

A tangible outcome of the Lisbon reform of the CCP institutional framework, as discussed above, is EU transparency and public deliberation of governance in this area. The EP has effectuated this change not only by creating a platform for

deliberation but has also – albeit indirectly – forced the Commission to seek legitimacy of its policy proposals through an enhanced practice of public consultations, exponentially increasing efforts to explain complex policy instruments to the broader public, and a radical increase of public access to trade negotiation documents. In this way, the emergence of the European Parliament has – overall - directly and indirectly resulted in enhanced transparency and democratic deliberation of CCP governance through the political institutions of the EU.

The same, however, cannot be said about the third Laeken objective, notably 'more efficient' EU governance. It is beyond doubt that the addition of another political institution to the CCP governance process has increased the costs of coordination and thus the overall level of associated transaction costs.

Do increasing levels of democratic accountability and transparency of EU governance thus require the expense of additional coordination costs? Do these values necessarily implicate trade-offs amongst each other? Such a conclusion, however, would fall short of taking into account an evaluation of the enhanced scope of EU exclusive CCP competence that the Lisbon Treaty has brought about. More crucially, it would ignore the role of the member states in the traditional practice of the mixed conclusion of EU trade and investment agreements. Viewed from this broader perspective, it is not the addition of the European Parliament to the institutional framework governing the CCP but the remaining presence of EU member states in EU external economic governance that stands in the way of the complete achievement of the three Laeken objectives.

This study argued that the broader post-Lisbon material scope of the CCP provides for ample space for a change in EU and member states' practice away from mixed and towards 'EU-only' external economic agreements. It is further argued that such practice could result not only in a stark increase of process efficiency and effectiveness of the overall institutional framework but could also further contribute to enhanced democratic legitimacy of CCP governance in the Lisbon era.

The 'CETA-drama' has laid bare a twofold structural weakness of the European Union as an external actor. It is when the Union includes the Member States as independent contractors in the process of international treaty-making that the Achilles heel of European external action is fully exposed to attempts of rent-seeking and self-interested opposition of small political fractions.

Europe's first weakness is one of democratic representation. The fact that a constituency of 3.5 million inhabitants is able to credibly threaten to bloc the signature of a treaty otherwise supported by the political representatives of 500 million EU citizens has reinforced already existing incentives for political paralysis of EU multi-level economic governance. The current form of 'mixed' treaty-making puts the fate of the European Union as an international actor into the hands of individual members states or even regional governments rather than European Union citizens and the Union's legitimate political institutions.

Europe's second weakness is mirrored in the results that stem from such an inward-oriented notion of the European project and its political process: the Union increasingly suffers from a creeping ineffectiveness of its policy formulation process and paralysis of its multi-level governance polity, a loss of its credibility as an international actor, and policy outcomes that are distorted and rendered inefficient as private or public rent-seekers are given overly generous institutional access or power in the decision-making process. The EU, in its current mode of governance, will remain inapt to tackle the vast amount of economic and political challenges that it is confronted with in the early years of the 21st century. Democratic governance of EU external trade and investment policy needs to sharply reduce the amount of veto-players and render remaining veto-rights commensurate to proportional democratic representation.

In the wake of the CETA-crisis, some commentators were quick to advocate for 'EU-only' treaty-making as the appropriate alternative to 'mixity' in order to mend the second category of problems outlined above. 'EU-only' agreements, indeed, would do away with the lengthy parallel ratification procedures on the Member State level and subject national democratic deliberations and decisions on the approval of EU external treaties to voting in the Council. As demonstrated in this study, however, treaty-making in the 'EU-only' procedure is, in the first instance, not a question of political preference, but a question of legal competence. It is the exact delineation of EU exclusive competences – codified in EU primary law and mirrored in constantly evolving EU secondary legislation - that determines whether the content of a treaty mandates 'EU-only' conclusion, or not.

With Opinion 2/15, the European Court of Justice finally ended the legal uncertainty over EU trade and investment competence and provided authoritative guidelines to the policy-makers responsible for the design of preferential trade

agreements. Opinion 2/15 confirms the tectonic shifts of competence that the Lisbon Treaty has brought about in the area of EU Common Commercial Policy. International treaty components governing trade in goods, services, commercial aspects of intellectual property, government procurement, competition policy, FDI admission and protection, transport services, e-commerce, and sustainable development provisions related to trade may be concluded by the EU without the participation of the Member States in their own right. As such, broad 'EU-only' economic agreements are now on the verge of becoming the new normal of EU external economic action, if such agreements were to exclude portfolio and ISDS and conclude such components separately as mixed agreements. These conclusions, admittedly, cast dark clouds over the future of the EU investment policy and, at the very least, the Commission's endeavour to reform the current BIT system by means of a multilateral investment Court. In this area, the Court places the Member States in the driver's seat. The Court's decision, nonetheless, places considerable pressure on the Member States to end the legal-political combat with the Commission over their involvement. With respect to portfolio investment, they may, eventually, wish to hand over exclusive external competence over that second-to-last bastion of shared competence via the legal avenue of Article 3(2)(1) TFEU. Moreover, should the Member States eventually come to the conclusion that they ought to advance a sensible reform of their old BIT regime, it is now up to national governments to take ownership and explain and sell the proposed Investment Court System to their domestic constituencies.

Overall, Opinion 2/15 hence created the conditions for more effective, efficient, and democratic EU external economic action. Albeit placing investment related homework on the desks of the Member States, the Court has done no less than giving a clear mandate to the institutions of the EU. A shift to 'EU-only' treaty conclusion of the exclusive trade and FDI parts of contemporary trade and investment agreements would address the issues associated with European 'vetocracy' by reducing the amount of veto-players to no more than two: A blocking minority in the Council and a simple majority of Members in the European Parliament.

Such a significant change of formal institutional practice, however, must not come at the expense of democratic accountability and representation. To the contrary, institutional practice ought to strengthen democratic governance of EU external trade

and investment policy and reconnect to citizens' concerns over economic policies in a visible and functional manner.

The achievement of this objective, however, requires a considerable re-think, adaptation, and a sense of ownership of national parliaments regarding the economic policy-making process in the EU. In pre-Lisbon institutional practice, national parliaments often only engaged in the political process long time after a respective mixed agreement was signed by national governments and, essentially, rubber-stamped agreements that were put before them for ratification. The run-up to the CETA signature has, somewhat ironically, shown early signs of the necessary and desirable shift of Member States' parliaments political engagement to the phase of the process where it is most needed for EU-only treaty-making. It is prior to the signing of CETA that national parliaments have now made more extensive use of their constitutionally guaranteed role in national decision-making processes in a visible fashion. In context of 'EU-only' agreements, national parliamentary deliberation, scrutiny, and control of executive decisions ought to shift to the (pre-)negotation stage of the treaty-making process in order to endow QMV Council decisions on the signature and provisional application of EU economic agreements with democratic legitimacy. Vertical inter-parliamentary co-operation can help to build trust in EU commercial policy making. The EP INTA committee, for instance, is frequently informed about on-going policy and negotiation developments, holds similar information rights to those of the Council, has built an intra-institutional infrastructure for an efficient division of labour, and has greatly improved its informational capacity over the last years. The development of vertical - formal or informal - links between the economic affairs committees of national parliaments and the INTA committee in the EP can facilitate issue specific problem-solving, build mutual trust, and function as an early warning system in regard of potential political or technical roadblocks.

Beyond the change of national institutional practice, secondly 'EU-only' treaty-making must go hand in hand with a notional and practical elevation of the EP, in addition to its acquisition of information, control, and veto-rights via the Lisbon Treaty of 2009. Addressing a long-standing deficiency, public perception of the EP as a significant governing institution should to be enhanced and fostered. National electoral reforms that do away with party lists and allow for direct elections of MEPs in regional districts of the Member States can contribute to the achievement of this objective. Moreover, the central role of the EP as the democratic institution that

effectively controls Common Commercial Policy governance should be reinforced by a further strengthening of the EPs technical, research, and staff capacity in regard of EU trade and investment policy matters.

Finally, member states governments and the EP ought to actively engage in restoring the public trust in and political support for the European Commission, which is functionally necessary for it to continue to serve as the agent of the Council and the EP in negotiating EU external economic agreements. Since the inception of TTIP negotiations, the Commission has become the main target of post-factual political campaigns that aim at imposing a digital dominance of fundamental opposition and targeted misinformation of citizens rather than contributing to democratic deliberation processes or technical debates in a constructive manner. It is the Member States' governments as represented in the Council, the EP, and eventually the national parliaments that are equipped with the communication channels that are necessary to counter post-truth political campaigns and win public support for EU economic policies through political leadership.

Institutional practice that affirms the Union's multilevel governance structures; that reinforces the *de jure* legitimate democratic process of the EU; and that builds on the design of EU-only external economic agreements can remedy the two main structural weaknesses that the recent CETA episode has exposed. The notion of 'EU Common Commercial Policy governance 2020', as outlined above, would render EU external economic treaty-making more democratic, more effective, more efficient, and more reliable.

Epilogue: After 'the End of History' – Reforming EU Trade Defence in the Shadow of WTO Law

1. Introduction

The brief 'end of history' that was famously proclaimed by Francis Fukuyama in the summer of 1989 has now been succeeded by a new quality and structure of international conflict and cooperation that partially – but more and more decisively - draws its energy from a Western relapse into identity politics and economic nationalism.[452] As a result, crucial political support for the international economic institutions and legal order that flourished in the 1990ies is fading. The European Union has not been immune to this development or remained a passive bystander. Since 2006, the EU has changed gear towards a trade negotiation strategy that prioritizes commercial over other objectives, seeks full bilateral reciprocity, and is flanked by markedly defensive – or: 'protectionist' - framework regulation. This epilogue provides for a thematic illustration of the now increasingly pronounced defensive dimension of EU Common Commercial Policy. It argues that the Union runs a serious risk of actively contributing to the erosion of the international legal and political institutions that it helped to build over the past decades.

On December 11, 2016, Article 15 (a)(ii) of China's Accession Protocol to the WTO expired. The expiration of this provision has terminated the right of WTO members to calculate anti-dumping duties against China on the basis of methodologies that "are not based on a strict comparison with domestic prices or costs in China". In this context, this chapter shall serve, first, as a reminder that the European Union violates its WTO obligations under the WTO Anti-Dumping Agreement (ADA) if the Union's institutions continues - after December 11, 2016 - to adopt anti-dumping measures against China that are based on 'non-market economy' (NME) treatment of Chinese exports in anti-dumping investigations. Moreover, the 2009 EU Anti-Dumping Regulation will be vulnerable to legal challenge in the WTO dispute settlement mechanism "as such" if it is not brought into compliance with the WTO Anti-Dumping Agreement by that date. These observations, however, do not prejudge the legality of EU anti-dumping measures – "as applied" - that the EU has adopted against Chinese producers prior to the December deadline. The post-2016 legality of already existing EU anti-dumping measures that are "not based on a strict

[452] Fukuyama, Francis (1989)

comparison with domestic prices or costs in China" is particularly relevant in context of the rising amount of new EU AD measures and investigations against Chinese producers of steel and solar panels that the EU has imposed and initiated in the last 2 years. It is this very question that is subject to analysis and discussion in the second part of this chapter. The third part provides for a brief assessment of the policy implications of the most recent WTO Appellate Body report in the *EU-Biodiesel* dispute.[453] The fourth and final part of this article advances a normative assessment the systemic implications of potential EU non-compliance with the WTO Anti-Dumping Agreement after December 2016 and hints at remaining legally viable alternatives.

2. EU Trade Defence Reform

On May 9, 2016, the German and French ministries responsible for trade and economic affairs posted a joint letter to EU Trade Commissioner Cecilia Malmström.[454] The document outlines "Common Core Demands from Germany and France on modernizing Trade Defence Instruments (TDI) of the European Union". Among others, it requests that "the EU must further explore and use the possibilities of China's WTO Accession Protocol *not* to use the standard calculation methodology to the extent *the producers under investigation can not clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product* [emphasis added]."

Three days later, the European Parliament (EP) passed a resolution on "China Market Economy Status" with broad inter-party support amidst manifestations of steel workers and trade union leaders outside the plenary in Strasbourg.[455] "[A]s long as China does not meet all five EU criteria required to qualify as a market economy", the resolution states, "the EU should use a non-standard methodology in antidumping and antisubsidy investigations on Chinese imports (…), in accordance with and giving full effect to those parts of Article 15 of China's Accession Protocol which provides room for the application of the non-standard methodology". In consequence, the EP "calls on the Commission to make a proposal in line with this principle".

[453] Appellate Body Report (2016): *European Union — Anti-Dumping Measures on Biodiesel from Argentina*

[454] Matthias Machnig & Matthias Fekl (May 9, 2016): *Letter to Cecilia Malmstrom - Common core demands from Germany and France on modernizing the Trade Defence Instruments (TDI) of the European Union*.

[455] *European Parliament resolution of 12 May 2016 on China's market economy status*

The phrase highlighted in the quote from the Franco-German letter is identical to language contained in Article 15(a)(ii) of China's Accession Protocol (CAP) to the WTO. It is this very provision that has served as a legal basis for a highly effective trade defense remedy that allows for the imposition of extraordinarily steep anti-dumping duties against Chinese exports, and Chinese exports of steel products and solar panels in particular. The provision is set to expire on December 11, 2016. This very fact has generated fierce debates in Europe, Canada, and United States, which increasingly conflate the legal with the political dimension of the underlying issues. In the run-up to the December deadline, special interest representatives of industry groups have heavily lobbied EU member states' (MS) governments and European Union institutions to ignore the expiry of WTO members' special trade defense rights under the CAP in order to continue unabated tariff protection.[456] These efforts have crystallized in both the EP and French-German initiatives. In the meanwhile, the official press agency of the People's Republic of China – Xinhua - opined that "European countries have put on a bizarre show of deciding whether to deliver on their promises to grant China market economy status."[457]

On November 15, 2016, the European Commission submitted a legislative proposal[458] to the Council and the EP that will, if adopted, amend the 2009 EU Anti-Dumping Regulation (ADR).[459] The proposal is subject to potential amendments by the EP and EU Member States in the Council. The proposed ADR amendments are currently subject to debate and scrutiny in the Council and the EP and will have to be adopted soon in order to protect the Anti-Dumping Regulation – "as such" – and existing as well as future EU anti-dumping measures against China – "as applied" – from legal challenges in the WTO context. China, indeed, has filed a request for consultations and a panel request on December 12, 2016, and March 31, 2017 respectively [460] – challenging the EU ADR, which remains in force until to date.

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[456] AegisEurope, a European association of 25 industries, has advanced a particularly targeted public relations campaign titled "Stop China MES".

[457] Xinhuanet (28 May 2015): *US Trade Protectionist Move will only backfire*

[458] European Commission (2016): *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union.*

[459] *Council Regulation of 30 November 2009 on protection against dumped imports from countries not members of the European Community*.

[460] Request for Consultations by China (2016): *European Union – Measures Related to Price Comparison Methodologies*

3. The Legal Effect of the Expiration of Article 15(a)(ii) of China's Accession Protocol to the WTO

Article 15 of China's WTO Protocol of Accession lays down special rules that apply to price comparisons in determining the existence of 'dumping' in context of third countries' trade defense proceedings against imports from Chinese producers. Article 15(a) provides for an explicit derogation from ADA Article 2.1. and Article 2.2. Under the ADA, a product is considered to be dumped onto the importing countries' market if the export price is lower than the price of the like product in the exporting countries' domestic market. Article 15(a) codifies an exception to this standard price comparison methodology in acknowledgement of non-competitive market conditions in the Chinese economy that prevailed at the time of accession:

"(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;

(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product."

Article 15(a)(i) and (ii) reflect the presumption that Chinese domestic prices are generated under conditions of government-induced market distortions. Domestic prices generated under non-market-economy (NME) conditions make for a deceptive comparator of export prices in the determination of whether, and to what extent, a

product has been dumped onto third country markets. The rationale for this presumption is straightforward: If Chinese domestic prices are artificially low due to non-competitive market conditions, a comparison with export prices in anti-dumping procedures would not allow for a determination of dumping at all, or result in the calculation of dumping margins and anti-dumping duties that are lower than under competitive market economy (ME) conditions.

It follows from Article 15(a)(ii) that WTO members' anti-dumping investigators may derogate from the price comparison requirements of ADA Article 2.2. if the Chinese producer under investigation cannot prove that ME conditions exist in the respective industry. The allocation of the burden of proof, however, makes for a formidable obstacle for the producer under investigation: neither WTO law nor the CAP define the concept of "market economy conditions". WTO members were thus free to determine criteria for the conferral of 'market economy status' (MES) to China under its national laws, either for the economy as a whole, or for specific industries. MES conferral to China, in other words, remained at full discretion of WTO members' policy-makers for the time being.

Throughout the past 15 years, Article 15(a)(ii) provided EU anti-dumping investigators in the European Commission with a wide margin of discretion in determining the existence and extent of Chinese dumping and created the legal basis for a highly effective trade remedy against Chinese exports: no less than 56 of the current 73 EU antidumping measures apply to imports from China.

Article 15(d), however, provides contingencies that trigger the termination of Article 15 (a), in general, and the expiry of Article 15(a)(ii), in particular:

"d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession.

In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession.

> In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector."

Providing for an *obiter dictum* in regard of the provisions of Article 15(d) in conjunction with Article 15(a), the WTO Appellate Body (AB), in *EC-Fasteners,* opined that Article 15(a) is a time-bound derogation from the ADA.[461] Until December 11, 2016, China had the opportunity to establish MES for the purposes of price comparisons under the ADA for the entire Chinese economy (Article 15(d), 1st sentence) or individual sectors (Article 15(d), 3rd sentence). The two provisions, however, only applied vis-a-vis countries that had enacted laws and regulations providing for criteria of MES conferral prior to 2001. It is noteworthy that the EU did not maintain legal criteria for MES conferral at that time.

Notwithstanding China's right to early termination of the ADA derogations laid down in Article 15(a), the AB interpreted the expiry of Article 15(a)(ii) – codified in Article 15(d), 2nd sentence – as WTO members' *erga omnes* obligation to apply the disciplines of the ADA on an unconditional basis, starting on December 11, 2016:

> "Paragraph 15(d) of China's Accession Protocol establishes that the provisions of paragraph 15(a) expire 15 years after the date of China's accession (that is, 11 December 2016). It also provides that other WTO Members shall grant before that date the early termination of paragraph 15(a) with respect to China's entire economy or specific sectors or industries if China demonstrates under the law of the importing member 'that it is a market economy'."

After this deadline, WTO members' use of methodologies other than those consistent with the ADA run foul of their obligations and expose respective practices to legal challenge at the WTO. With the December deadline looming, Western industries have become increasingly wary of the loss of a highly potent trade defense remedy in the post-2016 scenario. Such anxieties have resulted in spillover effects that inspired

[461] WTO Appellate Body Report (15 July 2011): *EC-Fasteners*, para. 289

innovative legal thinking among some trade defence lawyers. Ever since, the prevailing legal opinion on the interpretation of Article 15 CAP, as expressed by the AB in *EC-Fasteners* as well as numerous reputable legal scholars and practitioners, has become the target of intense opposition advanced by EU industry associations, politicians, and some legal practitioners.[462]

One opposing view contends that the remaining provisions of Article 15(a) and Article 15(d) make for an indefinite presumption of NME conditions in China even after the expiry of Article 15(a)(ii). The ADA derogations of Article 15(a), the story goes, are permanent and render China a NME forever and ever after, unless otherwise established under the national laws of WTO members in accordance with Article 15(d), 1st and 3rd sentence.[463]

This alternative and – among industry interest group representatives - increasingly popular reading of Article 15 is based on the assumption that Article 15(a) has a broader scope than Article 15(a)(ii), which expires in December 2016. After that date, the introductory sentence of Article 15(a) allowed WTO members' to choose between ADA and NME price comparison methodologies, if China cannot establish MES under Article 15(d). Article 15(a)(i), likewise, affirmed the continued presumption of China's NMES.

This view, however, is not convincing. The introductory sentence of Article 15(a) offers a choice between an ADA consistent and an alternative price comparison methodology "based on the following rules". These rules are codified in subparagraph (i) and (ii) of Article 15(a). In other words, paragraph (a) cannot operate in autonomy from subparagraphs (i) and (ii). The material content of subparagraphs (i) and (ii) is identical, albeit phrased in reverse logic: only subparagraph (ii) expressly permits that "[t]he importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs". Subparagraph (i), in contrast, requires that Chinese domestic prices or costs are used "[i]f the producers under investigation can clearly show that market economy conditions prevail in the industry."

A narrow textual interpretation of Article 15(a) following the expiration of subparagraph (ii) could mislead to the inferential conclusion that the use of alternative price comparison methodologies remains permissible under Article 15(a)(i) if

[462] Tietje, Christian & Karsten Nowrot (2011): 1-12; Graafsma, Folkert & Elena Kumashova (2014): 154-159

[463] O'Connor (2011); O'Connor (2015)

producers *cannot* clearly show that ME conditions prevail in the industry under investigation. An isolated reading of subparagraph (i), however, would preclude an effective interpretation of paragraph (d), 2nd sentence, which triggers the expiration of Article 15(a)(ii). Inferring the permission to use alternative methodologies from (i) would leave the expiration of subparagraph (ii) via paragraph (d), 2nd sentence, without any legal effect on WTO members' rights to use alternative price comparison methodologies. Such a reading of Article 15(a) would not only ignore the immediate legal context but also violate the principle of effective treaty interpretation in regard of paragraph (d), 2nd sentence, which the AB articulated in US-Gasoline.[464]

A less radical line of thought proposes that the expiration of Article 15(a)(ii) merely shifts the burden of proof in regard of MES conditions (and NMES conditions respectively) from China to the investigating WTO member.[465] Article 15, however, does not give any textual indications to this end, neither prior to nor after December 11, 2016.

It is, moreover, questionable whether the purpose of the CAP, in general, and Article 15(a) and (d) in particular, is to permit a permanent discriminatory legal treatment of Chinese producers in derogation from the WTO's ADA. To the contrary, as Graafsma & Kumashova point out, both then USTR Charlene Barshefsky (in a hearing before the US House of Representatives) as well as the European Commission (in its submission to the WTO panel in *EC-Fasteners*) have publically voiced their understanding that China will automatically receive ME status for the purposes of the ADA in December 2016.[466] It appears to be clear that evidence of official positions expressed by the drafters of the CAP will be taken into account by WTO panels and the AB in future proceedings.

3.1. Preliminary Conclusion: The WTO-compatibility of EU "as such" and "as applied" Anti-Dumping Measures against China after December 11, 2016

In conclusion, the adoption of EU AD measures against China that are based on the use NME methodologies will be vulnerable to legal challenge in WTO Dispute Settlement (DS) proceedings after December 11, 2016.

In order to bring EU secondary legislation – "as such" - and future EU

[464] WTO Appellate Body Report (1996): *US-Gasoline*, para. 23
[465] Miranda, Jorge (2014).
[466] Graafsma and Kumashova (2011)

antidumping measures – "as applied" in conformity with the ADA by December 11, 2016, the European Commission ought to table a legislative proposal as part of the envisaged EU TDI reform - or separately - in the coming weeks. The Commission will have to, at a minimum, propose China's removal from the list of NMEs in Article 2.7. of the EU's 2009 ADR to ensure compliance with ADA Articles 2.1. and 2.2. The ADR, "as such", will otherwise be vulnerable to legal challenge in the WTO's dispute settlement mechanism immediately after the December deadline has passed.

4. Are existing "as applied" Anti-Dumping Measures against China WTO-compatible after December 2016?

The conclusions drawn from the previous section, however, do not prejudge the legality of AD measures that the EU has (or will have) adopted against Chinese producers prior to the December deadline. The question about the post-2016 legality of *already existing* EU AD measures that are "not based on a strict comparison with domestic prices or costs in China", is particularly relevant in context of the rising amount of new EU AD measures and investigations against Chinese producers of steel and solar panels that the EU has imposed and initiated in the last 18 months.[467] It is this very question that is subject to analysis in this section.

China's Accession Protocol, to begin with, does not give any textual or contextual indication for a third country obligation to terminate existing AD measures against Chinese producers on or before December 12, 2016. Thus, in regard of the CAP, we are left with the conclusion those AD measures that were adopted before the deadline and are based on non-standard methodologies will remain valid after December 2016. WTO members' trade defense investigators may not, however, use non-standard price and cost comparison methodologies in proceedings under the ADA *after* December 11, 2016.

4.1. After Sunset: The End of the Anti-Dumping Regime under China's Accession Protocol

"As applied" anti-dumping measures are subject to a 'sunset clause', which is codified in Article 11.3 of the WTO's Anti-Dumping Agreement. The purpose of the

[467] Euractiv (12 February 2016): *EU hits China with new anti-steel probes*. European Commission Press Release (7 October, 2016): *European Commission imposes anti-dumping duties on Chinese steel products* (October 7, 2016).

provision is to preclude the indefinite application of AD measures after their adoption. The rule requires that

> "(…) any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (…)".

The lifespan of EU AD measures that have been imposed prior to the December deadline is thus limited to five years. The only way to extend the duration of such a measure is the request of an *expiry review* on behalf of the domestic industry or on the initiative of domestic government authorities. An expiry review entails a full anti-dumping investigation and is subject to the material and procedural requirements of the ADA. These requirements are frequently transposed into WTO members' domestic laws and regulations, such as the EU's Anti-Dumping Regulation of 2009.

Expiry reviews that are initiated after the December deadline must entail ADA consistent price and cost comparison methodologies under the post-CAP AD regime and would hence result in the calculation of much lower - if any - AD margins compared to the results attained under non-standard methodologies applied under Article 15 CAP. Both domestic industries and WTO members' government authorities will thus lack incentives to initiate such reviews in regard of AD measures that were adopted prior to the December deadline. As a preliminary conclusion, AD measures will henceforth have to be phased out over the course of five years, counting from the date of the adoption of each and every individual measure.

4.2. 'Immediate Termination' before Sunset? Interim Reviews under the WTO Anti-Dumping Agreement

"As applied" anti-dumping measures adopted under the CAP regime, however, may nevertheless have to be terminated before the end of the 5-year period. Article 11.1 ADA codifies the general principle that

> "an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury".

Article 11.2 ADA, in conjunction with Article 11.4 ADA, elaborates and specifies the contingency-based and time-bound approach of the ADA with regard to trade defense remedies, which is generally framed by Article 11.1 ADA.

> "11.2 The authorities shall review the need for the continued imposition of the duty where warranted, on their own initiative or, provided that *a reasonable period of time* has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which *submits positive information substantiating the need for a review*. Interested parties shall have the right to request the authorities to examine *whether the continued imposition of the duty is necessary to offset dumping* (…). If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, *it shall be terminated immediately."*
>
> 11.4 (…) *Any such review shall (...) normally be concluded within 12 months of the date of initiation of the review*" [emphasis added]

Article 11.2 ADA gives Chinese producers, exporters, and government authorities the right to request an interim review – i.e. a full AD investigation – before the end of the usual five-year lifespan of a measure. The purpose of the review a determination of whether an AD duty, at the time of the request and beyond that date, continues to respond to the existence of 'dumping' within the meaning Article 2.1 and 2.2 of the ADA.

The administration that has authored the measure has limited discretion to reject the request for interim reviews. Yet, two conditions must be fulfilled: First, a reasonable period of time must have passed since the adoption of the measure. The EU, in the ADR of 2009, has interpreted this period to last one year following the imposition of the duty (ADR Article 11(3), first sentence).

Secondly, the applicant must submit "positive information" that "substantiates the need for a review" (Article 11.2 ADA). By inference drawn from ADA Article 11.2, second sentence, a "need for a review", would be substantiated if the information submitted by the applicant provides "positive information" to the claim that the "continued imposition of the measure" will not "be necessary to offset dumping" after the review is concluded.

In *Mexico - Anti-Dumping Measures on Rice*, the AB clarified that

> "where the conditions in Article 11.2 have been met, the plain words of the provision make it clear that the agency has no discretion to refuse to complete a review."[468]

The review will then have to rely on an ADA consistent determination of 'dumping' and the determination of the potential extent thereof. It is noteworthy, in this context, that the ADA concept of "positive information" has been translated as "sufficient evidence" in the EU ADR.

4.3. EU Interim Reviews after December 2016: Practice and Litigation

The important question is therefore whether the European Commission will, in response to Chinese producers' interim review requests, consider the submission of producer and industry specific price and cost data in conjunction with the expiration of the CAP exception as "positive information" (Article 11.2 ADA), i.e. "sufficient evidence" (ADR Article 11(3), third sentence). Moreover, in the course of an admitted interim review, how would such evidence effectuate the determination of 'dumping' and the prospect of the "continued imposition" of the original measure?

If the interested party can, in its request, provide evidence indicating that an ADA consistent EU anti-dumping investigation could result in a finding of 'no dumping' or 'lower dumping margins', the Commission will be obliged to engage in a full AD investigation subject to the post-2016 regime's price and cost comparison methodologies. A subsequent finding of 'no dumping' or 'less dumping' requires that the original measure is "terminated immediately" (Article 11.2 ADA) or adjusted to the updated AD margin. The review, in any case, must be made within 12 (Article 11.4 ADA) to 15 months (Article 11.5 ADR). At the final stage, it is the Council that acts upon a proposal put forward by the Commission.

Given the incentives provided by the prevalent WTO and EU legal institutions, Chinese producers are likely to request interim reviews of existing EU AD measures in late 2016 and early 2017. If interim review requests are denied by the Commission the corresponding acts will be open to legal challenge before the EU Court under Article 263(4) TFEU. Moreover, Chinese government authorities are likely to challenge the denial of interim review requests within the context of WTO dispute settlement proceedings.

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[468] WTO Appellate Body Report (2005): *Mexico – Anti-Dumping Measures on Rice*. para 314

The first WTO panel dealing with this issue could be established as early as spring 2017. In the proceedings, the complainant will need to provide support to the claim that the party it represents had provided "positive information" – or "sufficient evidence" – to indicate that an interim review investigation could have resulted in a determination of 'no dumping' or 'lower dumping margins' under the ADR, and the ADA respectively. Conversely, the complainant can seek to demonstrate that it was but for the denial of the request that the Commission had not come to such a conclusion.

If the Commission admits Chinese producers' AD interim review requests, however, the modalities of these reviews are then subject to EU obligations under the post-2016 ADA regime, if not an ADA consistent ADR. The continued imposition of EU AD measures that are based on determinations of dumping that do not rely on Chinese domestic prices in accordance with ADA Article 2.1 or cost constructions in accordance with Article 2.2 ADA are hence vulnerable to challenge in WTO dispute settlement proceedings, if not before the EU Court in Luxembourg.[469]

It is further conceivable, in any case, that Chinese producers and government authorities feel inclined to contest the assumption that "a reasonable period of time" within the meaning of Article 11.2 ADA is adequately reflected by the phrase "the period of time of at least one year" in Article 11.3 of the EU's ADR. In light of the expiry of the CAP's ADA derogation on December 11, 2016, it may be convincingly argued that much less time ought to pass between the imposition of a measure and the request for an interim review, for that request to be admissible. It is at least conceivable that it is the date of that event rather than the prior duration of the measure in question, which determines the maximum duration of "a reasonable period of time".

An 'option map' prepared by the trade defense directorate of the European Commission's DG TRADE outlines an alternative scenario in which the Commission denies Chinese producers' interim review requests on the basis of the claim that a change in the applicable WTO legal regime does not constitute a change in factual circumstances.[470] Interim and expiry reviews, in line with this approach, would be conducted in further application of the expired right the use of non-standard price and

[469] For a discussion of permissible cost construction methodologies, see: Kok, Jochem de (2016)
[470] European Commission, DG TRADE, Unit H1: *Inception Impact Assessment – Possible change in the methodology to establish dumping in trade defence investigations concerning the People's Republic of China*, Brussels, January 2016.

cost comparison methodologies. It is highly unlikely, however, that this approach would not be subject to litigation if it finds its way into the law and practice of EU Anti-Dumping following the adoption of the ADR amendments in the months to come.

5. The WTO Appellate Body Report in EU - Biodiesel

Following the most recent Appellate Body report in the *EU – Biodiesel*, the EU now, more than ever, internally negotiates its trade defence reform in the shadow of WTO law and WTO legal precedents. The AB report considerably narrows the EU's options to address general policy-induced market price distortions in third countries by means of anti-dumping measures that are consistent with Article 2.2. and – more specifically – Article 2.2.1.1 of the ADA.[471] In its report, the AB clearly limits the scope of the AD agreement to producer and industry specific pricing practices, in contrast to price-distorting government policies, such as export controls or general subsidy schemes. The AB's findings clarify that WTO members cannot simply use third country or world market prices to prove dumping practices, but must use firm level costs of production in the country of origin of the export in anti-dumping investigations. In this way, the report sets an important precedent for the legality of future EU anti-dumping practice vis-à-vis China: the 'analogue country' price and cost comparison methodology, arguably now belongs to WTO legal history.

In this way, the AB's finding has important ramifications for the WTO legality of the coming reforms of the EU's AD regulation. With the AB ruling, the Commission will find it increasingly difficult to remedy price distorting government policies through WTO consistent anti-dumping measures. Yet, the Council and the EP have made it clear in previous statements and resolutions, that they seek an EU trade defense reform that is WTO compatible. As such, the process of EU's anti-dumping reform now stands in the shadow of established WTO case law and of the expiry of Article 15 (a)(ii) of the Chinese Accession Protocol to the WTO.

6. Outlook: Systemic Implications of Non-Compliance

If the EU reform of the 2009 Basic Anti-Dumping Regulation follows the recommendations voiced in the Franco-German letter to the EU Trade Commissioner

[471] WTO Appellate Body Report: *EU – Biodiesel*. paras 7.1-7.3

and the recent resolution of the European Parliament, the ADR, "as such", as well as future EU AD measures, "as applied", that will be highly vulnerable to legal challenge in WTO dispute settlement proceedings. The same is true, moreover, for EU AD measures that have been adopted against Chinese producers under the CAP regime prior to December 11, 2016, if EU law and practice, after that date, denies ADA conform interim reviews or base such reviews on ADA inconsistent price comparison methodologies.

In the past, Members of the European Parliament and Members States represented in the Council have frequently advanced unconditional and relentless efforts to promote the rule of law as a core European value at home and abroad likewise, quite in line with the EU's external action objectives under Article 21 TEU. Concerning the questions raised in this chapter, however, it may be the plain prospect of a flood of rather immediate legal challenges - both at the EU and WTO level - that could still make for a considerable factor in the course of the ongoing deliberations associated with the legislative process.

Should the Union, however, decide to ignore its WTO obligations, it ought to hold itself accountable for the further erosion of the rules-based multilateral trading system that it once helped to build in its very own interest. Furthermore, EU political leaders should be under no illusion that such a step back into the direction of the lawless jungle of international economic relations would alienate a vital partner in times of an increasing fragility of traditional alliances and dynamic global power shifts. Finally, it appears conceivable, to say the least, that the partner in question will deduct the costs incurred in this process in a currency other than trade revenues.

Rather than frustrating WTO members' credible expectations, which are anchored in negotiated legal disciplines, EU political institutions could opt to fully exhaust the available institutional alternatives of WTO consistent trade remedy design and practice under the ADA as well as the SCM Agreement and promote social mitigation strategies for industrial sectors in decline. [472]

[472] For a discussion and analysis of alternative (WTO consistent) trade defence instruments, see: Vermulst, Edwin, Juhi Dion Sud and Simon J. Evenett, (2016).

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Between March 2013 and February 2014, the author conducted 15 interviews that are listed below. The interviews covered various substantive and procedural aspects of EU Common Commercial Policy in the Lisbon era. The list refers to the interviewees professional positions held at the time the interviews were conducted. Planned interviews with Economic Affairs Attachés of member states Permanent Representations to the EU, policy advisors to the Green Group in the European Parliament, and the European Consumer Organisation BEUC did not materialize.

1. Elena Pereso (Member of the Cabinet of Karel DeGucht, Commissioner for External Trade)

2. Peter Chase, (Vice-President for Europe, US Chamber of Commerce)

3. Erik Bergelin (Director for Trade and Economics, European Automobile Manufacturers Association ACEA)

4. Adrian van den Hoven (Deputy Director General, BUSINESS Europe)

5. Hans Glatz (Delegate for EU Affairs at Communications and Network Consulting AG)

6. Rupert Schlegelmilch (Director for Services, Investment, IPR, and Government Procurement, DG TRADE, European Commission)

7. Pascal Kerneis (Managing Director, European Services Forum)

8. Anka Schild (Senior Policy Advisor for Government Affairs, Siemens AG)

9. Tom Jenkins (Advisor to the Secretary General, European Trade Union Confederation, ETUC)

10. Roberto Bendini (Administrator, DG External Policies, European Parliament)

11. Anna Cavazzini (Parliamentary Assistant to Ska Keller, Member of the European Parliament, the Greens, Member of the INTA Committee)

12. Vital Moreira, Member of the European Parliament, S&D Group, Chairman of the INTA Committee)

13. Piero Rizza (Policy Advisor for International Trade, EPP Group, European Parliament)

14. Christofer Fjellner (Member of the European Parliament, EPP Group, Member of the INTA Committee)

15. Ute Deceuninck-John, (Manager for Trade and Industrial Policy, Daimler EU Corporate Representation).

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