

1. Introduction

This book is an attempt to provide a thorough chronological analysis of the European Union's (EU)¹ existing law and policy in the field of international trade.² This book analyses the evolution of the EU's external trade relations, as well as its common commercial policy competence³ through the years, starting

¹ Throughout this book, terms such as *European Union*, *European Communities*, and *European Community* appear continuously. It is important to clarify the difference between them. The main difference between the European Community/Communities (EC) and the European Union (EU) until the entry into force of the Lisbon Treaty in 2009 is that, technically speaking, only the EC had legal personality and therefore could conclude international agreements, buy or sell property, sue and be sued in court. All these are competences that the EC had, but the EU did not have. Since the entry into force of the Lisbon Treaty, the EU has legal personality and replaces the EC. Article 47 TEU as amended by the Lisbon Treaty gives legal personality to the EU. This concludes a process that started at the signature of the Treaty of Rome, i.e., the unification of two of the three European Communities with separate legal personalities into a Union that technically did not possess legal personality prior to the Lisbon Treaty. For simplification purposes, wherever possible the term 'EU' has been used. See R. Leal-Arcas, 'EU Legal Personality in Foreign Policy?' *Boston University International Law Journal* 24(2) (2006) 165–212.

² For a policy analysis of the EU's foreign economic policy, see A.R. Young, 'The Adaptation of European Foreign Economic Policy: From Rome to Seattle' *Journal of Common Market Studies* 38(1) (2000) 93–116; see also, A.R. Young, P. Holmes and J. Rollo, 'The European Trade Agenda after Seattle' Sussex European Institute Working Paper No. 37, November 2000.

³ A distinction is often made between capacity and competence. Capacity relates to the legal power of the Community to enter into an agreement. It is an issue going to the legal personality of the Community and ultimately a matter of international law. Competence, however, refers to the legality of the exercise of that power in the internal legal order and it is a question of Community law. Even if there is general capacity, action must be referable on a specific legal basis (competence) in order to be valid internally. See Maria Giavouneli, 'International Law Aspects of the European Union' *Tulane Journal of International and Comparative Law* 8 (2000) 147, 158; I. MacLeod, I.D. Hendry and S. Hyett, *The External Relations of the European Communities* (Clarendon Press, 1996) 38–9. For the differences between competence, power, and capacity in the federal context, see J.H.H. Weiler, 'The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle' in D. O'Keeffe and H. Schermers (eds), *Mixed Agreements* (Kluwer Law and Taxation Publishers, 1983) at 41.

with the Treaty of Rome⁴ up until the Treaty of Lisbon, as a background for

⁴ Treaties are usually composed of articles, Protocols and Declarations. As an example we have the Treaty of Amsterdam, composed of 15 articles, 13 Protocols and 58 Declarations. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2 October 1997, 1997 OJ (C 340) 1 [hereinafter Treaty of Amsterdam]. In the case of the EU, there are currently founding treaties, amending treaties, accession treaties and budgetary treaties. There is also an unratified EU Constitutional Treaty, which sought to consolidate, simplify and replace the pre-Treaty of Lisbon set of overlapping treaties. Treaty Establishing a Constitution for Europe, 16 December 2004, 2004 OJ (C 310) 1. It was signed in Rome on 29 October 2004 and was due to come into force in the near future, conditional on its ratification by all EU Member States. As for the founding treaties, there are four of them: Treaty Establishing the European Coal and Steel Community (Treaty of Paris), 18 April 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty] (expired 2002); Treaty Establishing the European Atomic Energy Community (Euratom Treaty), 25 March 1957, 298 U.N.T.S. 169; Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty] (these last two treaties are known as the Treaties of Rome, however, when the term 'Treaty of Rome' or the acronym 'TEC' are used, it is to mean only the EEC Treaty); and TEU (changing the name of the European Economic Community to simply 'the European Community' and introducing new intergovernmental structures to deal with the aspects of common foreign and security policy, as well as police and judicial cooperation). The structure formed by these so-called Three Pillars (Community pillar; foreign and security policy; police and judicial cooperation) is the European Union, whose scope then became more overtly political as well as economic). There are also four amending treaties: Merger Treaty (providing for a Single Commission and a Single Council of the then three European Communities); 1987 Single European Act, 28 February 1986, OJ (L 169) 1 [hereinafter SEA] (providing for the adoptions required for the achievement of the Internal Market); Treaty of Amsterdam (simplifying decision-making in addition to further integrating the common foreign and security policy concept; amending and renumbering the TEU and EC Treaty); and Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 26 February 2001, 2001 OJ (C 80) 1 [hereinafter Treaty of Nice] (again extending QMV to more areas and abolishing a national right to veto in some policy areas). A concept of 'enhanced co-operation' was introduced for countries wishing to forge closer links in areas where other EU Member States disagreed. The accession treaties came into being for every enlargement of the EU. As for budgetary treaties, there have been two: Treaty Amending Certain Budgetary Provisions of the Treaties Establishing the European Communities and of the Treaty Establishing a Single Council and a Single Commission of the European Communities (Budgetary Treaty of 1970), 22 April 1970, 1377 U.N.T.S. 210 (giving the European Parliament the last word on what is known as 'non-compulsory expenditure'); and Treaty Amending Certain Financial Provisions of the Treaty Instituting the European Coal and Steel Communities, Treaty Establishing the European Economic Community, and Treaty Establishing the European Atomic Energy Community (Budgetary Treaty of 1975), 22 July 1975, 1435 U.N.T.S. 245 (Euratom) (giving the European Parliament the power to reject the budget as a whole and creating the European Court of Auditors).

understanding the EU's present role in the World Trade Organization (WTO) framework.⁵ Thus, a legal analysis of EU trade policy after the Treaty of Rome, after the conclusion of the WTO Agreement, at the Treaty of Amsterdam, at the Treaty of Nice, and at the Treaty of Lisbon is provided, taking into account the most recent constitutional developments by the Lisbon Treaty on division of competences between the EU and its Member States.

The EU has become an important actor on the international scene, and since the 1970s its external relations have been growing both in the number of agreements signed and in domains of participation. The EU has participated in an important number of multilateral conventions within the framework of international or regional organizations, and is increasingly present in world affairs. In legal terms, however, the EU has a growing role.⁶ The EU's progression has not been steady, but was achieved in small steps, as we will see in the analysis of this book.

STRUCTURE OF THE BOOK

After this short introduction in Chapter 1, Part I of this book (Chapters 2–5) deals with the substantive aspects of EU trade law and policy. Part I analyses the history and evolution of EU trade law and policy since its early days up to the Treaty of Lisbon. It begins with Chapter 2, by providing a legal clarification

⁵ The World Trade Organization (WTO) is a global trade agency that was established through the GATT Uruguay Round Agreement signed in 1994. The WTO provides dispute resolution, administration, and continuing negotiations for the 18 substantive agreements that it enforces. The WTO and its underlying agreements set a system of comprehensive governance that goes far beyond trade rules. It is argued by some commentators (Lori Wallach being one of the most relevant activists in the public domain) that the WTO system, rules, and procedures are undemocratic and non-transparent. The WTO's substantive rules systematically prioritize trade over all other goals and values. Each WTO member is required to ensure 'the conformity of its laws, regulations and administrative procedures' (WTO Agreement Article XVI(4)) to the WTO's substantive rules. National policies and laws found to violate WTO rules must be eliminated or changed; otherwise, the violating country faces trade sanctions. The economic, social and environmental upheaval being suffered by many countries that have lived under the WTO regime since 1995 means that business-as-usual at the WTO is over. It remains to be seen whether the handful of powerful WTO members who have dictated WTO policy since 1995 will adapt to the new reality. By the same token, it is also unclear whether countries demanding changes to the WTO's current system of rules that are damaging their national interests may begin to withdraw if those changes do not take place. Regarding withdrawal from the WTO Agreement, although Article XV(1) is clear, the withdrawal from certain rules or agreements is not entirely clear.

⁶ European Commission, *Participation Des Communautés Europeennes Aux Accords Multilateraux*, Direction General I A, Introduction (1997).

of Article 207 of the Treaty on the Functioning of the European Union (TFEU) (formerly Article 133 EC). It continues with an analysis of the emergence of the European Coal and Steel Community (ECSC) as a pioneer (1952–1958), as well as the European Economic Community (EEC) (1958–1967). Next is a discussion of the period of the merger of the three European Communities in 1965 and the end of the transitional period after the formation of the EEC (1967–1977).

Chapter 3 analyses the EEC/EU's position within the General Agreement on Tariffs and Trade (GATT) and the WTO. Opinion 1/94 of the Court of Justice of the European Union (CJEU) and its consequences for EU trade policy are explored. Chapter 3 also provides an analysis of the Amsterdam Treaty negotiations in the international trade field.

Chapter 4 provides an analysis of the changes made to the EU's common commercial policy by the Nice Treaty and the confusion resulting from those changes, whereas Chapter 5 provides an analysis of the trade policy provisions after the entry into force of the Lisbon Treaty. It then provides an analysis of the United Kingdom's (UK) decision to leave the EU, i.e., Brexit, from a trade policy perspective.

Part II (Chapters 6–11) deals with the procedural aspects of EU trade law and policy. An analysis of mixed agreements as well as the EU institutions and their interaction with EU Member States' institutions and trade policy form the core of Part II of this book. The problems that the enlarged EU will face in its internal decision-making process (such as transparency, efficiency, accountability) can be paralleled to the WTO's decision-making process. Although the new challenges of democratic legitimacy and accountability, demanded by European citizens, as well as efficiency, traditionally imposed on the EU supranational institutions, will be considered in Part II of this book, the focus of Part II is not about a thorough analysis of major parameters such as efficiency, accountability and transparency in the external relations powers of the EU and the implications thereof, all of which go well beyond its scope.

The thesis of Part II of this book, therefore, is that EU Member States wish to retain their right to participate and veto in international trade negotiations since they do not fully trust the supranational level (namely the EU) to defend their national interests in all areas of trade policy.⁷ Furthermore, EU citizens do not trust the supranational level either, since identity in the EU remains national (with the few exceptions of citizens that transcend it). An example is the failure of the EU Constitutional Treaty, which was rejected by popular will.

⁷ A clear example of this argument has been, and continues to be, the position of the French government in relation to agriculture in the world trading system.

Hence, the name of the game is democracy: EU citizens do not want an EU federation run by Eurocrats in Brussels.

To explore these arguments, Part II of this book is divided into three main sections:

1. An analysis of mixed agreements (Chapter 6);
2. a phase-by-phase analysis of international trade agreements (Chapters 7–10), by looking at the main EU institutions dealing with EU trade policy; and
3. an analysis of efficiency versus accountability in the decision-making process with respect to EU trade policy (Chapter 11).

The major actors dealing with the external relations of the EU will also be analysed as well as the role they play in the European commercial policy-making. Agreements are negotiated by the Commission and concluded by the Council, normally after consultation with the European Parliament (EP).⁸ Part II of this book, therefore, intends to go phase by phase in the analysis of an international trade agreement and see how it affects the EU trade policy-making process.⁹ We shall see that, as far as actors are concerned,

third States may face [in mixed agreements] one or more of the Communities, one or more of the Communities together with one or more of the (by now 15) [as of 2007, there are 27] Member States, the Member States acting jointly, for instance, under the Common Foreign and Security Policy (CFSP) spelled out in Title V of the Treaty on European Union (TEU),¹⁰ and the Member States acting in a more individual capacity.¹¹

To this can be added that,

while Community treaties should normally be concluded by the Council, the Commission, too, has certain powers to enter into international agreements (albeit on behalf of the Communities),¹² and a general right to represent the Union in its

⁸ P. Kent, *Law of the European Union* (Financial Times Pitman Publishing, 1996) 28.

⁹ See generally I. MacLeod, I.D. Hendry and S. Hyett, *The External Relations of the European Communities* (Clarendon Press, 1996).

¹⁰ (footnote original omitted).

¹¹ A. Rosas, 'Mixed Union – Mixed Agreements' in M. Koskeniemi (ed.), *International Law Aspects of the European Union* (Kluwer Law International, 1998) 126.

¹² (footnote original omitted).

external relations.¹³ Even some quasi-independent Community agencies have been given certain external functions.¹⁴

The aim of Chapter 6 is to portray the legal problems raised by issues of shared competence between the EU and its Member States. Some of these legal problems, which do not exist within the context of exclusive EU competence, are related to the functioning of the EU. Chapter 6 also intends to show the implications of the so-called legal phenomenon of mixed agreements for third parties.

Chapters 7–10 deal with the institutional balance in EU trade law and policy. They analyse the role of major EU institutions in trade law and policy, following the various phases of an international trade agreement. Chapter 7 explores the negotiation of EU trade agreements. It analyses the negotiating phase of international trade agreements. Although there are bilateral¹⁵ and WTO multilateral (services) trade negotiations in which the EU participates, I will only focus on the multilateral approach. In this regard, the role of national ministers in the EU's external trade relations, as well as the so-called Trade Policy Committee and civil society, is taken into consideration. We shall see, *inter alia*, how the Commission, the negotiator of international agreements, is limited by the Council in its initiatives and in its negotiation autonomy.¹⁶ Many of these issues deal with the division of roles between the Commission and the Presidency of the EU in the field of international trade.¹⁷ The role of civil society is also tackled by analysing the new challenges of trade diplomacy, such as the integration of non-economic aspects of trade into the EU's trade policy, how to have a greater involvement of civil society in trade policy, as well as how to include trade policies in the democratic debate.

Chapter 8 examines the conclusion and ratification of EU trade agreements. In Chapter 8, the Council, i.e., the EU's intergovernmental body and adviser

¹³ (footnote original omitted).

¹⁴ A. Rosas, 'Mixed Union – Mixed Agreements' in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (Kluwer Law International, 1998) 126.

¹⁵ Examples of bilateral trade negotiations that the EC is currently conducting are those with ASEAN, India, and South Korea. See Council of the European Union, 'Conclusions on the Recommendations to Open Negotiations with Countries of ASEAN, India and South Korea' 2795 General Affairs Council Meeting, 23 April 2007.

¹⁶ J.-V. Louis, 'Preface' in C. Flaesch-Mougin, *Les Accords Externes de la Cee. Essai d'une Typologie* (Editions de l'Université de Bruxelles, 1980) at 12.

¹⁷ H.F. Beseler, 'The representation of the European Community on issues of international trade' in a note to the attention of the Heads of Delegations of the EU, 12 April 1999.

on international agreements, shall be evaluated in its role as the responsible authority for conclusion of agreements. The EU's competence to adhere to a certain international agreement, and what is left to the Member States' competence shall also be explored.¹⁸ Chapter 8 is also devoted to the ratification phase of international trade agreements and the role and competence of the EP and national parliaments on these issues.

Chapter 9 analyses the implementation of international trade agreements and the WTO Dispute Settlement mechanism from the perspective of the EU. Of particular interest is the role of the CJEU in relation to the enforcement of international trade agreements concluded by the EU, which is analysed in Chapter 10. Chapter 11 provides an analysis of the tension between efficiency and accountability in decision-making processes in EU trade policy. Chapter 11 explores this clear tension in the decision-making processes of EU commercial policy, and analyses the criticism the EU has received for its commercial policy: that it is unable to negotiate without internal agreement and incapable of negotiating with one voice, due to a constraining mandate.¹⁹ Chapter 12 concludes this book.

¹⁸ S.I.H. Grosses, 'Contribution to the Discussion' in C. Timmermans and E. Völker (eds), *Division of Powers between the European Communities and Their Member States in the Field of External Relations* (Kluwer, 1981) at 127.

¹⁹ S. Woolcock, 'The European Union's Role in International Commercial Diplomacy' in J. Usher (ed.), *The State of the European Union* (Longman, 2000) 193–209.