7

Common Commercial Policy

Central Issues

- This chapter deals with a policy area that is traditionally seen as being at the heart of EU external relations law. The Common Commercial Policy (CCP) was not only at the start of the development of EU external relations, it remains a key example of how internal and external policies are inextricably linked.
- The chapter starts with an overview of the relation between the internal market and external trade and addresses the question of how this relationship influenced the development of CCP.
- Subsequently, we analyse the principles and instruments of the CCP. Building on the references in primary law, the Union has developed several instruments to shape this policy area. Moreover, we look at the roles of the Union institutions and the applicable decision-making procedures, which differ in some respects from the EU's other policy areas.

I. Introduction

The Common Commercial Policy (CCP) 'remains the centre-piece of the EU's external policies'.[1] In the early days, many authors would even have a tendency to equate EU external relations law to the CCP and, even today, academic treatises explain basic notions underlying EU external relations law with extensive references to the CCP.[2]

[1] See P Eeckhout, *EU External Relations Law*, 2nd edn (Oxford, Oxford University Press, 2011) 439.
[2] See ibid; and P Koutrakos, *EU International Relations Law*, 2nd edn (Oxford, Hart Publishing, 2015), who both start with the CCP in the first chapter.

The existence, nature and scope of external competences (see Chapter 3) have for a long time largely been defined by reference to early cases in the area of the CCP.

The CCP is not just a key external relations policy but, in substantive terms, it is at the heart of the European integration project and a logical consequence of the interaction between internal and external developments, in particular between the EU's customs union and the rules of free trade laid down in the General Agreement on tariffs and Trade (GATT). Also, in quantitative terms, the CCP cannot be ignored. According to the European Commission, the 'EU is the world's largest exporter and importer of goods and services taken together, the largest foreign direct investor and the most important destination for foreign direct investment (FDI)'.[3] This makes the EU the 'largest trading partner of about 80 countries and the second most important partner for another 40'.[4] Moreover, many of the agreements concluded between the EU and third states concern trade or at least deal with trade-related issues. Since the CCP has been part and parcel of the European integration process from the outset, a vast amount of legislation and case law exists in this area. In addition, despite the fact that the CCP competences are exclusively in the hands of the EU (see Chapter 3), issues of demarcation with Member State powers continue to flare up. Related to the last point, there is more to external relations than just trade and combinations and tensions with other policy areas (such as CFSP or development cooperation) do occur.

It is indeed difficult to overestimate the trade dimensions of the EU's external relations. In order to enable a solid understanding of the CCP, this chapter first provides a brief overview of the development of the CCP at the intersection of the European integration process and the international trade agenda. This is followed by the CCP's main instruments and the interplay between the EU's institutions in this policy area.

II. Development of the CCP: The Internal Market and International Trade

The development of the CCP can only be properly understood when taking into account that it was being shaped from the very outset by, on the one hand, the evolution of the international trade regime and, on the other, by the process of economic integration in Europe, most notably the advances in the completion of the internal market. Thus, the CCP is at the same time the EU's voice in the international trading order as well as 'a necessary corollary for the maintenance of its internal market'.[5] Arguably more than any other EU policy, the CCP exemplifies that, in the contemporary world, internal and external policies are inextricably intertwined.

[3] European Commission, *Trade for All: Towards a More Responsible Trade and Investment Policy* (European Union, 2015) 7.

[4] Ibid.

[5] J Larik, 'Much More Than Trade: The Common Commercial Policy in a Global Context' in M Evans and P Koutrakos (eds) *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Oxford, Hart Publishing, 2011) 16.

A. The Internal Market and GATT/WTO

The establishment and further evolution of the CCP reflects the strong relationship between internal and external aspects of economic integration. This was explicitly acknowledged by the Court in in Opinion 1/75.

Opinion 1/75 (*Re Understanding on a Local Costs Standard*), ECLI:EU:C: 1975:145, 1362–63

[C]oncerning the common commercial policy, the Community is empowered, pursuant to the powers which it possesses, not only to adopt internal rules of Community law, but also to conclude agreements with third countries pursuant to Article 113(2) and Article 114 of the Treaty [Articles 206 and 207 TFEU].

A commercial policy is in fact made up by the combination and interaction of internal and external measures, without priority being taken by one over the others. Sometimes agreements are concluded in execution of a policy fixed in advance, sometimes that policy is defined by the agreements themselves.

Such agreements may be outline agreements, the purpose of which is to lay down uniform principles … Furthermore, the implementation of the export policy to be pursued within the framework of a common commercial policy does not necessarily find expression in the adoption of general and abstract rules of internal or Community law. The common commercial policy is above all the outcome of a progressive development based upon specific measures which may refer without distinction to 'autonomous' and external aspects of that policy and which do not necessarily presuppose, by the fact that they are linked to the field of the common commercial policy, the existence of a large body of rules, but combine gradually to form that body.

It was indeed the 'combination and interaction of internal and external measures' which turned the CCP into one of the key policy areas of the Union. In this context, it should be recalled that 'European integration itself was launched in the shadow of the pre-existing General Agreement on Tariffs and Trade (GATT)'.[6] When the original six Member States signed the Treaty of Rome in 1957, the GATT had been in existence for a decade, and the Six were already parties to it. In fact, 'the EEC's common market was modelled partly on the GATT, and many of the EC Treaty provisions clearly reflect this'.[7] The EU (at the time still the Communities) came to succeed the Member States, by virtue of the CCP, in exercising the rights and duties under the GATT, as confirmed by the CJEU in *International Fruit Company*.[8]

[6] Ibid.

[7] G De Búrca and J Scott, 'The Impact of the WTO on EU Decision-making' in G De Búrca and J Scott (eds) *The EU and the WTO: Legal and Constitutional Issues* (Oxford, Hart Publishing, 2001) 2.

[8] Joined Cases 21/72-24/72 *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, ECLI:EU:C:1972:115, paras 16–18.

While the origins of the CCP can be found in the liberalisation of trade in goods, which was also the object of the GATT, gradually the scope of the CCP expanded to trade in services and trade-related aspects of intellectual property rights, in lockstep with the expansion of the international trade agenda. Yet, competences in the latter areas were shared with the Member States. In Opinion 1/94 on the WTO Agreements, the CJEU held that the EU could conclude the General Agreement on Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) only together with its Member States (see Chapter 3). This explains why the EU Member States are still members of the WTO in addition to the Union.

With regard to the links between the internal market and the WTO, the successive enlargements of the EU are also a noteworthy development. Enlargement can well be considered the area in which the EU has had the most tangible impact on domestic policy. Using the attraction of access to the prosperous EU market, it has incentivised candidate states to effect wide-ranging reforms to comply with the *acquis communautaire* (see Chapter 14). This has an important trade dimension. By virtue of pre-accession agreements with the candidate countries, which usually include the granting of trade preferences to them and their subsequent integration into the Union, trade is reinforced within the Union, which expands the EU's combined market leverage further but is, at the same time, diverted from the rest of the world. In addition to enlarging the EU, it has also partially extended the internal market beyond its own Member States, for instance through the European Economic Area (EEA) and a partial customs union with Turkey (see Chapter 13 on the EU's neighbourhood policy).

B. The Scope of the CCP

The scope of the CCP has been drastically expanded over time by amendments to the EU Treaties as well as through interpretations of the Court of Justice. As early as 1975, the Court of Justice ruled that the CCP had been devised in the Treaties 'in the context of the operation of the Common Market, for the defence of the common interests of the Community, within which the particular interests of the Member States must endeavour to adapt to each other'.[9] Its external nature is reflected in the Preamble to the TFEU, which explicitly refers to *international* trade as opposed to trade between the Member States.

Preamble TFEU

DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade …

[9] Opinion 1/75 (*Re Understanding on a Local Costs Standard*), ECLI:EU:C:1975:145, 1363–64.

As we will see, the contribution of the EU to the 'progressive abolition of restrictions' is not always clear when we take into account the protection of certain industries or consumers in the Member States, as well as the preferences granted only to certain external partners (eg, in development cooperation, see Chapter 8). Nonetheless, the definition of the CCP starts out in the TFEU with an emphasis on liberalisation.

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.

This 'liberalisation objective' is also reflected in Article 21(2)(e) TEU, which commits the EU to 'the integration of all countries into the world economy'. Article 206 TFEU points to the direct relationship between the establishment of an internal 'customs union' and the objective of replicating this, at least to some extent, at a global level. This explains why from the outset it was clear that the core of the CCP needed to be based on an exclusive competence. Any discretion on the side of Member States to enter into trade agreements on an individual basis could seriously harm the very foundations of the internal market and the customs union. Furthermore, in comparison to its pre-Lisbon predecessor, Article 206 TFEU not only mentions international trade, but also foreign direct investment (FDI) as forming part of the CCP, which indeed turns it into a more full-fledged 'commercial policy'.

The underlying principles and the scope of the CCP are set out in Article 207 TFEU (the only other provision specifically on the CCP).

Article 207(1) TFEU

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

The first sentence refers to the so-called principle of uniformity, requiring the adoption of common rules throughout the EU in the field of the CCP in order to prevent distortions of the internal market and to preserve the unity of the EU's position with respect to third countries. The scope of the CCP was expanded significantly by the

Lisbon Treaty. Now, Article 207(1) TFEU underlines that the CCP covers all trade aspects, eliminating previous uncertainties beyond trade in goods. Together with the references to services and 'commercial aspects of intellectual property', the CCP not only covers the GATT, but also to the two other key WTO agreements, the GATS and the TRIPS. This was confirmed by the CJEU in its later case law.[10] However, transport services remain a notable exception not covered by the CCP, which are part of the EU's transport policy, which is a shared competence (Article 4(2)(g) TFEU).

Like Article 206 TFEU, Article 207 underlines that foreign direct investment falls within the scope of the CCP. FDI usually involves long-term investments with an interest in having a degree of control over the management of the enterprise in question. It is to be distinguished from so-called 'portfolio investments' (eg, investments through stock), which are more short-term and which are not included in the scope of the CCP as defined in Article 207 TFEU. International investment operates in a different way than traditional trade. International trade agreements deal with the exchange of goods and cross-border services between two or more states (or the EU and third states for that matter), whereas international investment agreements aim to protect foreign investment in a specific country. However, it is often difficult to separate the two areas, which makes it important that both are covered by the CCP. Most interestingly, perhaps, is that, following the reforms introduced by the Lisbon Treaty, FDI has been turned into an exclusive competence of the Union. This has serious consequences for the many existing Bilateral Investment Treaties (BITs) which over the years have been concluded between Member States and third states. By contrast, where investment agreements or trade agreements with investment chapters also cover portfolio investments, that remains a shared competence and will require the conclusion of mixed agreements, as the CJEU confirmed in Opinion 2/15 (see also Chapters 3 and 4).[11]

Being 'a world power in trade and through trade',[12] the CCP also serves as an instrument of foreign policy through which a wider normative agenda and interests can be pursued by the EU. It should therefore come as no surprise that the CCP is an integral part of 'The Union's External Action' (Part Five TFEU) and finds its basis in Title II of that Part. Article 207(1) TFEU makes explicit that the CCP 'shall be conducted in the context of the principles and objectives of the Union's external action'. These are expressed, next to Article 21 TEU, in Article 3(5) TEU.

A Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy' (2010) 15 *European Foreign Affairs Review* 153, 169

[T]he Lisbon Treaty marks a new era for the orientation of the CCP. It signals the transformation of the CCP from an autonomous field of EU external

[10] Case C-414/11 *Daiichi Sankyo*, ECLI:EU:C:2013:520 regarding TRIPs; and Case C-137/12 *Commission v Council (Conditional Access Convention)*, ECLI:EU:C:2013:675 regarding trade in services.

[11] Opinion 2/15 (*Singapore*), ECLI:EU:C:2017:376, paras 225–44.

[12] S Meunier and K Nicolaïdis, 'The EU as a Trade Power' in C Hill and M Smith (eds) *International Relations and the European Union*, 3rd edn (Oxford, Oxford University Press, 2017) 211.

action, subject to its own rules and objectives, into an integrated part of EU external relations, characterized by common values that guarantee unity and consistency in the exercise of Union powers. Within this framework, uniformity and liberalization are no longer the only principles determining the formation of the CCP. EU action in the field shall take into account and pursue the general objectives of EU external relations, thus legitimizing the current practice of adopting CCP measures for achieving other trade and non-trade goals. In particular, the references to fair trade and integration to the world economy next to liberalization illustrate that trade liberalization should not be seen any longer as a self- determining objective, but it should be regarded within the broader context of economic and social development objectives.

Article 207(2) TFEU provides the legal basis for the adoption of 'measures for the implementation' of the CCP.

Article 207(2) TFEU

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

This empowers the EU's institutions 'by means of regulations' to adopt measures for the implementation of the CCP. A degree of flexibility is reflected in the phrase 'defining the framework'. As we have seen in Chapter 3, CCP competences are exclusive, which implies that the Member States have now transferred their powers in this (extended) area entirely to the Union. These wide-ranging exclusive powers notwithstanding, two safeguards have been introduced.

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.

The first safeguard merely states the obvious and is in line with the principle of conferral. The second aims to make sure that trade agreements in services do not lead to a harmonisation 'through the backdoor'. The exclusive competence of the European Union to negotiate and conclude international agreements within the scope of the CCP brings about the need to allow the Union to implement these agreements internally. However, this may lead to an extension of the European Union's competence to act internally in those areas where competence lies with the Member States. At the same time, allowing the EU to act internationally only to the extent that it has the competence to legislate at the internal level would restrict the external competence of the European Union as it could only implement international agreements to the extent that it has the internal power. Consequently, the European Union needs to enjoy the power to negotiate and conclude international agreements which fall within the scope of the CCP even if it does not have the power to legislate internally in this respect. This means that the EU's competence can be exclusive at the external level in the areas where it has internally shared competence with the Member States. Obviously, the duty of sincere cooperation between the European Union and Member States (see Chapter 2) should minimise the EU's lack of power to implement international agreements in this regard. In addition, the responsibility of the European Union to implement these agreements under public international law should encourage the Member States to implement them.[13]

III. Instruments and Tools of the Common Commercial Policy

The institutional and substantive rules that make up the CCP have been formalised in different instruments and tools that have placed some flesh on the skeleton presented in the Treaties. These instruments relate, inter alia, to tariffs, trade barriers, market access, and trade defence mechanisms. These are unilateral measures set by the EU, though they should be exercised in accordance with international law. Moreover, the CCP is carried out through negotiating and concluding trade agreements, which requires the consent of one or more external parties. Finally, the EU also engages in dispute settlement at the WTO as part of the CCP.

A. Common Custom Tariff

The Common Customs Tariff (CCT) dates back to 1968 and follows the logic of the internal market: once internal tariffs are removed one needs to agree on a common

[13] See G Villalta Puig and B Al-Haddab, 'The Common Commercial Policy after Lisbon: An Analysis of the Reforms' (2011) 36 *European Law Review* 289.

external tariff to prevent goods entering the internal market through the Member State with the lowest import tariff. The CCT can be found in Regulation 2658/87, which is frequently updated.[14] This Regulation makes a difference between so-called autonomous rates of duty, which were fixed in 1968, and conventional rates that are the result of the negotiations in the WTO.

Domestic authorities are in charge of the application of the CCT. Its application is quite technical and complex and finds its basis in Council Regulation 952/2013 laying down the Union Customs Code.[15] The EU's Customs Union needs to be distinguished from (partial) customs unions which the EU maintains with a number of surrounding countries. Andorra and San Marino have joined the customs union, as well as Monaco, which is part of the EU customs territory through an agreement with France. A customs union also exists between the EU and Turkey, but here agricultural products, inter alia, are excluded.

B. Trade Barriers and Market Access

Rules concerning market access and trade liberalisation find their basis in a number of regulations, the most general one being Regulation 2015/478, which lays down the basic rules on imports from third countries;[16] while general rules on exports are specified in Regulation 2015/479 establishing common rules for exports.[17] Next to this, separate regulations deal with specific (groups of) countries or specific products (eg, textiles).

Monitoring of the global rules on free trade is done above all on the basis of the Dispute Settlement system of the WTO. Yet, this system is only accessible to WTO members, not individuals or companies. However, by virtue of the Trade Barriers Regulation (TBR), first adopted in 1994, EU enterprises, industries or their associations (as well as the EU Member States) can lodge a complaint with the European Commission, which then investigates and determines whether there is evidence of a violation of international trade rules which has resulted in either adverse trade effects or injury. It is aimed at opening third country markets by eliminating obstacles to trade for the benefit of EU exporters. It not only relates to goods but also to services and intellectual property rights, when the rules concerning these rights have been violated and had an impact on trade between the EU and a third country. Hence, the TBR is designed to ensure that the rights of the EU under international trade agreements can be enforced in cases where third countries adopt or maintain barriers to trade.

[14] Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff [1987] OJ L 256/1.

[15] Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code [2013] OJ L 269/1.

[16] Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports [2015] OJ L 83/16.

[17] Regulation (EU) 2015/479 of the European Parliament and of the Council of 11 March 2015 on common rules for exports [2015] OJ L 83/34.

Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (codification) [2015] OJ L 272/1

Article 1

This Regulation provides for Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization ('WTO') which, subject to compliance with existing international obligations and procedures, aim to:

(a) respond to obstacles to trade that have an effect on the market of the Union, with a view to removing the injury resulting therefrom;
(b) respond to obstacles to trade that have an effect on the market of a third country, with a view to removing the adverse trade effects resulting therefrom.

The procedures referred to in the first paragraph shall be applied in particular to the initiation and subsequent conduct and termination of international dispute settlement procedures in the area of common commercial policy.

In addition, the Regulation makes clear that the rules are not intended to protect the interests of individual companies (or even Member States). Instead, there needs to be evidence that a Union-wide interest is at stake.

In relation to Development Policy (see Chapter 8), the CCP and the facilitation of access to the EU market has always played a role in creating leverage for improving for instance human rights or environmental standards. In this vein, CCP allows for special trade benefits for developing countries. This can be seen as specific steps to the 'eradication of poverty and the protection of human rights' (Article 3(5) TEU) as elements forming the context in which CCP should be implemented. Although the current EU Treaties do not make a distinction between different developing countries, the CCP had a history of treating the African, Caribbean and Pacific (ACP) countries differently. It is with these countries that the EU had a special relationship on the basis of a series of international agreements, most recently the Cotonou Agreement of 2000; see further Chapter 8). This special relationship has caused some controversies in the trade relationships with some other countries, including a longstanding dispute regarding bananas.

The WTO disputes on bananas arose from the fact that the EU differentiated between the ACP countries and other third countries, some of which were also producers of bananas. Through Regulation 404/93 the European Community at the time aimed at protecting both the domestic banana production and the imports of bananas from the ACP countries. The result was that it was much easier for ACP countries to have access to the European market than, say, for Latin American countries, where large American corporation operate.

J Larik, 'Much More Than Trade: The Common Commercial Policy in a Global Context' in M Evans and P Koutrakos (eds) *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Oxford, Hart Publishing, 2011) 26

It is in this context that the *Bananas* dispute arose, which would become the EU's longest-lasting trade dispute. The United States and several Latin American countries challenged the EU's regime for the import, sale and distribution of bananas favouring ACP countries. The [WTO] Appellate Body repeatedly found that the EU's preferential treatment, even after several reconfigurations, violated WTO rules. The EU had exceeded the derogations introduced in the GATT/WTO system favouring developing countries, as well as the special waiver granted to the EU in 1994 for the Lomé Agreement. Recently, the EU agreed to reduce the overall import tariffs for bananas in exchange for a no-litigation commitment from the Latin American countries. Consequently, an eroded preferential banana market organisation for the ACP countries will remain, but in order to adjust to the stiffer competition, the EU decided to pay additional financial aid to the ACP countries. While this is arguably a positive move in terms of WTO compliance, it also appears an implicit acknowledgement of the failure of this particular example of development through trade. More generally, the EU has abandoned its ACP-wide approach for granting trade preferences and has moved to negotiate WTO compatible bi-regional agreements.

In addition to challenges from third countries, the banana regime was also the subject of litigation within the EU. Germany, in an action it had brought before the CJEU challenged, among other things, Title IV of the Regulation, which referred to traditional imports of bananas form ACP countries into the Union and the absence of customs duties. Germany also argued that the Regulation was adopted in breach of GATT as well as the Banana Protocol. While the case was relevant in the context of determining the direct (non-)applicability of GATT provisions in EU and Member State courts (see further below and Chapter 5), in a more substantive sense it also clarified the subdivision of the tariff quota in favour of importers of EU and ACP bananas. These issues had been brought up by Germany by referring to the principle of non-discrimination.

Case C-280/93 *Germany v Council*, ECLI:EU:C:1994:367

72 It is therefore clear that before the Regulation was adopted the situations of the categories of economic operators among whom the tariff quota was subdivided were not comparable.

> 73 It is true that since the Regulation came into force those categories of economic operators have been affected differently by the measures adopted. Operators traditionally essentially supplied by third-country bananas now find their import possibilities restricted, whereas those formerly obliged to market essentially Community and ACP bananas may now import specified quantities of third-country bananas.
>
> 74 However, such a difference in treatment appears to be inherent in the objective of integrating previously compartmentalized markets, bearing in mind the different situations of the various categories of economic operators before the establishment of the common organization of the market. The Regulation is intended to ensure the disposal of Community production and traditional ACP production, which entails the striking of a balance between the two categories of economic operators in question.
>
> 75 Consequently, the complaint of breach of the principle of non-discrimination must be rejected as unfounded.

Apart from the preferential treatment of ACP countries (which has now been replaced by bi-regional agreements), there are other ways the EU can offer preferential access to its market. A so-called Generalised System of Preferences (GSP) provides such preferential access to developing countries. While such differential treatment would normally be at odds with the WTO's most-favoured national principle, the GSP is covered by the WTO's 1979 'enabling clause' regarding developing countries.[18]

In addition, rules for more wide-ranging market access were laid down by the EU in two special schemes.[19] First, the 'Special incentive arrangement for sustainable development and good governance', known as GSP+, incentivises third countries to comply with a range of international agreements, covering issues from labour standards and human rights to environmental protection, through preferential trade with the EU. Secondly, the 'Special arrangement for the least-developed countries', known as 'Everything but Arms' (EBA) is aimed specifically at helping the world's poorest countries through duty-free access to the EU market. As of January 2019, 15 developing countries fall under the standard GSP, which is now restricted to low and lower-middle income countries since 2014,[20] 48 under EBA, while only eight countries have qualified for GSP+. In general, the effects of these arrangements have been said to be limited, not least due to their complexity.[21] In the *EC-Tariff Preferences* dispute, the WTO

[18] GATT, *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, Decision of 28 November 1979, L/4903.

[19] 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 [2012] OJ L 303/1, ch III and ch IV.

[20] S Gstöhl and D De Bièvre, *The Trade Policy of the European Union* (London, Palgrave Macmillan, 2018) 160.

[21] L Bartels, *Human Rights Conditionality in the EU's International Agreements* (New York, Oxford University Press, 2005) 155–56.

Appellate Body determined that certain forms of its conditionality were not covered by the enabling clause, which underlines that also these EU preferential treatment regimes run the risk of being at odds with by the international trade rules.[22]

Next to development, the issue of environmental protection has received more heightened attention, not least in view of climate change. Both are linked through the notion of sustainable development, which features in the EU Treaties[23] and in the Preambles to the WTO Marrakech Agreement and the Doha Ministerial Declaration.[24] Noteworthy trade-related environmental protection measures adopted by the EU include the Regulation on waste shipment,[25] which transposes into EU Law the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and the adherence of the Union to the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.[26] This serves to show that the CCP is not always about liberalising trade, but can indeed also be used to regulate and, if necessary, restrict it, if this is in the interest of the Union.[27] Another area where the EU has combined trade with environmental protection is through the establishment of a regional emissions trading scheme, linked on the global level to the Kyoto Protocol. Finally, we can recall that environmental conventions also figure among the agreements to be ratified to qualify for GSP+.[28]

C. Trade Defence Instruments

At first sight, trade defence seems to go against the idea of a free market. However, perhaps ironically, to reach the objective of free trade adequate regulation and protection are needed. The EU's three principal trade defence instruments concern anti-dumping and countervailing (against subsidies) measures and safeguards.

The purpose of anti-dumping measures is to prevent the domestic market from being distorted by products that are sold below their so-called 'normal value' by imposing special duties. Determining whether sales are made below value is a complex

[22] WTO, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, Appellate Body Report (adopted 20 April 2004), WT/DS246/AB/R.

[23] See Art 3(3) TEU on 'sustainable development of Europe'; Art 3(5) TEU on 'sustainable development of the Earth'; and Art 21(2)(d) TEU on 'sustainable economic, social and environmental development of developing countries'.

[24] WTO, *Ministerial Declaration*, adopted on 14 November 2001, WT/MIN(01)/DEC/1, Pt 6; see also Pts 31–33.

[25] Regulation 1013/2006/EC of the European Parliament and of the Council of 14 June 2006 on shipments of waste [2006] OJ L 190/1.

[26] Council Decision 2006/730/EC of 25 September 2006 on the conclusion, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade [2006] OJ L299/23.

[27] See, to this effect, Case C-94/03 *Commission v Council (Rotterdam Convention)*, ECLI:EU:C:2006:2, para 49. See also Chapter 9, which addresses the relation between CCP and 'restrictive measures' (economic sanctions) established on the basis of the Common Foreign and Security Policy (CFSP).

[28] 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 [2012] OJ L 303/1, Art 9(1)(b) and Annex VIII Part B.

yet (politically) highly contested process, since it depends on an accurate comparison of data that is inherently hard to compare. The EU's commitment to the liberalisation of international trade depends on a level playing field between domestic and foreign producers based on genuine competitive advantages. Hence, like other markets, the EU is keen on using the possibilities to defend free trade that find their basis in Article VI GATT and issued Regulation 2016/1036 on protection against dumped imports from countries not members of the European Union.[29] The Commission monitors the application of these instruments, follows up the enforcement of measures and negotiates future international rules with EU trading partners.

Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union OJ [2016] L 176/21

Article 1 (Principles)

1. An anti-dumping duty may be imposed on any dumped product whose release for free circulation in the Union causes injury.
2. A product is to be considered as being dumped if its export price to the Union is less than a comparable price for a like product, in the ordinary course of trade, as established for the exporting country.
3. The exporting country shall normally be the country of origin. However, it may be an intermediate country, except where, for example, the products are merely transhipped through that country, or the products concerned are not produced in that country, or there is no comparable price for them in that country.
4. For the purposes of this Regulation, 'like product' means a product which is identical, that is to say, alike in all respects, to the product under consideration, or, in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

The following extract is an example whereby the European Commission decided to impose provisional anti-dumping duties on imports of solar panels and key components such as solar cells and wafers from China. An investigation by the Commission found that Chinese solar panels were sold to Europe far below their normal market value. This decision, taken by the Commission, was particularly sensitive for Germany. That Member State has the largest solar panel industry in the Union and feared that EU-level action would spark a trade war with China with commensurate impact on its industry. The Commission argued that international trade relations are to be conducted

[29] Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016] OJ L 176/21.

based on law, rather than political strong-arming and divide-and-rule tactics by third countries. The day after publication of the extract below, China opened anti-dumping proceedings against European wine imports into that country, which made up two-third of its imports in 2012.

European Commission, *EU Imposes Provisional Anti-dumping Duties on Chinese Solar Panels*, 4 June 2013, MEMO/13/497

Whereas the dumping rate is at 88% on average, the anti-dumping duties imposed will only be set at an average of 47.6%, which is required to remove the harm caused by the dumping to the European industry … The duty will have to be paid as an 'ad valorem' duty; in other words, as a percentage of the import value. It is provisional and imposed in total for a period of maximum six months …

The investigation was initiated on 6 September 2012 following a complaint lodged by EU ProSun, an industry association, which claims solar panels from China are being dumped in the EU at prices below market value and causing material injury to the EU photovoltaic industry.

The investigation was carried out within a strict legal framework covering a full analysis of dumping by Chinese exporting companies, injury suffered by the EU photovoltaic industry as a result of that dumping, and the interest of all EU players (Union producers, suppliers of components such as silicon, installers, importers, users and consumers). It showed that:

- there is dumping by the exporting producers in China: Chinese solar panels are sold on the European market far below their normal market value, resulting, on average, in dumping margins of 88%, which means that the fair value of a Chinese solar panel sold to Europe should actually be 88% higher than the price to which it is sold. In some cases, dumping margins of up to 112.6% were found;
- material injury has been suffered by the Union industry concerned translated in loss of market shares in the EU, decrease in sales prices and decrease in profitability leasing [sic] to a number of insolvencies of Union producers;
- there is a causal link between the dumping and injury found;
- the imposition of measures is not against the Union interest …

How has the duty been calculated?

In general, duty rates are set by reference to the 'lesser duty rule'. The 'lesser duty rule' is a so-called 'WTO-plus' commitment of the EU, ie, which allows the Commission to set a duty at a level lower than the dumping margin when this lower level is sufficient to remove the injury suffered by the Union industry. This fair approach benefits the exporters and goes beyond what is required by

> our WTO obligations. In practice, the injury margin is the amount 'removing the injury' ie, it aims at increasing prices to a level allowing EU industry to sell at a reasonable profit …
>
> Since the EU does not recognise China as a 'market economy', India has been chosen as the most appropriate and reasonable analogue country. This choice is not disputed by the Chinese side. In effect, a number of parties – including Chinese – have proposed India and expressed a clear preference over other alternatives such as the USA …
>
> By 5 December 2013, the European Commission may propose to the Council (a) to terminate the case without measures or (b) to impose definitive anti-dumping measures for a duration of five years. According to the current rules, the Council can reject the Commission's proposal by simple majority …

In addition, Regulation 2016/1037 aims to protect the internal market and its industries from subsidised imports from third states.[30] The EU can do so by imposing so-called countervailing duties to neutralise the benefit of such subsidies if the latter are 'specific to an enterprise or industry or group of enterprises or industries'.[31] Export subsidies and subsidies contingent on the use of domestic over imported goods are deemed to be specific.[32] Subsidies can be used for different purposes eg, pursuing domestic and social policies, boosting production or exports, creating jobs, facilitating the creation and expansion of new industries, supporting economic activities that might otherwise fail, etc. However, they may distort competition by making subsidised goods artificially competitive against non-subsidised goods. In parallel to the aforementioned solar panel anti-dumping investigation, the Commission has, since the end of 2012, also carried out an anti-subsidy investigation.

The third category of trade defence instruments concerns so-called safeguards. Safeguards are intended for situations in which an EU industry is affected by an unforeseen, sharp and sudden increase of imports from third countries. The objective is to give the industry a temporary breathing space to make necessary adjustments. Safeguards always come with an obligation to restructure. Unlike anti-dumping and anti-subsidy measures, they do not focus on whether trade is fair. Hence, the conditions for imposing them are more stringent. A safeguard investigation may lead to quantitative restrictions on imports of the investigated product (import or tariff quota) from any non-EU country and surveillance (a system of automatic import licensing). The legal basis for safeguards is different for measures against WTO members

[30] Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union [2016] OJ L 176/55.
[31] Ibid, Art 4(2).
[32] Ibid, Art 4(4).

(Regulation 2015/478) and non-WTO members (Regulation 2015/755).[33] The results of the Trade Defence Instruments are presented to the European Parliament on a yearly basis.

D. Trade Agreements

The EU has a decades-long history and expertise in the negotiation and conclusion of Free Trade Agreements (FTAs) with third parties. It has built a dense web of FTAs around the world, which continues to expand and evolve. Trade agreements serve as a tool for acquiring access to foreign markets and for promoting the EU's values and interests. Moreover, they go further in terms of collaboration than the multilateral framework of the WTO with specific partners, for instance by providing a framework for closer regulatory cooperation. The procedural specificities that apply to the CCP are outlined below in section IV, while the EU's international treaty-making in general is discussed in Chapter 4. Here, we consider the substance of these agreements, which illustrates how they are used by the EU.

There is no one-size-fits-all model for trade agreements. In most cases, the EU tends to negotiate comprehensive FTAs. While bilateral trade agreements may – at first sight – not contribute to a global trade liberalisation regime, they are often used as alleged 'stepping stones' to multilateral liberalisation. The rules for FTAs are set out in the WTO, specifically in Article XXIV of the GATT and Article V of the GATS. FTAs are designed to create opportunities by: opening new markets for goods and services; increasing investment opportunities; making trade *cheaper* (by eliminating substantially all customs duties); making trade *faster* (by facilitating the transit of goods through customs and setting common rules on technical and sanitary standards); and making the policy environment more *predictable* (by taking joint commitments on areas that affect trade such as intellectual property rights, competition rules and the framework for public purchasing decisions).

Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ 127/6

HAVE AGREED AS FOLLOWS:

CHAPTER ONE

OBJECTIVES AND GENERAL DEFINITIONS

Article 1.1

Objectives

1. The Parties hereby establish a free trade area on goods, services, establishment and associated rules in accordance with this Agreement.

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

2. The objectives of this Agreement are:

   (a) to liberalise and facilitate trade in goods between the Parties, in conformity with Article XXIV of the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as 'GATT 1994');
   (b) to liberalise trade in services and investment between the Parties, in conformity with Article V of the General Agreement on Trade in Services (hereinafter referred to as 'GATS');
   (c) to promote competition in their economies, particularly as it relates to economic relations between the Parties;
   (d) to further liberalise, on a mutual basis, the government procurement markets of the Parties;
   (e) to adequately and effectively protect intellectual property rights;
   (f) to contribute, by removing barriers to trade and by developing an environment conducive to increased investment flows, to the harmonious development and expansion of world trade;
   (g) to commit, in the recognition that sustainable development is an overarching objective, to the development of international trade in such a way as to contribute to the objective of sustainable development and strive to ensure that this objective is integrated and reflected at every level of the Parties' trade relationship; and
   (h) to promote foreign direct investment without lowering or reducing environmental, labour or occupational health and safety standards in the application and enforcement of environmental and labour laws of the Parties …

As this excerpt shows, the coverage is comprehensive, going far beyond traditional trade in goods and tariff issues. The reference to 'sustainable development' serves as an example of the wider normative 'context of the principles and objectives of the Union's external action'. As confirmed by the CJEU in Opinion 2/15 concerning the EU's FTA with Singapore, 'the objective of sustainable development henceforth forms an integral part of the common commercial policy'.[34]

Widening of the substance of trade agreements, however, brings back the question of 'mixity' (see Chapter 4). This means that if issues are included in an FTA which exceed the scope of the exclusive CCP competence, then the participation of the Member States as parties in their own right may become necessary. This issue flared up in the context of investor-state dispute settlement mechanisms in FTAs. As noted above, while foreign direct investment is now covered by the CCP, portfolio investment is not. According to the CJEU, therefore, an envisaged agreement with Singapore that would have covered non-direct investments and a dispute settlement mechanism to rule

[34] Opinion 2/15 (*Singapore*), ECLI:EU:C:2017:376, para 147.

on investment disputes 'cannot be approved by the European Union alone'.[35] As the CJEU clarified in a later judgment, however, this meant that there was no *legal duty* to conclude such an agreement as an EU-only agreement. By contrast, if there had been the political will within the Council to make it an EU-only agreement, that would have been an option.[36]

Concluding trade agreements as mixed agreements slows down the process leading to ratification, as the FTA needs to be approved by all Member States according to their constitutional requirements, in addition to the EU itself. A prominent example for the repercussions of mixity is the Comprehensive Economic and Trade Agreement (CETA) with Canada. After seven years of negotiations, the agreement was ready for signature by the parties. However, this was delayed due to Wallonia (one of the three federal states of Belgium) withholding its consent which, in turn, was necessary for Belgium to agree under its own constitutional law. The crisis was overcome by a compromise, though all Member States are needed to ratify the agreement. In order to bridge this waiting period (parts of) trade agreements are being applied 'provisionally' (see further on that below).

A way to avoid mixity is to 'split' the comprehensive agreement into two separate parts, one of which can be concluded as an EU-only agreement. This was done, for instance, in the case of the EU–Japan Economic Partnership Agreement. The part on investment protection, which remains a shared competence, was split into an agreement of its own, while the EU-only agreement was concluded in December 2018 by the Union and entered into force in February 2019.[37]

E. Trade Dispute Settlement

The EU is also one of the most active participants in WTO dispute settlement (on the EU's position in the WTO generally see Chapter 6). It has been a complainant in over 100 cases and had to defend the EU as respondent in more than 80 cases.

Unlike most other international dispute settlement mechanisms, dispute settlement at the WTO is quasi-compulsory thanks to the so-called 'reverse consensus principle'. This means that *unless* there is a consensus *not* to establish a panel, it will be established.[38] Similarly, *unless* there is a consensus *not* to adopt a panel report or Appellate Body report, they will be adopted.[39] The same applied to the authorisation of 'suspensions of concessions' (often called 'trade sanctions' in the media) to encourage the responding party to comply with its obligations.[40] Hence, as long as at least one WTO member votes in favour, the procedure moves ahead.

[35] Ibid, para 244.
[36] Case C-600/14 *Germany v Council (COTIF)*, ECLI:EU:C:2017:935, para 68.
[37] Council Decision (EU) 2018/1907 of 20 December 2018 on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership [2018] OJ L 330/1.
[38] Understanding on rules and procedures governing the settlement of disputes (DSU), Annex 2 of the WTO Agreement, Art 6(1).
[39] Art 16(4) and Art 17(14) DSU, respectively.
[40] Art 22(6) DSU.

Even though the EU and the Member States are both represented at the WTO, only the EU brings cases against other WTO members. Moreover, the EU takes up the defence, even if cases are occasionally brought against individual Member States. When the EU is authorised to adopt 'suspensions of concessions' against WTO members who have violated their obligations towards it, it can use the entire weight of its internal market to make them effective. However, as a whole, the EU also represents a larger target.

A Delgado Casteleiro and J Larik, 'The "Odd Couple": The Responsibility of the EU at the WTO' in M Evans and P Koutrakos (eds) *The International Responsibility of the European Union* (Oxford, Hart Publishing, 2013) 253

The combined result of this particular enforcement mechanism and the position the EU has assumed in the WTO is that the Union can be targeted as a whole, and not the individual Member States in which the violation was committed. This makes sense, since the Union is the bigger target providing a wider selection of vulnerable sectors and companies to single out in the quest for inducing compliance. This is confirmed by practice, as there is no instance thus far in which a WTO Member has requested suspension of concessions against a single EU Member State. As shown earlier, in the cases where Member States have been targeted either individually or alongside the EU for complaints, in most cases a mutually agreed solution was reached by the EU. At the same time, suspensions have been applied against the EU in its entirety. Prominent examples include suspensions by the US in the course of the bananas and hormones disputes. These targeted a range of products from various Member States, with specific targets such as Italian pecorino cheese in the former case, and French Roquefort cheese in the latter.

As we have seen from the discussion of trade defence instruments such as anti-dumping measures, the CCP also plays a crucial role in defending the internal market from external influences which are seen as harmful to it, also at the WTO. In attempting to maintain a level playing field also with respect to the outside world, these instruments can be understood as complementing competition and state aid policy within the Union. For example, in the *Large Civil Aircraft* disputes between the United States and the EU, both sides accused the other of subsidising their major civil aviation companies in violation of WTO Agreement on Subsidies and Countervailing Measures.[41] In view of the fact that Boeing and Airbus are also involved in the production of defence equipment, ie military aircraft, and given that awarding

[41] WTO, *United States – Measures Affecting Trade in Large Civil Aircraft*, Request for consultations by the European Communities of 12 October 2004, WT/DS317/1; WTO, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, Request for Consultations by the United States of 12 October 2004, WT/DS316/1.

such projects to them might be seen as masked subsidies, it cannot be denied that 'this matter is all but exclusively civil, and relates to the EU's efforts for armaments cooperation',[42] and thus, albeit indirectly, to the CSDP (see Chapter 9).

To take another example, the EU market is also to be protected from products which are considered harmful to European consumers, which other WTO members can see as protectionism. The issue of trade restrictions based on health concerns is addressed in the WTO framework by the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). Under this agreement, the EU found itself being sued by its trading partners, notably the US, in widely publicised disputes such as *Beef Hormones*[43] and those concerning genetically modified organisms (GMOs).[44] These disputes raise fundamental questions about the interpretation of the 'precautionary principle' and the use of scientific evidence by the WTO Appellate Body. These controversies show that the internal market and its relations with the outside world are far from being matters of only technical relevance and can become highly politicised.

IV. The Role of the Institutions and Decision-making

The main actors and instruments of EU external relations were introduced in Chapters 1 and 4. In the framework of the CCP, there are a number of important deviations from the general rules and procedures which are explained in this section.

A. The Commission

International agreements concluded in the area of the CCP follow the single procedure laid down in Article 218 TFEU (see Chapter 4). However, Article 207(3) TFEU adds a few particularities, which point to a somewhat different position of the institutions.

Article 207(3) TFEU

Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.

The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission

[42] Larik (n 5) 20.

[43] WTO, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report (adopted 13 February 1998) WT/DS26/AB/R, WT/DS48/AB/R.

[44] WTO, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, Panel Report (adopted 21 November 2006) WT/DS291/R, WT/DS292/R, WT/DS293/R.

shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

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.

It is explicitly mentioned that the Council and the Commission need to make sure that the agreements are compatible with internal policies. There is no choice in the selection of the 'Union negotiator' or the 'negotiating team' (see Article 218 TFEU). Trade negotiations are, by definition, in the hands of the Commission. However, the Commission must act in consultation with a special committee. Whereas Article 218 TFEU gives some freedom to the Council to establish such committees, it is mandatory in relation to the CCP. Through this 'Trade Policy Committee' the Council can maintain its influence on the negotiations. The European Parliament is to be regularly informed during the negotiations (see below).

Despite the expressly mentioned roles of the Council and the European Parliament in the final decision-making, the role of the Commission in CCP cannot be overstated. Over the years, the Commission has built-up an extensive (technical) expertise and has been the main Union representative at the WTO (previously the GATT). It is the negotiator of trade agreements and executes the EU's trade policy. On the basis of the adapted comitology rules of 2011, which define the role of the various Member States driven committees in the Commission's decision-making procedure,[45] the Commission – and no longer the Council – takes final trade defence measures in the important CCP fields of anti-dumping, anti-subsidy and safeguards. Finally, the Commission's general competence to initiate an infringement procedure against a Member State is also applicable in relation to CCP matters.[46]

B. The Council

Article 207 TFEU

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

[45] Regulation 182/2011/EU of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L 55/13.

[46] See for instance, Case C-173/05 *Commission v Italy*, ECLI:EU:C:2007:362.

> 4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.
>
> For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.
>
> The Council shall also act unanimously for the negotiation and conclusion of agreements:
>
> (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;
> (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

Together with the European Parliament, the Council is the main decision-making institution – this time in the formation as the 'Trade Council'. Article 207(2) TFEU refers to the application of the ordinary legislative procedure for the adoption of 'the measures defining the framework for implementing the common commercial policy'. As the Member States are represented in the Council and the Trade Policy Committee, they can discuss and influence all trade matters also in non-mixed contexts.

In terms of voting modalities, the two paragraphs are clear: the Council decides by qualified majority voting (QMV). This follows from the application of the ordinary legislative procedure. Yet, Article 207(4) TFEU also mentions an exception to the rule: the Council acts unanimously in the negotiation and conclusion of international agreements in the areas of trade in services, commercial aspects of intellectual property, as well as FDI, 'where such agreements include provisions for which unanimity is required for the adoption of internal rules'.

In the areas mentioned in paragraphs 4(a) and (b), the Council always decides by unanimity. These concerns areas that are particularly sensitive for the Member States, such as 'cultural and audio-visual services and health services. Pre-Lisbon, FTAs addressing these issues would be concluded as mixed agreements to accommodate this sensitivity. With former Article 133 TEC having been modified and replaced by Article 207 TFEU, these sensitivities are now catered to by more burdensome procedures and voting prerogatives of the Member States within the Council, while the CCP as a whole has become an exclusive Union competence.

This pre-Lisbon practice is one factor explaining the large number of mixed agreements (see Chapter 2) in an area which is considered to be the prime example of exclusivity. At the same time, it puts the relevance of the principle of parallelism (see Chapter 3) into perspective, as harmonisation is not possible in areas not foreseen by

the Treaty. These days, this is clearly laid down in paragraph 6 of Article 207. This excludes the conclusion of international agreements once these would lead to internal harmonisation in areas where this was not meant to happen, such as the areas mentioned in Article 6 TFEU, even in the area of the CCP.

C. The European Parliament

As in most other areas of Union policy, the European Parliament is a co-decider in relation to the CCP. As we have seen, according to Article 207(2) TFEU, the ordinary legislative procedure applies here, which implies that internal measures on CCP issues need the support of a majority in the EP. Moreover, the EP must be kept informed on the negotiations of trade agreements by the Commission on the basis of Article 207(3) TFEU.

Article 207(3) TFEU

The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

This allows for parliamentary scrutiny over trade negotiations. Irrespective of these specific provisions, Article 207(3) TFEU points to the applicability of the general procedure in Article 218 TFEU, which, inter alia, includes the following in relation to the negotiation and conclusion of international agreements (see also Chapter 4):[47]

Article 218 TFEU

6. … the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases: …

  (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent. …

10. The European Parliament shall be immediately and fully informed at all stages of the procedure.

[47] The arrangements are further specified in the Framework Agreement on relations between the European Parliament and the European Commission [2010] OJ L 304/47.

Article 218(6)(a)(v) TFEU implies that the consent of the EP is also necessary for international agreements concluded under the CCP. This is an important change to the situation pre-Lisbon, where the EP's consent was not necessary for the conclusion of trade agreements.[48] Yet, while the requirement of final consent may certainly be helpful, the EP has only a limited role to play during the negotiation process. Obviously, it will be very difficult for the EP to deny its consent or call for amendments after (usually) difficult and complex negotiations have ended. This makes consulting the EP during the negotiation process all the more important, thereby giving the Parliament the possibility of indicating some possible obstacles for its final consent.

The EP's consent is not needed for provisional application of international agreements. Council decisions to authorise the provisional application of an agreement can be taken following a proposal from the Commission alone without the need to ask for prior parliamentary consent (Article 218(3) TFEU). The latter rule is of particular importance in relation to CCP, as indicated by the 'Banana Agreement' between the EU and a number of Latin-American States which effectively ended that long trade dispute. The EU was only able to conclude this deal with the possibility to put it into early provisional application in late 2009. The Latin American countries dropped their WTO cases against the EU in return for easier access to the EU market. On 3 February 2011, the European Parliament then gave its consent to the text. The agreement was officially signed in November 2012.

The extract below illustrates the proactive role the European Parliament plays in the CCP. In this legally non-binding resolution, the EP sets out its views on trade negotiations conducted by the Commission with Australia. It stresses the promotion of common values, the interest of the European agricultural sector and the wide-ranging scope of EU trade agreements. Moreover, it references important developments in the case law – here Opinion 2/15 – and its implications for democratic scrutiny. Last, but not least, the EP does not fail to remind the other institutions of its prerogatives, ie, the requirement of its consent to such an agreement and, therefore, to have its positions 'duly taken into account at all stages'.

European Parliament Resolution of 26 October 2017 containing the Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, 2017/2192(INI)

The European Parliament …

A. whereas the EU and Australia work together in tackling common challenges across a broad spectrum of issues and cooperate in a number of international fora, including on trade policy issues in the multilateral arena; …

F. whereas the European agricultural sector and certain agricultural products, such as beef, lamb, dairy products, cereals and sugar – including special sugars – are particularly sensitive issues in these negotiations; …

[48] Villalta Puig and Al-Haddab (n 13) 299.

K. whereas Australia is among the EU's oldest and closest partners, sharing common values and a commitment to promoting prosperity and security within a global rules-based system; …

1. Underlines the importance of deepening relations between the EU and the Asia-Pacific region, among other things, in order to foster economic growth within Europe and stresses that this is reflected in the EU's trade policy; …

9. Calls on the Council to fully respect the distribution of competences between the EU and its Member States, as can be deduced from CJEU Opinion 2/15 of 16 May 2017, in its decision on the adoption of the negotiating directives; …

14. Emphasises that an ambitious agreement must address, in a meaningful way, investment, trade in goods and services (drawing on recent European Parliament recommendations as regards policy space reservations and sensitive sectors), customs and trade facilitation, digitalisation, e-commerce and data protection, technology research and support for innovation, public procurement, energy, state-owned enterprises, competition, sustainable development, regulatory issues, such as high-quality sanitary and phytosanitary standards and other norms in agricultural and food products without weakening the EU's high standards, robust and enforceable commitments on labour and environmental standards, and the fight against tax avoidance and corruption while remaining within the scope of the Union's exclusive competence, all while giving special consideration to the needs of micro-enterprises and SMEs; …

20. Stresses that following CJEU Opinion 2/15 on the EU–Singapore FTA, Parliament should see its role strengthened at every stage of the EU-FTA negotiations from the adoption of the mandate to the final conclusion of the agreement; … reminds the Commission of its obligation to inform Parliament immediately and fully at all stages of the negotiations (before and after the negotiating rounds); is committed to examining the legislative and regulatory issues that may arise in the context of the negotiations and the future agreement without prejudice to its prerogatives as a co-legislator; reiterates its fundamental responsibility to represent the citizens of the EU, and looks forward to facilitating inclusive and open discussions during the negotiating process;

21. Recalls that Parliament will be asked to give its consent to the future agreement, as stipulated by the TFEU, and that its positions should therefore be duly taken into account at all stages; calls on the Commission and the Council to request the consent of the Parliament before its application, while also integrating this practice into the interinstitutional agreement;

22. Recalls that Parliament will monitor the implementation of the future agreement; …

D. The Court of Justice

This sub-section differs from those addressing the other institutions in the sense that we will use it to highlight several issues on which the role of the Court of Justice has been quite decisive with regard to the definition and development of the CCP. Because of the inextricable relationship between the CCP and the European integration process, a broad range of actors may be affected by CCP measures or hope to be able to rely on WTO agreements before EU courts (including Member State courts). In principle, the EU Courts are competent to deal with CCP on the basis of the general judicial procedures: the action for annulment (Article 263 TFEU), the preliminary reference procedure (Article 267 TFEU) and an action to invoke the contractual liability of the Union (Articles 268 and 340 TFEU). Furthermore, the Member States and the institutions can request the *ex ante* review of a trade agreement by the Court under Article 218(11) TFEU, as was the case with the WTO agreements of 1994 or CETA.[49] The extensive case law may be divided in cases related to commercial policy measures and cases on the effects of GATT/WTO law in the EU legal order, both reflecting the internal/external interface which is so characteristic for the CCP.

(i) CCP Measures

The possibility for individuals to bring an action for annulment against a CCP measure was confirmed by the Court in *Allied Corporation and Others*, which concerned an anti-dumping measure.[50] Irrespective of their general legislative nature, the fact that the exporters (of fertilizers) were expressly named in the regulation caused the Court to rule that the provisions of anti-dumping regulations could be of direct and individual concern to the producers and exporters. Indeed, many CCP cases concern anti-dumping measures. In *Timex*,[51] a watch producer successfully argued that anti-dumping duties on imports of mechanical wrist watches originating from the (then) Soviet Union were insufficient to protect its interests on the EU market. In this case, the measure in question was of direct and individual concern to Timex as this company was involved in initiating the proceedings and was in fact the only producer that was affected by the dumping of Soviet watches.

Anti-dumping duties are paid by the importers of dumped products and obviously they may disagree with the duties themselves or with their amount. However, proving to be directly and individually concerned has proven difficult for importers. In *Alusuisse*,[52] the Court found the anti-dumping measure to be of general application as the importers were not listed in the regulation. Exceptions have been noted when importers were associated with the mentioned exporters, or in very specific situations,[53]

[49] Opinion 1/94 (*WTO*), ECLI:EU:C:1994:384; Opinion 1/17 (*CETA*), ECLI:EU:C:2019:341.
[50] Joined Cases 239/82 & 275/82 *Allied Corporation and Others v Commission*, ECLI:EU:C:1984:68.
[51] Case 264/82 *Timex v Council and Commission*, ECLI:EU:C:1985:119.
[52] Case 307/81 *Alusuisse v Council and Commission*, ECLI:EU:C:1982:337.
[53] Case C-358/89 *Extramet Industrie v Council*, ECLI:EU:C:1991:214.

but the general rule seems to be that anti-dumping measures apply generally and hence cannot be challenged in court by individual importers.

Nevertheless, the fact that current Article 263(4) TFEU allows individuals to initiate proceeding against a 'regulatory act' when it is 'of direct concern to them and does not entail implementing measures', may allow for some flexibility. After all, once anti-dumping measures can be qualified as 'regulatory acts' there is no need for individuals to state their individual concern. As explained by the CJEU in the judgment below (concerning anti-dumping duties applied to iron or steel fasteners originating in the People's Republic of China or consigned from Malaysia), this happens because otherwise the private party would first need to violate the measure to cause 'individual concern'.

Case C-145/17 P *Internacional de Productos Metálicos SA v Commission*, ECLI:EU:C:2018:839, para 49

Where a regulatory act directly affects the legal situation of a natural or legal person without requiring implementing measures, that person could be denied effective judicial protection if he did not have a legal remedy before the European Union judicature for the purpose of challenging the legality of the regulatory act. In the absence of implementing measures, natural or legal persons, although directly concerned by the act in question, would be able to obtain a judicial review of that act only after having infringed its provisions, by pleading that those provisions are unlawful in proceedings initiated against them before the national courts …

(ii) Effects of WTO Law

The effects of international law in the EU legal order have been addressed in Chapter 5. In this sub-section, we highlight some specific aspects of the role of the CJEU in relation to the CCP and, above all, the effects of WTO rules in the Union's legal order. In principle, the competence of the Court extends to CCP issues and in terms of legal scrutiny and protection the whole regime of Article 263 TFEU annulment proceedings applies.

However, challenging EU acts on the basis of violations of the GATT and later on WTO law has proved difficult due to the CJEU's stance. In *International Fruit Company*, the Court found that the then Community was bound by the GATT as it had assumed the rights previously exercised by the Member States. Nevertheless, the Court ruled that individuals could not rely on the GATT 1947 to call into question the validity of EU measures in either national courts or the EU courts. It did so for the reasons set out below.

Joined Cases 21/72-24/72 *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, ECLI:EU:C:1972:115

19 It is also necessary to examine whether the provisions of the general agreement confer rights on citizens of the Community on which they can rely before the courts in contesting the validity of a Community measure.

20 For this purpose, the spirit, the general scheme and the terms of the General Agreement must be considered.

21 This agreement which, according to its preamble, is based on the principle of negotiations undertaken on the basis of 'reciprocal and mutually advantageous arrangements' is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.

22 Consequently, according to the first paragraph of Article XXII [GATT] 'each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by any other contracting party with respect to … all matters affecting the operation of this agreement'.

23 According to the second paragraph of the same Article, 'the contracting parties' – this name designating 'the contracting parties acting jointly' as is stated in the first paragraph of Article XXV – 'may consult with one or more contracting parties on any question to which a satisfactory solution cannot be found through the consultations provided under paragraph (1)'.

24 If any contracting party should consider 'that any benefit accruing to it directly or indirectly under this agreement is being nullified or impaired or that the attainment of any objective of the agreement is being impeded as a result of', inter alia, 'the failure of another contracting party to carry out its obligations under this agreement', Article XXIII lays down in detail the measures which the parties concerned, or the contracting parties acting jointly, may or must take in regard to such a situation.

25 Those measures include, for the settlement of conflicts, written recommendations or proposals which are to be 'given sympathetic consideration', investigations possibly followed by recommendations, consultations between or decisions of the contracting parties, including that of authorizing certain contracting parties to suspend the application to any others of any obligations or concessions under the General Agreement and, finally, in the event of such suspension, the power of the party concerned to withdraw from that agreement.

26 Finally, where by reason of an obligation assumed under the General Agreement or of a concession relating to a benefit, some producers suffer or are

> threatened with serious damage, Article XIX gives a contracting party power unilaterally to suspend the obligation and to withdraw or modify the concession, either after consulting the contracting parties jointly and failing agreement between the contracting parties concerned, or even, if the matter is urgent and on a temporary basis, without prior consultation.
>
> 27 Those factors are sufficient to show that, when examined in such a context, Article XI of the General Agreement is not capable of conferring on citizens of the Community rights which they can invoke before the courts …

However, the CJEU has carved out some exceptions to this general rule of no direct applicability in the EU legal order. In *Fediol*, the Court established that the flexibility of the GATT rules did not prevent it from interpreting the Agreement to assess the consistency of a specific commercial practice with its provisions. In the case the applicant had a right to challenge a Commission Decision in view of the GATT by virtue of the very detailed procedure laid down in the regulation which provided the framework for the contested decision, and its explicit reference to the GATT.[54] Moreover, in *Nakajima*, the Court was asked whether a Council Regulation (the 1988 'Basic Regulation'[55] against dumped or subsidised imports from third countries) violated the Anti-Dumping Code annexed to GATT 1947. Court ruled that 'direct effect' of international legal commitments was not the issue, as the Basic Regulation was clearly intended to implement the relevant commitment within the EU.[56] *Fediol* and *Nakajima* did not change the principle set out in *International Fruit*, but rather pointed to the fact that, in these strictly defined cases, the GATT rules were to be seen as part of the Community legal order, which made it unnecessary to address the question of whether international trade law could be relied upon by individuals. Finally, the Court has argued that the provisions of international agreements should be taken into account as far as possible when reading EU legislation by virtue of the principle of 'consistent interpretation' (see also Chapter 5).[57]

The establishment of the WTO (1994) and, in particular, its quasi-judicial dispute settlement system laid down in the Understanding on Rules and Procedures Governing the Settlement of Disputes (or 'Dispute Settlement Understanding', DSU), turned the rather 'member-driven' GATT 1947 trade regime into a more sophisticated, and 'rules-based' system. Reports are prepared by panels and an Appellate Body, but ultimately adopted by the 'Dispute Settlement Body' (DSB) in which all WTO Member States are represented. However, the crucial novelty was the applicable voting procedure called 'reverse consensus'. As noted above, this means panel reports will be

[54] Case 70/87 *Fediol v Commission*, ECLI:EU:C:1989:254.
[55] Regulation 2423/88/EEC of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community [1988] OJ L 209/1.
[56] Case C-69/89 *Nakajima v Council*, ECLI:EU:C:1991:186.
[57] Case C-61/94 *Commission v Germany* (*International Dairy Arrangement*), ECLI:EU:C:1996:313.

adopted unless they are appealed by a party to the dispute.[58] Appellate Body reports, in turn, will always be adopted 'unless the DSB decides by consensus not to adopt the Appellate Body report'.[59] In other words, as long as at least one Member State (the winning party) votes in favour of adopting the report, it shall be deemed to have been adopted.

This development sparked several cases before the CJEU, as it was expected that it might depart from its approach in *International Fruit*. However, this was not the case. The leading case is *Portuguese Textiles*,[60] in which Portugal challenged a Council Decision concerning the conclusion of Memoranda of Understanding between the Community and Pakistan and India on arrangements in the area of market access for textile products. In this case the CJEU was asked to decide on the direct applicability of WTO law in the EU legal order, which the Court denied. While this case was brought to the Court by a Member State, two years later it came to a similar conclusion in *Parfums Dior* concerning the question of whether individuals could challenge the legality of EU secondary legislation by invoking a WTO agreement.[61]

Case C-149/96 *Portugal v Council*, ECLI:EU:C:1999:574

36 While it is true that the WTO agreements, as the Portuguese Government observes, differ significantly from the provisions of GATT 1947, in particular by reason of the strengthening of the system of safeguards and the mechanism for resolving disputes, the system resulting from those agreements nevertheless accords considerable importance to negotiation between the parties.

37 Although the main purpose of the mechanism for resolving disputes is in principle, according to Article 3(7) of the [DSU], to secure the withdrawal of the measures in question if they are found to be inconsistent with the WTO rules, that understanding provides that where the immediate withdrawal of the measures is impracticable compensation may be granted on an interim basis pending the withdrawal of the inconsistent measure.

38 According to Article 22(1) of that Understanding, compensation is a temporary measure available in the event that the recommendations and rulings of the dispute settlement body provided for in Article 2(1) of that Understanding are not implemented within a reasonable period of time, and Article 22(1) shows a preference for full implementation of a recommendation to bring a measure into conformity with the WTO agreements in question.

39 However, Article 22(2) provides that if the member concerned fails to fulfil its obligation to implement the said recommendations and rulings within a

[58] Annex 2 of the WTO Agreement: Understanding on rules and procedures governing the settlement of disputes, Art 14(4).
[59] Ibid, Art 17(4).
[60] Case C-149/96 *Portugal v Council*, ECLI:EU:C:1999:574.
[61] Joined Cases C-300/98 and C-392/98 *Parfums Christan Dior*, ECLI:EU:C:2000:688.

reasonable period of time, it is, if so requested, and on the expiry of a reasonable period at the latest, to enter into negotiations with any party having invoked the dispute settlement procedures, with a view to finding mutually acceptable compensation.

40 Consequently, to require the judicial organs to refrain from applying the rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of entering into negotiated arrangements even on a temporary basis.

41 It follows that the WTO agreements, interpreted in the light of their subject-matter and purpose, do not determine the appropriate legal means of ensuring that they are applied in good faith in the legal order of the contracting parties.

42 As regards, more particularly, the application of the WTO agreements in the Community legal order, it must be noted that, according to its preamble, the agreement establishing the WTO, including the annexes, is still founded, like GATT 1947, on the principle of negotiations with a view to 'entering into reciprocal and mutually advantageous arrangements' and is thus distinguished, from the viewpoint of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations, or create special relations of integration with the Community, such as the agreement which the Court was required to interpret in *Kupferberg*.

43 It is common ground, moreover, that some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law.

…

46 To accept that the role of ensuring that Community law complies with those rules devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.

47 It follows from all those considerations that, having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.

48 That interpretation corresponds, moreover, to what is stated in the final recital in the preamble to Decision 94/800 [concerning the conclusion of the WTO agreements], according to which 'by its nature, the Agreement establishing the

World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts'.

[The CJEU goes on to explain that the above-mentioned *Fediol* and *Nakajima* exceptions do not apply in this case.]

The sentence in paragraph 47 is particularly important: 'The WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.' Hence, the changes introduced to the international trade regime by the WTO agreements, notwithstanding the arguments noted by the Court, continue to highlight the strong element of 'negotiation' between the parties, the reciprocal and mutually advantageous nature of the WTO and the fact that allowing for direct effect in the EU legal order would lead to putting the EU at a disadvantage with regard to the application of WTO rules, given the fact that other WTO members would not allow it.

But what about decisions by the WTO's Dispute Settlement Body? After all, a report by the WTO Appellate Body is 'as final a pronouncement on compatibility with WTO law as a party can possibly get',[62] providing a clear illustration of the legalisation process within that international organisation. In *Van Parys*, the Court was confronted with this question.

Case C-377/02 *Van Parys v BIRB*, ECLI:EU:C:2005:121

39 It is settled case-law in that regard that, given their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions …

40 It is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules …

41 In the present case, by undertaking after the adoption of the decision of the [WTO's Dispute Settlement Body] of 25 September 1997 to comply with the WTO rules and, in particular, with Articles I(1) and XIII of GATT 1994, the Community did not intend to assume a particular obligation in the context of the WTO, capable of justifying an exception to the impossibility of relying on

[62] Koutrakos (n 2) 288.

WTO rules before the Community Courts and enabling the Community Courts to exercise judicial review of the relevant Community provisions in the light of those rules.

42 First, it should be noted that even where there is a decision of the DSB holding that the measures adopted by a member are incompatible with the WTO rules, as the Court has already held, the WTO dispute settlement system nevertheless accords considerable importance to negotiation between the parties (*Portugal* v *Council*, paragraphs 36 to 40).

43 Thus, although, in the absence of a resolution mutually agreed between the parties and compatible with the agreements in question, the main purpose of the dispute settlement system is in principle, according to Article 3(7) of the understanding, to secure the withdrawal of the measures in question if they are found to be inconsistent with the WTO rules, that provision provides, however, that where the immediate withdrawal of the measures is impracticable, compensation may be granted or the application of concessions or the enforcement of other obligations may be suspended on an interim basis pending the withdrawal of the inconsistent measure ….

44 It is true that, according to Articles 3(7) and 22(1) of the understanding, compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings of the DSB are not implemented within a reasonable period of time, the latter of those provisions showing a preference for full implementation of a recommendation to bring a measure into conformity with the WTO agreements in question (*Portugal* v *Council*, paragraph 38).

45 However, Article 22(2) [of the DSU] provides that, if the Member concerned fails to enforce those recommendations and decisions within a reasonable period, if so requested, and within a reasonable period of time, it is to enter into negotiations with any party having invoked the dispute settlement procedures with a view to agreeing compensation. If no satisfactory compensation has been agreed within 20 days after the expiry of the reasonable period, the complainant may request authorisation from the DSB to suspend, in respect of that member, the application of concessions or other obligations under the WTO agreements …

47 Where there is no agreement as to the compatibility of the measures taken to comply with the DSB's recommendations and decisions, Article 21(5) of the understanding provides that the dispute shall be decided 'through recourse to these dispute settlement procedures', including an attempt by the parties to reach a negotiated solution.

48 In those circumstances, to require courts to refrain from applying rules of domestic law which are inconsistent with the WTO agreements would have the

consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of reaching a negotiated settlement, even on a temporary basis …

49 In the dispute in the main proceedings, it is apparent from the file that:

– after declaring to the DSB its intention to comply with the DSB's decision of 25 September 1997, the Community amended its system for imports of bananas upon the expiry of the period allocated to it for that purpose; …

[The judgment goes on to summarise further steps in the dispute and efforts by the EU to adapt its system with a view to making it compatible with WTO law.]

50 Such an 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 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 upon the expiry of the time-limit, in January 1999, granted by the DSB within which to implement its decision of 25 September 1997.

51 The expiry of that time-limit does not imply that the Community had exhausted the possibilities under the understanding of finding a solution to the dispute between it and the other parties. In those circumstances, to require the Community Courts, merely on the basis that that time-limit has expired, to review the lawfulness of the Community measures concerned in the light of the WTO rules, could have the effect of undermining the Community's position in its attempt to reach a mutually acceptable solution to the dispute in conformity with those rules. …

Key elements are to be found in paragraphs 50 and 51, where the Court concludes that a judicial review possibility at EU-level would undermine the negotiating position of the Community, also with regard to reports of the Appellate Body that clearly find that the EU is violating its obligations under the WTO agreements.

In both *Portuguese Textiles* and *Van Parys*, the Court refers to earlier case law of the pre-WTO era denying the direct applicability of the GATT in the EU legal order and expanding it to WTO law as a whole. The argumentation has been criticised quite extensively over the years[63] and mainly related to the specific nature of the agreement which was characterised by the Court to exhibit 'great flexibility'. This idea of flexibility was based on a number of specific characteristics of the original GATT, such as the duty of contracting parties to engage in consultations on any issue pertaining to the operation of GATT and their right to engage in further consultation if a satisfactory

[63] See T Cottier and K Schefer, 'The Relationship between World Trade Organization Law, National and Regional Law' (1998) 1 *Journal of International Economic Law* 83, 91–106.

solution was not reached and the possibility of derogation by means of unilateral suspension of GATT obligations in the event or the threat of serious damage. This precluded individuals and even Member States to challenge the legality of EU legislation in the light of GATT.

Moreover, as the Court found in *FIAMM*,[64] companies or individuals in the EU cannot claim damages for being adversely affected by 'suspensions of concessions' imposed by third countries authorised by the DSB for WTO law-inconsistent behaviour on the part of the EU.

The effects of WTO law in the EU legal order can be summarised as follows: As the general rule, the provisions of WTO Agreements cannot be invoked by either Member States (*Portuguese Textiles*) or individuals (*Parfums Dior*) to challenge the legality of EU secondary legislation. This general rule holds even when the DSB has decided that an EU measure is incompatible with the WTO rules (*Van Parys*). However, by way of exception, EU measures may be challenged in the light of a WTO rule if it can be established that the latter was to be implemented by that particular EU measure (*Nakajima*) or when an EU measure makes an express reference to that WTO rule (*Fediol*).

Obviously, the limited role the Court can play here may be criticised as it excludes parts of the exercise of the CCP from scrutiny by the Court and may be seen to condone certain violations of international law by the EU, which is at odds with its self-imposed pledge to the 'strict observance' of international law (Article 3(5) TEU).

V. The Broader Picture of EU External Relations Law

This chapter addressed the key role of the CCP in the EU's external relations regime, which also has shaped EU external relations law from the beginning. This role as a 'driving force' behind the development of the Union's external relations flows from the fact that internal market issues were – and still are – closely related to external trade issues. Both the existence and further development of the GATT and later the WTO, have had a large impact on the CCP – and *vice versa*.

Meanwhile, with the Lisbon Treaty and through the case law of the CJEU, the CCP has not only expanded in scope but has also been integrated more fully into the EU's external action, while democratic oversight over it was strengthened by requiring the EP's consent for the conclusion of trade agreements. However, stressing the need for political manoeuvring space in international trade, the CJEU continues to severely limit the extent to which individuals, companies and even Member States can rely on WTO law in EU courts.

[64] Joined Cases C-120/06 & C-121/06 *FIAMM and Others v Council and Commission*, ECLI:EU:C:2008:476.

VI. Sources and Further Reading

Bartels, L, *Human Rights Conditionality in the EU's International Agreements* (New York, Oxford University Press, 2005).

Bartels, L, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements' (2013) 40 *Legal Issues of Economic Integration* 297.

Cottier, T and Schefer, K, 'The Relationship between World Trade Organization Law, National and Regional Law' (1998) 1 *Journal of International Economic Law* 83.

Cremona, M, 'The External Dimension of the Internal Market: Building (on) the Foundations' in C Barnard and J Scott (eds) *The Law of the Single European Market: Unpacking the Premises* (Oxford, Hart Publishing, 2002) 351–94.

Cremona, M, 'The Internal Market and External Economic Relations' in P Koutrakos and J Snell (eds) *Research Handbook on the Law of the EU's Internal Market* (Cheltenham, Edward Elgar, 2017) 479–99.

De Búrca, G and Scott, J, 'The Impact of the WTO on EU Decision-making' in G De Búrca and J Scott (eds) *The EU and the WTO: Legal and Constitutional Issues* (Oxford, Hart Publishing, 2001) 1–30.

Delgado Casteleiro, A and Larik, J, 'The "Odd Couple": The Responsibility of the EU at the WTO' in M Evans and P Koutrakos (eds) *The International Responsibility of the European Union* (Oxford, Hart Publishing, 2013) 233–55.

Dimopoulos, A, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy' (2010) 15 *European Foreign Affairs Review* 153.

Eeckhout, P, *EU External Relations Law*, 2nd edn (Oxford, Oxford University Press, 2011).

Gstöhl, S and D De Bièvre, *The Trade Policy of the European Union* (London, Palgrave Macmillan, 2018).

Koutrakos, P, *EU International Relations Law*, 2nd edn (Oxford, Hart Publishing, 2015).

Larik, J, 'Much More Than Trade: The Common Commercial Policy in a Global Context' in M Evans and P Koutrakos (eds) *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Oxford, Hart Publishing, 2011) 13–45.

Meunier, S and Nicolaïdis, K, 'The EU as a Trade Power' in C Hill and M Smith (eds) *International Relations and the European Union*, 3rd edn (Oxford, Oxford University Press, 2017) 209–34.

Petersmann, E-U and Pollack, M (eds) *Transatlantic Economic Disputes: The EU, the US, and the WTO* (Oxford, Oxford University Press, 2003).

Villalta Puig, G and Al-Haddab, B, 'The Common Commercial Policy after Lisbon: An Analysis of the Reforms' (2011) 36 *European Law Review* 289.