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ARTICLE: "GLOBAL EUROPE": THE EU'S NEW TRADE POLICY IN ITS LEGAL CONTEXT

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LEXISNEXIS SUMMARY:

... Renewed interest in bilateral trade negotiations follows a lengthy de facto moratorium on trade negotiations outside the WTO framework, which resulted from an effort to sustain the current multilateral talks. ... Even though one may be tempted to explain the inclusion of non-trade issues by pointing to the likelihood that the Union is using its trading power as leverage to pursue non-trade objectives, the actual normative value of the provisions contradicts this view. ... Enlargement Policy: Albania, Bosnia and Stabilisation and Herzegovina, Croatia, Macedonia, Association Agreements Montenegro, Serbia European Neighborhood Algeria, Egypt, Israel, Jordan, 'POLITICAL' Policy: Euro-Med Morocco, Lebanon, Occupied Agreements / Partnership Palestinian Territory, Syria, TRADE and Cooperation Tunisia / Armenia, Azerbaijan, AGREEMENTS Agreements Georgia, Moldova, Ukraine Development Policy: Cotonou-Convention / European Partnership ACP countries Agreements European Economic Area Iceland, Liechtenstein, Norway 'PURE' Customs Union / FTAs Andorra, San Marino, Turkey / with European Countries Switzerland **TRADE AGREEMENTS** FTAs with Countries Chile, Mexico, South Africa, outside Europe South Korea Figure 2.3: Existing EU 'Political' and 'Commercial' Preferential **Trade Agreements** In view of this analysis, the Europe 2020's strategy of creating growth through trade is not well served by existing FTAs. ... The Union has since included rules on competition, transparency in government procurement and investment in its **trade agreements** and FTAs with developing countries. ... Under static conditions and with the prospect of Parliament voting on the agreements, the Commission will only ask the Council for such a mandate that falls within the common political preferences of all three institutions. ... The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity; (b) consolidate and support democracy, the rule of **law,** human rights and the principles of international **law;** (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders; (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; (f) help develop international measures to preserve and improve the quality of the environment and

the sustainable management of global natural resources, in order to ensure sustainable development; (g) assist populations, countries and regions confronting natural or man-made disasters; and (h) promote an international system based on stronger multilateral cooperation and good global governance. 3. ... This Paper assumes that the crucial question is not how to provide an exact definition of "coherence" in the abstract, but rather the most salient inquiry examines how best to ensure consistency between the EU's trade policy-- in particular the policy surrounding FTAs--and the EU's other policies.

HIGHLIGHT:

This article links recent developments in EU trade politics with the relevant rules governing the formulation of the common commercial policy. Its aim is to explain the domestic law regulating the EU's current external trade relations. Since 2006 EU trade policy has undergone a major shift from a policy of strict multilateralism towards selective bilateralism. To that end, the EU has launched a "new generation" of free trade agreements (FTAs), which are today its principle means for opening foreign markets. Despite the fact that already many bilateral trade treaties are in place between the EU and third countries, these new agreements mark a change in EU trade policy in that, for the first time, purely commercial goals are pursued on a bilateral basis. This shift in policy is accompanied by a major treaty amendment: the entry into force of the Lisbon Treaty, which has a great impact on EU external action in general and on trade policy in particular. One of the Treaty's main features is to link the Union's trade policy with its other foreign policies. In the context of the common commercial policy, this leads to some contradictions between the language of the law and actual EU trade policies. This paper identifies the relevant factors in the move towards bilateralism and provides an in depth analysis of EU trade policies in the face of these changes.

TEXT:

[*278] I. INTRODUCTION

Until recently, the EU typically pursued trade interests multilaterally. Although the EU has concluded many bilateral treaties containing trade chapters, crucial issues and the most important market access commitments were typically negotiated within the multilateral framework of the World Trade Organization ("WTO"). More recently, however, the WTO's pivotal role as the central forum for trade negotiations has diminished. The emergence of new political and economic powers--such as China, India, and Brazil--asserting their new roles in the world economy has significantly altered negotiations within the WTO. Whereas the Uruguay Round was basically the outcome of negotiations between four major trade blocks, the current Doha Round faces the intricate problem of accommodating many more and often diverging positions. [n1] As a result, the Doha Round is the longest-running round of negotiations in WTO history. Many pressing issues have not yet found a multilateral solution. In addition, due to the duration of the Round, many subject matters from the initial agenda are no longer relevant. Facing this impass, many major trading nations, including the EU, have sought new market access opportunities through other channels. [n2] These innovations have largely come in the form of reciprocal trade commitments outside the WTO framework with those states that are willing to tackle unresolved issues of the Doha negotiations.

The principal means of codifying these new trade strategies is the conclusion of free trade agreements ("FTAs"). FTAs are bilateral treaties that liberalize trade between the parties by abolishing nearly all tariffs and other obstacles to trade. [n3] FTAs are distinct from customs unions because each party maintains its external barriers to trade with non-parties. The EU is one of the major participants in such activities outside the multilateral framework. In 2010 the EU formed an FTA with the Republic of Korea--the first one with an Asian nation--and is now negotiating agreements with Canada, India, and the ASEAN nations. Whereas the EU had previously concluded trade accords outside of Europe only with developing countries, for the first time, it has now entered into bilateral contractual relations with industrialized nations and emerging market economies.

This paper is organized as follows: Part I delineates the developments leading up to the reformulation of EU trade

policy in 2006 and gives an overview and classification of the existing trade treaties. In addition, Part I outlines the reasons **[*279]** leading to the recalibration of the common commercial policy and considers why the changes occurred. Part II analyzes domestic EU law governing the shift towards bilateralism and examines its impact on the EU's new trade strategy. Part II is subdivided into two sections: The first deals with the procedural aspects of the formation of FTAs, and the second deals with the substantive requirements of the same. The final section concludes.

II. THE SHIFT TOWARDS BILATERALISM

Currently, there are about twenty-five trade agreements between the European Union and non-EU countries in force. [n4] These trade agreements include countries in Europe, Asia, Africa, and the Americas. Notwithstanding these agreements, the EU launched a new series of FTA negotiations in 2006. [n5] In 2010, after a seven-year hiatus from bilateral activities, the EU concluded its first FTA with the Republic of Korea. [n6] This treaty is only the first of a long list of prospective agreements. [n7] Renewed interest in bilateral trade negotiations follows a lengthy de facto moratorium on trade negotiations outside the WTO framework, which resulted from an effort to sustain the current multilateral talks. [n8] The question hence arises: what has changed to make the Union recommence bilateral negotiations despite ongoing efforts within the WTO?

There are numerous conceivable motives to establish preferential trading arrangements outside the WTO framework. Economists and political scientists offer various explanations why states conclude trade agreements in general and FTAs in particular. The most obvious economic inducement is enhanced market access. [n9] Based on the ideas of comparative advantage, [n10] economies of scale and consumers' preference for varieties, FTAs promise to increase the welfare of all participants in comparison to situations where trade barriers exist. [n11] In contrast, Bagwell and Staiger stress the function of trade agreements to discipline governments that may, **[*280]** due to their country's economic ponderosity, exploit their market power and produce negative externalities. [n12] In particular, trade agreements may inhibit tariffs and other border measures so as to influence a state's terms-of-trade, that is, the quantity of imports it can buy through the sale of its exports. [n13] However, this approach is highly contested, because it does not seem to explain why states under real-world conditions rarely manipulate their terms-of-trade. [n14] A third approach considers trade agreements as a means for securing long-term government commitments because they ensure consistent trade policies and allow governments to resist the protectionist pressures of domestic interest groups by referring to their international obligations. [n15] Others emphasize the role of FTAs for non-economic foreign policy goals. [n16] For example, FTAs satisfy domestic constituencies, whose interest in foreign markets and political influence has shifted the political economy equilibrium in favor of free trade. [n17] Finally, FTAs may put political pressure on other WTO members by forcing them to accelerate negotiations and deepen commitments. [n18]

As the remainder of this article will show, the primary impetus for the launch of the EU's new generation of FTAs was economic, and largely corresponds to the explanations outlined above.

The Commission's 2006 "Global Europe" communication [n19] and 2010 "Trade, Growth and World Affairs" communication identify four main reasons for the launch of new FTA negotiations. [n20] First and foremost, domestic economic policy considerations; second, the ineffectiveness of existing trade agreements to meet the EU's economic objectives; third, the stalemate of the Doha Development Round; and finally, the trade policy of the EU's main competitors. [n21]

A. Commercial Motives

The EU's principal objective in concluding new FTAs is to stimulate economic growth. [n22] Enhanced market access and accompanying economies of scale foster employment opportunities and consumer welfare, thereby creating tangible results for EU citizens. [n23] In the words of a recent Commission communication, "[t]he latest **[*281]** generation of competitiveness-driven Free Trade Agreements is precisely inspired by the objective of unleashing the economic potential of the world's important growth markets to EU trade and investment." [n24] However, these "unleashed" forces place efficiency pressures on all producers within the free trade area. [n25] While tariffs and other

import barriers may allow inefficient producers to remain in the market, the logic of the free trade area is to force these producers either to adapt to increased competition by becoming more productive or to give way to more efficient producers. [n26] Thus free trade areas may have an important domestic effect of fostering innovation and efficiency through intensified competition. [n27]

Moreover, FTAs lock in domestic policy reforms. The external and internal dimensions of trade are intrinsically linked. FTAs will increase competitive pressure on EU market actors. Accordingly, the establishment of free trade areas is a means of encouraging domestic reforms, and may even have the effect of facilitating the completion of the common market by creating incentives for economies of scale and accompanying comparative advantages in international competition. [n28] This holds particularly true in sectors that have not yet wholly liberalized, such as the services sector. In the same vein, by binding itself externally the Union may overcome collective action problems caused by well-organized special interests, and may reject the demands of domestic pressure groups for protectionist measures by tying its hands *ex ante*. [n29] Accordingly, the Global Europe communication stresses that market access abroad should be accompanied by the right policies at home. [n30] In other words, the EU should make sure that it remains an open market economy.

However, political support for a European free trade agenda does not depend on economic criteria alone. Apart from adjustment costs caused through competitive pressure and detrimental effects on social justice, [n31] trade policy has to take into account wider policy concerns to ensure support from that part of the domestic constituency that has only an indirect interest in free trade. [n32] Whereas opposition to free trade traditionally comes from import-competing industries, nowadays the resistance is broader. [n33] It ranges from worried consumers and workers to plain citizens--people who are worried about non-economic virtues such as labor standards, environmental protection or cultural diversity, which they feel are **[*282]** threatened by the forces of free trade. [n34] Since these concerns are not fully addressed within the multilateral framework, FTAs may be a tool to ensure that these concerns are taken into account and thus to strengthen the social legitimacy of trade policy.

In sum, there are three domestic considerations for the launch of new FTA negotiations: commercial interests, the lock-in of the open market model domestically, and linkage issues concerning the social acceptance of trade policy. However, these objectives also have a more far-reaching goal, which is to contribute to the Union's output legitimacy. [n35] This pursuit of legitimacy is emphasized in the Global Europe Communication, which states that "economic prosperity, social justice and sustainable development . . . are a core criterion by which citizens will judge whether Europe is delivering results in their daily lives." [n36]

B. Ineptitude of Existing FTAs

Existing FTAs do not fully serve current EU trade policy's objectives. [n37] While they promote the EU's security and development policies, they have a low impact on trade, mainly because FTA partners are of relatively little importance for EU trade. Many existing FTAs were motivated by politics rather than trade. Due to FTAs' exclusive competence in the field of external trade, countries have used them to further non-commercial interests, such as general foreign policy concerns. [n38] The constant struggles of the Commission and Council to maintain the appropriate scope of the common commercial policy provide illustrative examples of FTAs' susceptibility to non-commercial uses. [n39]

The twenty-five preferential trade agreements that the EU has concluded can be classified into five groups. The distinctiveness of the agreements is not only based on their objects but also is reflected in their substantive regulation of trade--an important point for present purposes. The five groups can be distinguished according to their political and territorial vicinity to the Union: (i) agreements with neighboring European countries that deliberately did not accede to the Union or were too small for full Union membership but nevertheless participate in the common market project; (ii) agreements with neighboring European countries with an accession perspective; (iii) agreements with the countries within the wider neighborhood without an accession perspective (except Turkey); (iv) agreements with developing countries; and (v) purely commercially motivated agreements with countries all around the globe. [n40] **[*283]**

Agreements Extending the Internal	Andorra, EEA-Agreement, San

Market and with Microstates	Marino, Switzerland
Agreements with Candidate Countries	Albania, Bosnia-Herzegovina, Croatia, FYROM, Montenegro, Serbia
Agreements with Neighboring Countries	Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestinian Authority, Tunisia, Turkey
Agreements with Developing Countries	Central America, Cariforum
Agreements with other Countries	Chile, Mexico, Republic of Korea, South Africa

Figure 2.1: Existing EU Trade Agreements

SHARE OF TOTAL EU TRADE 2010

COUNTRIES	AGREEMENTS	IMPORTS (%)	EXPORTS (%)
	EEA		
Andorra, Iceland, Lichtenstein, Norway, San Marino Switzerland	FTA	11.2	11.2
	Customs Union		
Albania, Bosnia-Herzegovina, Croatia, FYROM, Montenegro, Serbia	Stabilization and Association Agreements	0.9	2.0
Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestinian Authority, Tunisia, Turkey	Euro-Med Agreements and Customs Union with Turkey	6.5*	10.3*
Cariforum, Central America	European Partnership Agreement	1.7	2.3
Chile, Korea, Mexico, South Africa	FTAs	5.3	5.7
	TOTAL	25.6	31.5

[*284] Figure 2.2: Share of Trade under EU Preferential Trade Agreements

Source: Aggregated Data from EU Commission, DG Trade website

* The high numbers result from the intensive trade relation between the EU and Turkey.

The five types of existing EU FTAs can be classified into two broader groups: those that are motivated primarily by foreign policy considerations (such as development or security) and those that aim at commercial objectives. [n41] The first group consists of European Partnership Agreements with regional groups of the ACP countries, the Euro-Med Agreements, the Partnership and Cooperation Agreements with the eastern neighbors, and the Stabilisation and Association Agreements with the Western Balkan Countries. At the moment, these agreements are less commercially motivated and make no claim to have a significant impact on economic welfare in the Union. These agreements serve other purposes that go well beyond trade by touching on issues such as illegal immigration, [n42] Nuclear Safety [n43] and illicit drugs. [n44] These fields clearly exceed the traditional scope of trade **[*285]** agreements. Even though one may be tempted to explain the inclusion of non-trade issues by pointing to the likelihood that the Union is using its trading power as leverage to pursue non-trade objectives, the actual normative value of the provisions contradicts this view. [n45] About 92% of all the provisions beyond the scope of traditional FTA coverage are unenforceable. [n46] Moreover, trade under all of these arrangements accounts for only a small share of EU external trade. [n47] The non-reciprocal phase-in period of the agreements--the amount of time until tariffs are fully abolished--further argues for mixed commercial and non-commercial motivations. Whereas goods from these countries may be imported duty free from the entry into force of the respective agreement, tariffs on goods originating in the EU are only removed in successive annual steps. [n48] Against this backdrop, it is hard to justify FTAs as a means to foster economic prosperity in the Union. The first group of agreements should rather be assessed as a means of implementing foreign policy by using trade as leverage. [n49] Nevertheless, these treaties represent nearly two thirds of all EU FTAs (see figure infra). [n50]

The second group of more commercially motivated FTAs consists of agreements with western European countries, either under the EEA-Agreement or separate agreements, as well as FTAs with non-European states. However, these agreements are either concluded with countries whose markets are static and do not anticipate fast growth, or countries that only account for a small share of EU trade. **[*286]**

'POLITICAL' TRADE AGREEMENTS	Enlargement Policy: Stabilisation and Association Agreements	Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia
	European Neighborhood Policy: Euro-Med Agreements / Partnership and Cooperation Agreements	Algeria, Egypt, Israel, Jordan, Morocco, Lebanon, Occupied Palestinian Territory, Syria, Tunisia / Armenia, Azerbaijan, Georgia, Moldova, Ukraine
	Development Policy: Cotonou-Convention / European Partnership Agreements	ACP countries
'PURE' TRADE AGREEMENTS	European Economic Area Customs Union / FTAs with European Countries	Iceland, Liechtenstein, Norway Andorra, San Marino, Turkey / Switzerland
	FTAs with Countries outside Europe	Chile, Mexico, South Africa, South Korea

Figure 2.3: Existing EU 'Political' and 'Commercial' Preferential Trade Agreements

In view of this analysis, the Europe 2020's strategy of creating growth through trade is not well served by existing FTAs. In particular, trade relations with the emerging market economies in Asia and South-America are neglected under the established agreements. In order to serve the "Europe 2020" goals of sustainable, intelligent and inclusive growth, new FTAs are necessary.

In addition, the criteria for the launch of FTA negotiations have changed. Whereas broader policy considerations will still be taken into account, it is now primarily market potential and the level of protection against EU export interests that will be decisive for paving the way to new negotiations. [n51] In line with these requirements, the EU has identified its potential treaty partners. **[*287]**

	North-America:	
		Canada
	Comprehensive Economic and Trade Agreement	
"PURE" TRADE AGREEMENTS	Far East: Free Trade Agreements	India, Singapore, ASEAN
	Middle East: Free Trade Agreement	Gulf Cooperation Council
	South-America: Free Trade Agreement	Colombia & Peru, Mercosur
	Middle East: Deep and Comprehensive Free Trade Agreements	Amendments
'POLITICAL' TRADE AGREEMENTS		Euro-Med Agreements
	Eastern Europe: Deep and Comprehensive Free Trade Agreement	Ukraine

Figure 2.4: EU Preferential Trade Agreements under Negotiations

C. Stalemate of the Doha Round

The third reason for the new focus on FTA negotiations has been the stalemate of the Doha Development Round ("DDR"). The DDR is the current round of WTO negotiations that commenced in 2001. [n52] Its main goal has been to implement the WTO development objectives, as set out in the preamble of the Marrakesh Agreement establishing the WTO. [n53] In particular, the DDR aims to secure **[*288]** developing countries a share of the growth of world trade that is commensurate with their economic development needs. [n54] Although the EU has reiterated its commitment to the multilateral system on several occasions, the slow progress of the Doha Rounds has been one of the crucial motivations for the shift toward selected bilateralism through FTAs. [n55]

The Union began the DDR with a highly ambitious agenda. It aimed to deepen existing commitments, specifically in the services sector. In addition, it brought up a range of new matters that would extend the reach of the WTO, in particular the four so-called Singapore Issues. [n56] Moreover, the Union's agenda included clarifying the role of

environmental and labor standards in the WTO. [n57] However, after two rounds of negotiations, the EU realized that it could not find enough support among WTO Members for its proposals. [n58] Consequently, negotiations collapsed during the Cancun Ministerial Meeting. [n59] In particular, developing countries rejected any attempts to extend the coverage of WTO obligations and did not address their interests and needs under existing rules. Eventually, three of the four issues were taken off the agenda such that trade facilitation remains the only one still under negotiations. [n60] After the breakdown of the talks and the formal suspension of the negotiations in 2006, the Commission launched the Global Europe strategy. [n61] This strategy illustrates the tight link between failed efforts in the WTO and the shift towards bilateralism.

The failure to integrate new and, arguably important, issues into the multilateral framework led the Union to look for second-best solutions. Accordingly, the Global Europe communication states that key issues--including the Singapore Issues--should be addressed through FTAs. [n62] The Union has since included rules on competition, transparency in government procurement and investment in its trade agreements and FTAs with developing countries. [n63]

D. Trade Policy of the EU's main competitors

Finally, the EU was inspired to shift its trade policy in view of the strategies followed by its main competitors, notably the United States and Japan, which also engaged in FTA negotiations with the EU's priority FTA partners. [n64] The United **[*289]** States, for instance, has already concluded and ratified an FTA with Korea, [n65] one of the EU's priority partners, and has further FTAs on its trade agenda. Japan has embarked on negotiations with ASEAN countries, [n66] another high-listed EU FTA partner. Under these circumstances the problem of trade diversion has become urgent. Trade diversion denotes the possibility that with the establishment of preferential trade agreements, there is the risk that trade flows are not established between the most efficient traders but, due to the protection of the respective markets through tariffs, are diverted to less efficient traders within the preferential trade area. [n67] This happens when tariff reductions outweigh efficiencies. [n68]

The EU suffered from trade diversion problems after the conclusion of NAFTA, which resulted in a substantial loss in market share for EU exporters in Mexico. [n69] The example of NAFTA also helps to explain today's move toward FTAs. NAFTA triggered what Baldwin called the "domino effect of regionalism: [n70] EU exporters who suffered from NAFTA lobbied for an FTA with Mexico to restore a level playing field. In this vein, the political economy equilibrium has shifted with respect to other FTA partners, too. One FTA led to another one (the "domino effect"). Thus, FTAs are being used as defensive means to maintain a level playing field in emerging markets and to prevent trade diversions to the detriment of EU exporters. [n71]

E. Interim Conclusion

The launch of a new generation of EU FTAs marks a far-reaching policy shift. Whereas the FTAs of the past almost solely existed within the framework of other policies, the new generation FTAs are primarily commercial pursuant to the Europe 2020 strategy. [n72] Economic welfare is a strong thread of legitimization for the Union and successful trade policy forms one part of this general approach. [n73] To a certain extent, FTAs nowadays are separated from other policies, operating as a discrete means of achieving economic objectives outside of the WTO framework. This is a significant policy change insofar as it redefines the role that FTAs play in EU external relations. Furthermore, it underscores the political choice that has been made in favor of more, rather than less competition and thus extending both potential sales markets and the number of competitors.

Nevertheless, FTAs are perhaps only a second-best solution for attaining economic objectives and are by no means a panacea. Even if the EU concluded all **[*290]** planned FTAs, they would, together with preferential systems for developing countries, [n74] cover only 50% of EU external trade. [n75] MFN-tariffs would still apply to trade with all EU major trading partners. [n76] Important regulatory issues, by contrast, may be addressed more effectively through FTAs since the Union can more easily leverage market access for regulatory issues in bilateral negotiations. These issues have

a multilateral effect. When an FTA partner decides to adopt competition laws or rules on public procurement, these laws will most likely govern trade with the Union as well as becoming rules of general application. The EU often seeks to include behind-the-border policies in its FTAs, in particular the opening of foreign public procurement markets, the strengthening of IP-Rights and the elimination of unnecessary trade-restrictive standards and technical regulations. [n77]

II. THE LAW GOVERNING EU BILATERAL TRADE RELATIONS

The negotiation and conclusion of trade agreements is an exclusive EU competence. The entry into force of the Lisbon Treaty has brought about some changes in EU external relations law. These changes affect the EU treaty making power in three ways. First, the scope of competences has been broadened. The EU's power in the field of external trade now covers almost the whole realm of WTO law. [n78] Second, the procedure for the conclusion and ratification of FTAs has been amended. [n79] Whereas before the European Parliament did not even have a right to be consulted in the FTA process, now its consent is required for all trade agreements. [n80] Both developments influence the setting for negotiations among EU institutions. In order to assess the impact of the latter amendment, I will apply Tsebelis' veto-player-theory to this new institutional scenery and explain the shift of powers that it brings about. [n81] Finally, the CCP has been subjected to a general framework of EU foreign relations rules. This framework provides for non-economic objectives and principles the EU has to pursue in all of its external actions. Whether these rules impose substantive requirements on the conclusion of FTAs will be the subject of the final part of this section.

[*291] *A. Procedural Requirements*

1. Competences

Pursuant to Article 3(1) (e) TFEU, the Common Commercial Policy ("CCP") is an exclusive EU power and explicitly includes the power to conclude trade accords. [n82] Article 207(1) TFEU states in relevant part:

> 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. [n83]

The EU's exclusive treaty making competence hence relates to trade in goods, services, commercial aspects of intellectual property, and foreign direct investment. [n84] Moreover, former exceptions concerning sensitive areas such as trade in cultural, social, educational, and health related services are now exclusive Union competences. [n85]

The scope of competences is of the utmost importance in shaping EU trade policy in that it impacts the mode of negotiations between the institutions. In addition, it makes an enormous difference whether the Commission can initiate negotiations of an FTA by a qualified majority Council decision--which is the case for all subject matters over which the EU has exclusively competence--or whether it has to obtain a unanimous decision, which would be the case for areas outside of the EU's exclusive competence. [n86] Thus, the scope of the EU's competence directly affects FTAs by determining the political level at which decisions are made. This in turn implicates different procedural rules' ultimate impact on the range of policy options.

[*292] 2. Procedure

The process by which trade agreements are transformed-from negotiation into final trade accords differs slightly from the regular treaty-making procedure of Article 218 TFEU. Article 207(3) TFEU provides for some special procedural modifications for subject matters falling within the scope of application of the CCP. [n87] In principle, the process consists of three steps: initiation, negotiation, and conclusion, [n88] and involves three institutions: Commission, Council and, newly, Parliament. [n89] The next section discusses the treaty-making process.

The power to initiate FTA negotiations comes from the Commission. The Directorate General for Trade proposes the launch of FTA negotiations with a third country. [n90] This proposal is then discussed on the administrative level in inter-service consultations where different technical concerns and interests are voiced. [n91] Next, in order to obtain the Council's authorization for negotiations, the proposal must obtain approval at the political level from the College of Commissioners. [n92] After their deliberations, the Commission may recommend to the Council the opening of negotiations with a third country. [n93] The Council can then accept or reject the proposal by qualified majority vote. [n94]

If the Council so authorizes, the Commission launches and conducts negotiations. According to Article 207(3) subparagraph 3:

> The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations. [n95]

The bodies to which the Commission reports pursuant to this proviso are, on the one hand, the Council's Trade Policy Committee (TPC), [n96] which consists of Member States' representatives; and, on the other hand, Parliament's Committee on International Trade (INTA Committee). [n97] The TPC shall ensure that Member States' interests are protected and that the Commission does not transgress the negotiation **[*293]** authorization. [n98] Therefore, the Commission and the Trade Committee cooperate closely in the course of negotiations. [n99] Relations to the INTA are regulated in an agreement between Parliament and the Commission [n100] in which the Commission undertakes far-reaching obligations that go well beyond the reporting obligation. [n101]

When negotiations are successful and the Commission can agree with the third party on a final treaty text, the Council may authorize the Commission to sign the FTA on behalf of the EU. [n102] Subsequently, the Commission submits the FTA to both Parliament and Council, who must give their consent to the FTA's entry into force. [n103] Parliament votes on whether to give consent by a simple majority vote, whereas the Council does so either by qualified majority or, in cases where the FTA falls under Article 207(4) subparagraph 3 TFEU, by unanimity. [n104] If any of the two bodies withholds its consent, the FTA cannot be concluded. Moreover, if the FTA touches upon Member States' competence and is thus a mixed agreement, national parliaments must ratify the agreement for its full entry into force. [n105] In these cases, those parts of an FTA that deal with areas of exclusive EU competence may be provisionally applied until the national parliaments' approval. [n106] Since the exclusive competence under Article 207 (1) TFEU renders ratification possible without the involvement of the national parliaments, the next section will focus on the procedure on the European level. [n107]

[*294] IV. PROCEDURAL STEPS FOR THE CONCLUSION OF FTAS

See Image

The Lisbon amendments concerning the treaty ratification procedure have major impact on all phases of the process. The most notable change is giving the European Parliament veto-power. [n108] This Article will explain why this not only affects the final decision on the approval of an FTA, but also impacts the Commission's proposal to open negotiations, and extends through the negotiation phase itself. First, this Article will depict the dynamics between the Commission and the Council and then add Parliament to the framework.

[*295] The first stage--when the Commission requests negotiation authorization from the Council--is shaped by the Commission's agenda-setting power. Only the Commission can recommend the initiation of FTA negotiations and suggest the negotiating partner and content of a mandate for negotiations. [n109] Thus, the first prerequisite for the launch of new FTAs is a respective preference within the Commission, *i.e.* there must be the political will to launch FTA negotiations. For such a preference, the Commission then has to find a qualified majority in Council. These two factors together endow the Commission with a relatively strong position *vis-[#xE0]-vis* the Council. The Commission's

agenda-setting power, coupled with the qualified majority requirement, allows the Commission to bargain with individual Member States instead of with the Council as such. If no qualified majority initially exists, the Commission can alter its negotiation priorities by accommodating individual Member States' concerns. By negotiating with each Member State individually, the Commission can secure the qualified majority for its new recommendation without a reluctant Member State's input, so long as a sufficient number of other Member States approve the recommendation. n110 Member States therefore have an incentive to give their consent to a recommendation, even if the recommendation does not fully reflect their preferences because the alternative would be to face an agreement which lacks their contribution. n111

The necessary institutional preconditions n112 for the initiation and conclusion of FTAs can be examined by applying *Tsebelis'* veto-player-model, which will be explained in the following on the basis of the Article 207(3) and 218 of TFEU procedure. Both the Commission and the Council are veto-players in that their consent is necessary to change the status quo, which means, in this case, initiating FTA negotiations. n113 Both the Commission and the Council have diverging preferences and interests. While the Commission is more likely to represent pro-integration, pan-European' positions, n114 the Council will often represent Member States' interests which may diverge due to the autonomic nature of each Member State. n115 Whose preference prevails depends on the intersection of these institutions' individual preferences. Nevertheless, due to the agenda setting-power of the Commission and the possibility for it to arrange individual bargains with Member **[*296]** States under the shadow of QMV, the final outcome will most likely be closer to the Commission's preference than to that of the Council. n116

Even though Parliament is not yet involved at this stage, the prospect of its eventual consent potentially changes the range of the Commission's possible recommendations. This consent requirement makes Parliament a veto-player, albeit at a later stage in the process. Under the assumption that Parliament's political preferences differ from those of the Commission and the Council, n117 the common area of overlapping preferences is smaller relative to the *status quo ante*. In other words: it may be easier to find an agreement between two players with diverging preferences than between three such actors, given that the chances to find a compromise are lower when the sum of common positions is small. Under static conditions and with the prospect of Parliament voting on the agreements, the Commission will only ask the Council for such a mandate that falls within the common political preferences of all three institutions. n118 That is to say, the Commission will only from the outset seek a negotiating mandate that corresponds to the political positions of the Council and the Parliament. It would be useless to negotiate a treaty for which the Commission could not obtain approval from these two bodies. If, for instance, the Council or the Parliament would voice concerns about the economic situation of European farmers, the Commission would rather not propose to initiate trade negotiations with a strong farm products exporter. However, because negotiating FTAs takes time--often even years--at this stage, the Commission may seek a mandate that lies outside Parliament's preferences under certain circumstances. For example, if the Commission is confident that it will either not make full use of the mandate and the result of negotiations will lie within the common intersection of political preferences or, if the Commission believes that it may alter Parliament's preferences.

To ensure that the final agreement's text will reflect preferences in the overlapping intersection of all three institutions, their continuous input is essential. Accordingly, during negotiations, the Commission has a duty to report to the Trade Policy Committee and to the INTA Committee. n119 Reports to the TPC ensure that the Commission obeys its original mandate. n120 Consultations with the INTA **[*297]** Committee, in turn, ensure that the negotiating mandate fits within Parliament's preferences, or is adapted to assure Parliament's final consent.

At the last stage, the Commission has to seek both the Council and Parliament's consent for the final text of the FTA. n121 The Council's consent is required for the signing as well as for the conclusion of the respective FTA. n122 However, at this stage the advantage that the Commission had vis-[#xE0]-vis the Council at the beginning of the process is no longer operative. Once a text is agreed upon with a non-EU country, the Commission cannot make further changes. n123 This follows from the fact that at this juncture Member States' preferences are already reflected in the agreement and are impossible to impair due to the political and transaction costs of renegotiating the treaty with the third country. Hence, the Commission cannot enter into bargains with individual Member States so as to ensure a QM.

In view of the costs of reopening the completed treaty, amendments to the final text to accommodate Parliament's preferences are also not possible at this stage. [n124] Accordingly, the Commission has to ensure that the final text presented to the Council and Parliament reflects the preferences of both institutions.

As a result, Parliamentary involvement will render the initiation and conclusion of FTAs more difficult and more complex, at least in cases in which Parliament's preferences diverge from the Commission's and the Council's. In such cases, the scope of overlapping preferences, and thus the range of policy options, decreases in comparison to the pre-Lisbon setting in which only two veto-players' preferences had to be reconciled.

A. Substantive Requirements?

Interestingly, the paradigm shift in EU trade politics towards a more commercial approach coincides with contrary primary law amendments. For the first time ever, the CCP is explicitly embedded into a broader framework of EU external relations law. [n125] Notably, pre-Lisbon, there was no legal connection between trade and other policies, though they were *de facto* connected. [n126] Today the CCP is explicitly subject to the framework of EU external relations law and should thus by law take into account broader foreign policy objectives. In fact, however, the Commission attempts to minimize the influence of non-commercial aspects in order to focus on economic objectives, at least in the field of bilateral trade agreements. [n127] Thus, actual trade politics and the text of the Treaty seem to have developed in divergent directions.

[*298] According to Article 207 (1) (2) TFEU "[t]he common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action." [n128] These principles and objectives are set forth in Article 21 TEU, which states in relevant part: [n129]

> 1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: 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 Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.
>
> 2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:
>
> (a) safeguard its values, fundamental interests, security, independence and integrity;
>
> (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
>
> (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
>
> (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
>
> (e) encourage the integration of all countries into the world economy, including through the progressive

abolition of restrictions on international trade;

(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;

(g) assist populations, countries and regions confronting natural or man-made disasters; and

(h) promote an international system based on stronger multilateral cooperation and good global governance.

3. The Union shall respect the principles and pursue the objectives set out in paragraphs I and 2 in the development and implementation of the **[*299]** different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

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.

Article 21 contains a long list of principles (paragraph 1), objectives (paragraph 2) and the duty of consistency (paragraph 3). In this context, the common commercial policy's principal objective of international economic liberalization must be reconciled with these non-economic virtues. [n130] In other words, the treaties establish an explicit connection between trade and other policies. Therefore, the question arises as to what the legal effect of this general external action framework will be on trade politics.

While the external policy goal prescriptions in Article 3(5) and 21(1) TFEU are not strict legal requirements [n131] --a violation of which would invalidate a measure, the duty of consistency could impose a substantive obligation on EU institutions. [n132] This is especially true in the conduct of external action and the making of FTAs. Nevertheless, external policy objectives may influence this duty of consistency by determining the permissible content of the various policies: the Union may only pursue policies that are congruent with its objectives as enshrined in the treaties. The duty of coherence on the other hand, could be conceived of as a substantial obligation that limits the discretion of the institutions in that all policies must be consistent with each other. For example, on this basis the question of whether the EU's trade actions do not compromise its development policies could potentially be amenable to judicial review.

How do FTAs work with other Union policies so as to comply with the duty of consistency? Due to the resurgence of FTAs, the question has no concrete answer. But, one may theoretically consider the following examples. First, the focus on recent commercially motivated FTAs binds resources that could have been available for other tasks. For example, officials that deal with development policy may now instead scrutinize technical barriers to, for instance, the EU products' access to Canadian markets with the effect of weakening one policy (development) for the sake of the other (trade). Another issue is whether the EU should take into account the trade diversion effects of its FTAs on developing countries. Would an FTA with this effect be considered inconsistent with the EU's other policies because it could **[*300]** compromise the EU's development objectives or policies and hence be unlawful? This depends on the interpretation of the duty of consistency and a determination of what the duty's legal implications are.

The term "consistency" within the meaning of Article 21(3) TEU is commonly referred to as the absence of contradictions between the different external policy areas. [n133] However, due to ambiguities arising from different translations coupled with the treaty's overarching aim--to bring about mutual support between all Union policies--some suggest that "consistency" should rather be understood as "coherence," or a positive obligation to ensure synergy between the different external policies. [n134] This Paper subscribes to the coherence interpretation. Coherence in this context has two implications, bearing in mind that this definition's objectives are twofold. First, coherence thus denotes

efficient use of available resources by avoiding contradictory policy measures. [n135] Second, coherence shall generate legitimacy by making policy actions amenable to "rational motivated acceptance," which is based on the insight that the respective policy is concerned with other EU policies. [n136] In simple terms, a policy decision one would reject when it is viewed in isolation may become acceptable when it is presented as part of an integrated approach. To give a concrete example: some parts of the European population may dislike the idea of fiscal transfers between individual Member States but they can accept them because they fit with other measures preserving the Union's Monetary Union and are thus perceived as coherent.

Cremona has elaborated a more differentiated notion of coherence. [n137] She distinguishes between "vertical" and "horizontal" coherence; the former refers to the relationship between Member States and the Union, whereas the latter concerns inter-policy coherence on the Union level. [n138] Secondly, she suggests that coherence should be understood as a three-level concept. [n139] The first level refers to rules of hierarchy such as the primacy of EU law and the precedence of primary over secondary EU law. The second level denotes rules of delimitation between different actors in order to avoid duplications and gaps. [n140] Finally, coherence represents a "synergy between norms, actors and instruments," or the principles of cooperation and complementarity. [n141]

This Paper assumes that the crucial question is not how to provide an exact definition of "coherence" in the abstract, but rather the most salient inquiry examines how best to ensure consistency between the EU's trade policy-- in particular the policy surrounding FTAs--and the EU's other policies. "Coherence" as an abstract **[*301]** term is aspirational and tells us virtually nothing about the permissible content of FTAs. Moreover, the aspirational quality of "coherence" in the abstract renders this concept amenable to divergent understandings and definitions. Accordingly, the following section deals solely with the legal effects of the coherence requirement. In addition, this Paper focuses on the horizontal dimension of coherence, and its analysis is limited to Cremona's rules of delimitation level, *i.e*. the delimitation of competences between actors.

In order to give meaning to the duty of coherence, one must explore *who* gives meaning to the term. In other words, who shall decide what an efficient use of resources is and how to balance different policies in the course of concluding FTAs? Since processes within institutions--rather than individuals--conduct EU trade politics, it is these institutions that determine the content of the duty of coherence. In order to respond to the question of what coherence in EU trade politics really is, one should thus analyze the institutions assigned with this duty, compare the different institutional alternatives, and contrast their respective advantages and disadvantages. In this vein, the quest for coherence is the quest for the proper institution(s) to deliver such coherence.

Whereas the treaties explicitly impose the duty of coherence upon the political institutions, [n142] some commentators esteem the courts as being competent to evaluate whether coherence between different external actions prevails. [n143] While courts may invalidate a trade policy measure on specific grounds, such as a violation of fundamental rights or non-compliance with procedural requirements, it is less likely that they will do so because of mere incoherence.

The only judicially enforceable substantive limit set forth by EU law for the making of FTAs seems to follow from the *FIAMM* case. [n144] In that case, the ECJ emphasized that the political institutions' space for maneuver in the realm of international trade law finds its limits in the fundamental rights of individuals. This duty to observe fundamental rights might be a proxy for coherence in some but not necessarily all cases.

The case law of the Court of Justice suggests that the duty of coherence in the CCP and FTA context is better allocated to the political process. In many cases concerning external trade, the Court upheld the findings of the political institutions and was reluctant to substitute its own decisions for the outcome of political deliberations. For instance, in *Denmark v. Commission (Gran Padano Cheese)*, the ECJ found that the Commission must balance the competing policy objectives of the common commercial policy and other policies so as to ensure consistency. [n145] In this case the Community had installed a scheme of export subsidies for Gran Padano cheese, which was, following two decisions of the Commission, only applicable to **[*302]** products from Italy. [n146] Denmark argued that the Commission decisions

were contrary to the regulation establishing the scheme, since they discriminated between like products on grounds of origin. [n147] However, the regulation also provided that in applying the scheme, the Commission had to take account not only of the objectives of the common agricultural policy but also for the CCP's objectives. [n148] The Court followed the Commission's reasoning and accepted the argument that the extension of the aid beyond Italy could lead to distortions with the Communities' trading partners and that it was rightfully restricted to certain disadvantaged producers. [n149] To ensure coherence between agricultural and trade policy was thus considered to be the task of the Union's political branches--and not the Court--even when these policies incidentally discriminated against one group of community producers. For striking the right balance between compliance with the Union's international obligations on the one hand, and its commitment to non-discrimination on the other hand, the Commission was implicitly deemed to be the better-situated institution. [n150] In other words, even though the fundamental principle not to discriminate on grounds of nationality was at stake, the Court adopted a hands-off approach and left it in this case to the Commission to determine what is coherent.

Germany v. Council (the "*Banana* case") is another example where the duty of coherence played a role. [n151] In this case many different interests were at stake including, development, agricultural, trade policy, fundamental rights, compliance with the Union's international obligations and the principles of non-discrimination. [n152] The Community had installed a scheme for the importation of bananas that favored domestic producers and those producers from the former colonies in the African, [n153] Caribbean and Pacific (ACP) countries ("traditional producers") over exporters in Central and South America ("non-traditional producers"). [n154] With this new import regime the Union violated its international obligations under the GATT 1947 quite obviously, given that the scheme openly discriminated between WTO members. [n155] To establish a common market for bananas, the remaining quotas for the importation of bananas from non-traditional producers were distributed among importers all over the Community, regardless of whether they previously had been supplied by them or by traditional producers. As a result, the traders of non-traditional bananas had to buy the import-licenses of the traders of traditional bananas to stay in business and consumers in these countries had to pay higher prices. [n156] This led to a wealth shift from countries which had been **[*303]** supplied by non-traditional producers to countries which had imported bananas from "traditional producers." [n157] Nevertheless, the Court upheld the regulation, albeit on rather dubious grounds, most likely because it did not want to interfere with the findings of the political process. [n158] Even though the Court delved into legal scrutiny, the result of acknowledging the other institutions' policy space was deference to the political branch. In the words of the ECJ:

> It should be pointed out in this respect that in matters concerning the common agricultural policy' the Community legislature has a broad discretion which corresponds to the political responsibilities given to it . . . The Court has held that the lawfulness of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue. More specifically, where the Community legislature is obliged, in connection with the adoption of rules, to assess their future effects, which cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question . . . The Court's review must be limited in that way in particular if, in establishing a common organization of the market, the Council has to reconcile divergent interests and thus select options within the context of the policy choices which are its own responsibility. [n159]

"Discretion," "manifestly incorrect" and "limited review" are common indications for a Court's reluctance to substitute a Council's decision with its own. The choice to accept the judgment of the political institution is in itself an institutional choice. Finding the right balance between all of the competing claims was thus left to the political institutions, even if the political decision resulted in a breach of WTO law and was therefore inconsistent with the EU's other international obligations. [n160]

Read in conjunction, the two cases paint an even clearer picture. In the first case the Court justified privileging trade policy over domestic agricultural concerns by referencing the CCP's objective to contribute to the harmonious development of world trade and the possible counter-reactions of the Union's trade partners to any infringement of

international trade obligations. [n161] By contrast, in the *Banana* case, even though the measure quite clearly infringed WTO law, the Court did not take into account the possibility of countermeasures by other WTO members. [n162] The courts do not see themselves as capable political institutions when it comes to balancing different policies with trade. This was reaffirmed in cases such as *Van Parys* and *FIAMM*, where the ECJ stated:

> [A]n outcome, by which the Community sought to reconcile its obligations under the WTO agreements with those in respect of the ACP States, and with the requirements inherent in the implementation of the **[*304]** common agricultural policy, could be compromised if the Community Courts were entitled to judicially review the lawfulness of the Community measures in question in light of the WTO rules. [n163]

The reasons for the Courts' deference in the realm of trade law can be explained by a comparative institutional analysis, which assesses each institution's advantages and disadvantages.

Coherence is inextricably tied to political preferences. [n164] At a given moment, it only reflects then contemporary political preferences. These preferences are, however, not necessarily a polity's future preferences. The right balance between trade and development policy in the 1980s might not be the same in 2010. Legal criteria, by contrast, must have precedential value and therefore set out fixed requirements. [n165] Legal decisions are generally static in order to provide for a limited scope in which legal certainty is appropriate. [n166] Consequently, legal decisions could freeze the political process to the preferences at the moment when the criterion was established. [n167] This, in turn, could prevent shifts in political views over time and could hinder the evolution of political preferences.

Another drawback the Court has as a moderator of coherence in trade politics is that the procedural settings in Court proceedings can limit the participation of potentially affected interests through the judicial concept of standing rights. [n168] Whereas EU traders, consumers, and other interest groups may lobby the Commission, Council or Parliament, they do not necessarily have standing in court proceedings. [n169] Similarly, when a trade policy incidentally affects foreign governments (who would not have standing in an EU Court) the political institutions may be able to find a mutually satisfactory compromise, whereas a Court's ruling could potentially undermine the EU's relations with that government. Furthermore, reviewing trade policy measures is an extremely complex undertaking and may be best executed by the administrative and political institutions that have more appropriate resources for such a task.

A third, and rather prosaic reason, for the ECJ to abstain from delving too deeply into the review of trade policy measures is the judiciary's limited scale and **[*305]** competence. In view of this, it is impractical to add the task of reviewing the EU's external policy coherence to its enormous caseload. [n170] Taking on this responsibility would require the Court, when deciding on a single trade policy before it, to consider all existing trade measures and attempt to strike the appropriate balance. Scrutinizing measures for their coherence within the whole body of external policy measures would even further aggravate this situation, because it would open the floodgates and invite plaintiffs to bring potentially any external action measure before the Court.

Finally, the dynamics of litigation impact the Court's ability to ensure coherence. The ECJ cannot make decisions on its own motion. Rather, it can only rule on plaintiffs claims. Cases will only reach the Court if there are plaintiffs who have an economic interest in lodging a claim, or if a plaintiffs potential benefits exceed the costs of litigation. The dynamics of litigation thus could create a situation where the coherence review is done inconsistently, which would lead to selective enforcement of the coherence duty.

For the above reasons, courts cannot enforce the duty of coherence as a legal obligation in the course of FTA-making. The duty of coherence remains a political concept, and the political institutions endowed with trade policymaking must determine its content. Courts will not address the coherence of trade measures. However, courts will scrutinize measures for their formal and substantive legality and make sure the agreements are compatible with EU law. In relevant cases, the duty of coherence will at most be *lex generalis*, which will be derogated by more specific rules, such as rules of procedure or fundamental rights.

V. CONCLUSION

EU trade policy has undergone a major change from a policy of strict multilateralism towards selected bilateralism. The recalibration of EU trade politics towards commercial objectives induced this change, in particular because domestic economic growth is currently a *leitmotiv* of the common commercial policy. Given that the multilateral track for enhancing market access is currently closed because of an ongoing stalemate in the WTO negotiations, bilateral FTAs seem to loom large in the near future. As a consequence, the WTO's importance will not entirely vanish. But as long as no major breakthrough occurs in the Doha-Round, the WTO will be reduced to primarily acting as the forum for dispute settlement instead rather than the engine of trade liberalization.

The new EU trade agenda will be shaped by both the Commission and, since the Treaty of Lisbon's entry into force, the European Parliament--, which must now consent to any trade accord. Given the diverging preferences of these two players, the Commission's task will be to reconcile its own interests with those of Parliament as well as the interests of the respective negotiation partner. While at first glance **[*306]** this seems to restrain the Commission in the pursuance of its agenda, it might eventually strengthen its position relative to its negotiation partner because unwanted proposals can be rejected by referring to the need for Parliament's consent. However, the ways in which Parliament's involvement will influence the Commission's negotiation tactics remains to be seen. Nevertheless, what is already clear is that the objectives and principles written in the EU Treaties will not have a judicially enforceable governing effect on EU trade policy. The ways in which the EU's political institutions will navigate the tensions between overarching principles of EU law and the specific needs of a trade agreement will shed important light on whether these principles create concrete legal obligations or whether they are relegated to unenforceable rhetoric.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBilateral ContractsInternational LawTreaty FormationNegotiationsInternational Trade LawGeneral Overview

FOOTNOTES:

n1 The Uruguay Round led to the foundation of the WTO. The four major trading blocks--the so-called "Quad"--were Canada, the EU, Japan, and the U.S. *See, e.g.*, JOHN CROOME, RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND (1999).

n2 Throughout the article I will refer to the EU as a "trading nation." Of course, I do not intend to suggest that the EU is a nation state.

n3 Gabrielle Marceau & Cornelis Reiman, *When and How is a Regional Trade Agreement Compatible with the WTO?*, 28 LEGAL ISSUES OF ECON. INTEGRATION 297, 302 (2001).

n4 An overview of the agreements in force is available at the European Commission's website. European Commission, *Overview of Regional Trade Agreements* (Nov. 14, 2011), *available at* http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_111588.pdf.

n5 *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Global Europe Competing in the World--A Contribution to the EU's Growth and Job Strategy*, at 10, COM (2006) 567 final (Oct. 4, 2006) [hereinafter *Global Europe*]; *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU's 2020 Strategy*, at 9-10 COM (2010) 612 final (Nov. 9, 2010) [hereinafter Trade, Growth and World Affairs].

n6 Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, May 14, 2011, 2011 O.J. (L127) 6.

n7 A list of ongoing FTA negotiations is available at the European Commission's website. European Commission, *Overview of FTA and Other Trade Negotiations* (Mar. 12, 2012), *available at* http://trade.ec.europa.eu/doclib/docs/2006/december/tradocl_18238.pdf.

n8 *Commission Staff Working Document, Report on Progress Achieved on the Global Europe Strategy, 2006-2010*, at 3, COM (2010) 612 final (Sept. 11, 2010).

n9 *Global Europe*, *supra* note 5, at 10-11.

n10 DAVID RICARDO, ON PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 140-203 (1821).

n11 Paul R. Krugman, *Increasing Returns, Monopolistic Competition and International Trade*, 9 J. INT'L ECON. 469-79 (1979).

n12 KYLE BAGWELL & ROBERT STAIGER, THE ECONOMICS OF THE WORLD TRADING SYSTEM 18-31 (2002).

n13 FRANK WILLIAM TAUSSIG, INTERNATIONAL TRADE (1927).

n14 Donald Regan, *What are Trade Agreements for? Two Conflicting Stories Told by Economists, with a Lesson for Lawyers*, 9 J. INT'L ECON. L 951, 969-82 (2006).

n15 Giovanni Maggi & Andres Rodriguez-Clare, *The Value of Trade Agreements in the Presence of Political Pressures*, 106 J. POL. ECON. 574 (1998)..

n16 *See* B. HOEKMAN & M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND 480-81 (2009).

n17 Richard Baldwin, *A Domino Theory of Regionalism, in* EXPANDING EUROPEAN REGIONALISM: THE EU'S NEW MEMBERS (Richard Baldwin, P. Haaparanta & J. Kiander eds., 1995); Wilfred J. Ethier, *The Theory of Trade Policy and Trade Agreements: A Critique*, 23 EUR. J. POL. ECON. 605 (2007).

n18 HOEKMAN & KOSTECKI, *supra* note 16, at 480-81.

n19 *Global Europe*, *supra* note 5.

n20 *Trade, Growth and World Affairs*, *supra* note 5.

n21 *See Global Europe*, *supra* note 5; *See also id*.

n22 *Communication from the Commission: Europe 2020--A European Strategy for Smart, Sustainable and Inclusive Growth*, at 22-34, COM (2010) 2020 final (Mar. 3, 2010); *Trade, Growth and World Affairs*, *supra* note 5, at 5.

n23 *Id*.

n24 *Communication from the Commission to the Council, the European Parliament, the European Economic Social Committee and the Committee of the Regions: Towards a Comprehensive European International Investment Policy*, at 7, COM (2010) 343 final (July 7, 2010).

n25 Global Europe, *supra* note 5, at 5.

n26 If markets are perfectly competitive, the abolishment of trade barriers does not have an impact on market structure and market performance. If, however, markets are imperfectly competitive, free trade results in a consolidation on the supply side. *See* STEPHEN MARTIN, INDUSTRIAL ORGANIZATION IN CONTEXT 575-82. (2010).

n27 Schumpeter was the first to emphasize the rivalry to create new products as an important factor of competition. *See* JOSEPH SCHUMPETER, THE THEORY OF ECONOMIC DEVELOPMENT (1934).

n28 *See* MARTIN, *supra* note 26.

n29 *Cf.* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971).

n30 *Global Europe*, *supra* note 5, at 3.

n31 *Global Europe*, *supra* note 5, at 4.

n32 Joost Pauwelyn, *New Trade Politics for the 21st Century*, 11 J. INT'L ECON. L. 559, 563 (2008).

n33 *Id*. at 564.

n34 *Id*. at 563.

n35 "Output legitimacy" can be described in terms of Lincoln's famous description of the main elements of democracy as "government for the people," which requires "no more than the perception of a range of common interests that is sufficiently broad and stable to justify institutional arrangements for collective action." FRITZ SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 11 (1999).

n36 *Global Europe*, *supra* note 5, at 2.

n37 *See Global Europe*, *supra* note 5, at 10-11.

n38 *See* Oliver Cattaneo, *The Political Economy of PTAs*, *in* BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 28, 44-45 (Simon Lester and Bryan Mercurio eds. 2009).

n39 *Cf.* PIET EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION: LEGAL AND CONSTITUTIONAL FOUNDATIONS 9-137 (2004); PANOS KOUTRAKOS, EU INTERNATIONAL RELATIONS LAW 5-134 (2006).

n40 SIMON HIX, THE POLITICAL SYSTEM OF THE EUROPEAN UNION 384 (2005).

n41 For a similar distinction, see Marise Cremona, *The European Union and Regional Trade Agreements, in* 1 EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 245, 249 (Christoph Herrmann & J[#xF6]rg Philipp Terhechte, eds. 2010). For an analysis of most of the agreements, see Marc Maresceau, *Bilateral Agreements Concluded by the European Community, in* 309 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 311-450 (2004).

n42 Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, June 21, 2000, 2000 O.J. (L147) 3, art. 57.

n43 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, Mar. 20, 2004, 2004 O.J. (L84) 13, art. 103.

n44 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, Jan. 28, 2005, 2005 O.J. (L26) 3, art. 79.

n45 Sophie Meunier & Kalypso Nicola[#xEF]dis, *The European Union as a Conflicted Trade Power*, 13 J. EUR. PUB. POL'Y 906 (2006).

n46 *Id.*

n47 *See* Figure 2.2, *supra* and accompanying text.

n48 *See* Euro-Mediterranean Agreement Establishing an Association between th[#xE9] European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, Mar. 30, 1998, 1998 O.J. (L97) 2, art. 11.

n49 *Cf.* L. Alan Winters, *EU's Preferential Trade Agreements: Objectives and Outcomes*, *in* THE EXTERNAL ECONOMIC DIMENSION OF THE EUROPEAN UNION 195, 196 (Pitou Van Dijck & Gerrit Faber eds., 2000).

n50 *See* Figure 2.3, *infra*.

n51 *Global Europe*, *supra* note 5, at 9.

n52 World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

n53 [FOOTNOTE TEXT MISSING IN ORIGINAL]

n54 *Id*. P 2.

n55 *Global Europe*, *supra* note 5, at 10.

n56 The term "Singapore Issues" refers to four working groups set up during the 1996 WTO Ministerial Meeting in Singapore: investment, competition, transparency in government procurement, and trade facilitation.

n57 Council of the European Communities, Preparation for the Third WTO Ministerial Conference -- Draft Council Conclusions, Document 12092/99 WTO 131 (Oct. 22, 1999).

n58 Sungjoon Cho, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Canc[#xFA]n and the Future of Trade Constitution* 7 J. INT'L ECON. L. 219, 230-01 (2004).

n59 Jagdish Bahgwati, *Don't Cry for Canc[#xFA]n*, 83 FOREIGN AFF. 52 (2004).

n60 World Trade Organization, Ministerial Declaration of 18 December 2005, WT/MIN(05)/DEC (2006), *available at* http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm.

n61 *Global Europe*, *supra* note 5.

n62 *Id*. at 8.

n63 *Cf*. Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, Oct. 30, 2008, 2008 O.J. (L289-I) 3, art. 65 *et seq*. (Investment); art. 125 *et seq*. (Competition); art. 165 *et seq*. (Public Procurement).

n64 *Global Europe*, *supra* note 5, at 14.

n65 United States--Korea Free Trade Agreement Implement Act, Public Law 112-41, 125 Stat. 428, 19 U.S.C. 3805 note.

n66 Michael Sutton, *Japanese Trade Policy and Economic Partnership Agreements: A New Conventional Wisdom?* 4 RITSUMEIKAN ANN. REV. INT'L STUD. 113-35 (2005).

n67 Jacob Viner, *The Customs Union Issue* 43-44 (1950).

n68 *Id.*

n69 *Global Europe*, *supra* note 5, at 17.

n70 *See* Baldwin, *supra* note 17.

n71 Andreas D[#xFC]r, *EU Trade Policy as Protection for Exporters: The Agreements with Mexico and Chile* 45 J. COMMON MARKET STUD. 833 (2007) (discussing previous cases of trade diversion).

n72 *See also* Colin M. Brown, *The European Union and Regional Trade Agreements: A Case Study of the EU-Korea FTA*, *in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 297, 308 (C. Herrmann & J.P. Terhechte eds., 2011).

n73 GIANDOMENICO MAJONE, EUROPE AS THE WOULD-BE WORLD POWER: THE EU AT FIFTY 143 *et seq* (2009).

n74 Council Regulation 732/2008, Applying a Scheme of Generalised Tariff Preference for the period from 1 January 2009 to 31 December 2011, art. 1, 2008 O.J. (L 211) 1 (EC).

n75 *Trade, Growth & World Affairs, supra* note 5, at 20 (table 1).

n76 These countries are Australia, China, Japan, New Zealand, Russia and the United States. Even though Russia is not a member of the WTO, the MFN tariff applies to trade with it. Council and Commission Decision 97/800 on the Conclusion of the Partnership and Cooperation Agreement Between the European Communities and Their Member States, of the One Part, and the Russian Federation, of the Other Part, 1997 O.J. (L 327) 1, art. 6. Trade with these countries accounts for about 50 % of all imports and 39 % of all exports.

n77 *See, e.g., Free Trade Agreement between the European Union Korea, supra* note 6.

n78 Markus Krajewski, *External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy*, 42 COMMON MKT L. REV. 91-111 (2005). Krajewski deals with the draft constitutional treaty that never entered into force. However, the provisions on the common commercial policy are identical to those in the Lisbon Treaty.

n79 PAUL CRAIG, THE LISBON TREATY 391 (2010).

n80 Consolidated Version of the Treaty Establishing the European Community, art. 300(3), Dec. 29, 2006, 2006 O.J. (C 321E) [hereinafter EC Treaty]. In practice, trade agreements were nevertheless submitted to Parliament, which in every case approved the respective treaty.

n81 GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK (2002).

n82 TFEU art. 3(1)(e).

n83 Consolidated Version of the Treaty on the Functioning of the European Union, art. 207(4), Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU].

n84 For a full account on the scope of the CCP after the Lisbon amendment, see e.g., Marc Bungenberg, *Going Global? The EU Common Commercial Policy After Lisbon*, 1 EUR. YEARBOOK INT'L ECON. L. 123 (2010); Markus Krajewski, *External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?* 42 COMMON MKT L. REV. 91, 108-19 (2005); Horst Krenzler & Christian Pitschas, Die Gemeinsame Handelspolitik im Verfassungsvertrag -- Ein Schritt in die richtige Richtung [The common commercial policy in the Constitution - A step in the right direction], *in* 11 DIE AUBENWIRTSCHAFTPOLITIK DER UNION NACH DEM VERFASSUNGSVERTRAG [THE FOREIGN TRADE POLICY UNION AFTER THE CONSTITUTIONAL TREATY] (Christoph Herrmann, Horst Krenzler, & Rudolf Streinz eds., 2005); Rafael Leal-Arcas, *The European Union's Trade and Investment Policy after the Treaty of Lisbon*, 11 J. WORLD INVESTMENT & TRADE 463, 484-94 (2010); Dorota Leczykiewicz, *Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade*, 6 GERMAN L. J. 1673, 1674-78 (2005); F. Van den Berghe, *The EC's Common Commercial Policy Revisited: What does Lisbon Add?*, 4 GLOBAL TRADE AND CUSTOMS J. 275 *et seq*. (2009).

n85 TFEU art. 207(4)(3) (competences in these areas were shared between the Union and its Member States under the previous treaty regime. *Cf*. TEC art. 133(6)(2)).

n86 TFEU art. 352.

n87 EECKHOUT, *supra* note 39, at 209-11.

n88 TFEU art. 207(3). *See also* Stephen Woolcock, *Trade Policy: A Further Shift Towards Brussels*, *in* POLICY-MAKING IN THE EUROPEAN UNION (Helen Wallace, Mark Pollack & Alasdair Young, eds., 2010) 381, at 387-93.

n89 TFEU art. 207(3).

n90 *Id*.

n91 Inter-service consultations are deliberations among the Commission's Directorate Generals (DGs). While DG Trade is responsible for trade negotiations, the other DGs can raise concerns or make proposals in these inter-service consultations.

n92 *See* Commission Decision 2010/138, Amending its Rules of Procedure, OJ (2010) (L55) 60, art. 8.

n93 TFEU art. 207(3)

n94 *Id*.

n95 *Id*.

n96 The TPC consists of Member States' representatives. For more detail, see FIONA HAYES-RENSHAW & HELEN WALLACE, THE COUNCIL OF MINISTERS 90-94 (2006).

n97 TFEU art. 207(3); Framework Agreement on Relations Between the European Parliament and the European Commission, 2010 O.J. (L 304) 47, annex III (5).

n98 MANFRED ELSIG, THE EU's COMMON COMMERCIAL POLICY 34 (2002).

n99 TFEU art. 207(3). *See also* Woolcock, *supra* note 88, at 389.

n100 Framework Agreement, *supra* note 97.

n101 For details, *see Id*. P 19-21.

n102 See TFEU art. 207(3) in conjunction with TFEU art. 218(5).

n103 See TFEU art. 207(3) in conjunction with TFEU art. 218(6).

n104 The provision applies to subject matters that are considered particularly sensitive by EU Member States, such as trade in cultural and audiovisual services as well as social, educational, and health services.

n105 EECKHOUT *supra* note 39, at 213-20.

n106 TFEU art. 218(5).

n107 Almost all aspects of trade policy are an exclusive EU competence after the entry into force of the Lisbon Treaty, and thus, Member States no longer have competence in any of these fields. Agreements covering these subject matters can therefore be concluded by the EU without the need to involve national decision-makers.

n108 TFEU art. 218 (6).

n109 TFEU art. 207(3) (The Commission then suggests the negotiating partner and content of a mandate for negotiations).

n110 Fiona Hayes-Renshaw, Wim Van Aken, & Helen Wallace, *When and Why the EU Council of Ministers Votes Explicitly* 44 J. COMMON MKT STUD. 161, 184-85 (2006).

n111 *Id. See also* MANFRED ELSIG & CEDRIC DUPONT, EUROPEAN UNION MEETS SOUTH KOREA: BUREAUCRATIC INTERESTS, EXPORT DISCRIMINATION AND THE NEGOTIATIONS OF TRADE AGREEMENTS 9 (2011).

n112 i.e., the question is, what must the political attitudes of the Commission, the Council, and the Parliament be towards FTA negotiations.

n113 TSEBELIS, *supra* note 81, at 19.

n114 There is a rich literature on the Commission's trade policy preferences. *See, e.g.*, D[#xFC]r, *supra* note 71; Manfred Elsig, *The EU's Choice of Regulatory Venues for Trade Negotiations: A Tale of Agency Power?*, 45 J. COMMON MKT STUD. 927 (2007); Andreas D[#xFC]r & Manfred Elsig, *Principals, Agents, and the European Union's Foreign Economic Policy*, 18 J. EUR. PUB. POL'Y 323 (2011).

n115 *See* Eug[#xE9]nia da Concei[#xE7][#xE3]o-Heldt, *Variation in EU Member States' Preferences and the Commission's Discretion in the Doha Round*, 18 J. EUR. PUB. POL'Y 403 (2011).

n116 George Tsebelis & Geoffrey Garrett, *Agenda-Setting Power. Power Indices and Decision Making in the European Union*, 16 INT'L REV. L. ECON. 345 (1996).

n117 Parliament's preferences can significantly deviate from those of the other institutions. This has been dramatically illustrated by Parliament's first vote on an international treaty under the Lisbon Treaty regime. Parliament withheld its consent on the so-called SWIFT Agreement and made renegotiations with the US necessary. *See* J[#xF6]rg Monar, *The Rejection of the EU-US SWIFT Interim Agreement by the European Parliament: A Historic Vote and its Implications*, 15 EUR. FOREIGN AFF. REV. 143-51 (2010). In particular, the attitude towards 'free-trade' is rather antagonistic in Parliament. According to a 2010 survey conducted among MEPs regarding their view on

whether the EU should promote global free trade, the average preference was slightly in disfavour of that statement. MEPs had the option between five possible answers, ranging from 1 -- strongly agree, 2 -- agree, 3 -- neither agree nor disagree, 4 -- disagree, to 5 -- strongly disagree. The aggregated average value was about 3.33. The data are taken from David Farrell, Simon Hix, & Roger Scully, EPRG MEP SURVEY DATASET: 2011 RELEASE, (2011), *available at* http://www2.lse.ac.uk/govemment/research/resgroups/EPRG/MEPsurveyData.aspx.

n118 *i.e.* political preferences remain unaltered.

n119 TFEU art. 207(3).

n120 Woolcock, *supra* note 88, at 389.

n121 TFEU art. 218(6).

n122 TFEU art. 218 (5)-(6).

n123 The political and also transactional costs of renegotiating a final agreement are in most cases extremely high, if not even prohibitively high. Therefore, one can assume that this possibility is ruled out.

n124 *Id.*

n125 Marise Cremona, *The Draft Constitutional Treaty: External Relations and External Action* 40 COMMON MKT L. REV. 1357 (2003); Angelos Dimopoulos, *The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy* 15 EUR. FOREIGN AFF. REV. 153 (2010).

n126 The increase of unenforceable non-trade provisions suggests that the common commercial policy was used as a foreign policy tool to pursue non-economic objectives.

n127 *Cf. Global Europe*, *supra* note 5, at 11 (stating that the key criteria for new FTA partners are market potential, protection against EU export interests, and parallel negotiations with EU competitors).

n128 TFEU art. 207(l)-(2).

n129 Consolidated Version of the Treaty on European Union art. 9, Mar. 30, 2010, 2010 O.J. (C 83) 13 [hereinafter TEU];

n130 TFEU art. 206 ("[T]he 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").

n131 The ECJ has stated on many occasions that mere objectives do not limit the institution's policy space and, accordingly, refrained from invalidating measures which potentially were not in compliance with a Treaty objective. *See, e.g.*, Case 112/80, D[#xFC]rbeck v. Hauptzollant Frankfurt am Main-Flughafen, 1981 E.C.R. 1095, P 44.

n132 Peter Van Elsuwege, *EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency* 47 COMMON MKT L. REV. 987, 1012 *et seq.* (2010).

n133 *Id.* at 1013 *et seq.*

n134 Christophe Hillion, *Tout pour un, un pour touts! Coherence in the External Relations of the European Union*, *in* DEVELOPMENTS IN EU EXTERNAL RELATIONS LAW 10, 12 et seq., (Marise Cremona ed., 2008).

n135 Van Elsuwege, *supra* note 132, at 1013.

n136 This point is made more formally by JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTION TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 211 (1996).

n137 Marise Cremona, *Coherence Through Law: What Difference will the Treaty of Lisbon Make*? 3 HAMBURG REV. SOC. SCI. 11 (2008).

n138 *Id*. at 16 *et seq*.

n139 *Id*. at 14 *et seq*.

n140 *Id*. at 15.

n141 *Id*. at 16.

n142 TFEU art. 7; TEU art. 18(4) ("The High Representative shall be one of the Vice-Presidents of the Commission. *He shall ensure the consistency of the Union's external action*. He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action.").

n143 Van Elsuwege, *supra* note 132, at 1012 *et seq*.

n144 Case C-120 & 121/06 P, FIAMM v. Comm'n, 2008 E.C.R. I-6513, P 182-83.

n145 Case 263/87, Denmark v. Comm'n, 1989 E.C.R. 1081.

n146 *Id*. at P 17.

n147 *Id*. at P 5. The provision Denmark was referring to was Article 17(2) of Council Regulation 804/68 on the Common Organization of the Market in Milk and Milk Products, 1968 O.J. (L 148) 176.

n148 *Id*., art. 33).

n149 *Denmark*, 1989 E.C.R. 1081, P 19.

n150 TFEU art. 18(1).

n151 Case C-280/93, Germany v. Council, 1994 E.C.R. I-04973.

n152 *Id*.

n153 Council Regulation 404/93, On The Common Organization of the Market in Bananas, 1993 O.J. (L47) 1.

n154 Harald Badinger, Fritz Breuss, & Bernhard Mahlberg, *Welfare Implications of the EU's Common Organization in Bananas for EU Member States*, (IEF Working Papers, No. 38, 2001).

n155 Appellate Body Report, *European Communities--Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, (Sept. 9, 1997).

n156 Badinger, Breuss, & Mahlberg, *supra* note 154.

n157 *Id.*

n158 Eeckhout, *supra* note 39, at 447.

n159 Case C-280/93, Germany v. Council, 1994 E.C.R. I-04973, PP 88-81.

n160 *Regime for the Importation, Sale and Distribution of Bananas*, *supra* note 155, at 177.

n161 *Denmark*, 1989 E.C.R. 1081, P 19.

n162 The U.S. reacted with the suspension of concessions. *See, e.g.*, *FIAMM*, 2008 E.C.R. I-6513; Case T-393/00, Beamglow Ltd. v. Parliament, 2005 E.C.R. II-5465.

n163 Case C-377/02, Van Parys v. Belgisch Interventie, 2005 E.C.R. I-1465 P 50; *FIAMM*, 2008 E.C.R. I-6513, P 118.

n164 *Cf.* Panos Koutrakos, *Primary Law and Policy in EU External Relations*, 33 EUR. L. REV. 666, 675 (2008); Marise Cremona, *supra* note 125, at 1349 (both stressing the political nature of the duty of consistency and the limited effect of primary law in this regard).

n165 J[#xDC]RGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTION TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 194-237 (1998).

n166 *Id.*

n167 See also the more general critique by de Witte regarding the constitutional law governing EU external affairs: Bruno de Witte, *Too Much Constitutional Law in the European Union's Foreign Relations? in* EU FOREIGN RELATIONS LAW: CONSTITUTIONAL FUNDAMENTALS 3 (Marise Cremona & Bruno de Witte eds. 2008).

n168 Under EU law, individuals, in order to institute direct proceedings, must prove that they are either directly and individually concerned, or that they are directly concerned by a regulatory framework which does not entail implementing measures. TFEU art. 263(4).

n169 The case law on access to the court in direct proceedings initiated by individuals (TFEU art. 263(4)) is very restrictive. *Cf.* for instance, Case C-50/00 P, Union de Pequefi[#xF1]os Agricultores v. Council, 2002 E.C.R. I-6677; Case C-263/02 P, Comm'n v. J[#xE9]go Qu[#xE9]r[#xE9], 2004 E.C.R. I-3425. *See also* Anthony Amull, *Private Applicants and the Action for Annulment since Codorniu*, 38 COMMON MKT. L. REV. 7.

n170 In 2010, 631 new cases were brought to the ECJ. In the same year the court completed 574 cases while 799 were still pending.

EUROPEAN COURT OF JUSTICE, STATISTICS CONCERNING THE JUDICIAL ACTIVITIES OF THE COURT OF JUSTICE 83 (2010), *available at* http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/ra2010_stat_cour_final_en.pdf.