1. Negotiating and implementing EU free trade agreements in an uncertain environment

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INTRODUCTION

When the Treaty establishing a Constitution for Europe was drawn up, prior to the Lisbon Treaty, there was a unanimous consensus that the European Union's (EU's, or the 'Union's') external action, as derived from the Maastricht, Amsterdam and Nice Treaties, was neither coherent, transparent nor effective.[1] The ambition of the Lisbon Treaty was therefore to clarify, simplify and democratise this legal framework. In many respects, these objectives have been achieved: the unity of the EU legal order is generally ensured by the removal of the pillars; its legal personality (Article 47 of the Treaty on European Union (TEU)) is affirmed; external competences are categorised, albeit not perfectly; the coherence of the instruments is ensured and the European Parliament has seen its powers strengthened.

Nevertheless, 10 years after the entry into force of the Lisbon Treaty, many uncertainties clearly remain. This is reflected in the very large number of disputes brought before the European Court of Justice (ECJ, or the 'Court') concerning the EU's external relations. This is also reflected in the unprecedented number of questions and even challenges that the EU's conventional action raises in the Member States and among European citizens. At the heart of these questions are the new free trade agreements (FTAs) that the EU has undertaken to negotiate and conclude with a significant number of emerging and industrialised third countries, encouraged by the difficulties of the multilateral trading

[1] European Council, 'Laeken Declaration on the Future of the European Union' (2001) para I–57. See also External Action Group at the Convention on the Future of Europe, 'Final Report' (CONV459/02, 2002).

system. This evolution started with the Global Europe Communication[2] and the wish to conclude FTAs with countries that have a high market potential and a high level of protection against EU exports. It took a new step with the 'Trade for All' Communication,[3] which prioritised trade and investment negotiations with major partners (USA, Canada, Japan, and Southern Asian Countries).

The new goals assigned to FTAs go beyond traditional trade issues (such as tariffs) and now include significant regulatory cooperation and investment issues that may impact citizens and local authorities more directly. FTAs have now become a cause for concern for these stakeholders, both in the EU and among its partners. While public attention has focused on relations with North America, through the Transatlantic Trade and Investment Partnership (TTIP),[4] an aborted agreement with the United States, and the Comprehensive Economic and Trade Agreement (CETA), a global economic and trade agreement with Canada, new generation FTAs are or have been negotiated, signed and/or concluded by the EU over the past 10 years with a very large number of partners throughout the world.[5]

The purpose of this introduction is not to go into the details of all these agreements, nor to consider all the issues they raise, which are the subject of detailed contributions in this book. The main objective is to present the legal frameworks of the agreements and the ambiguities specific to their negotiation and conclusion, in order to better understand the issues at stake. These ambiguities stem first of all from the unfinished work of clarifying the legal framework for external action as set out in the Lisbon Treaty (1). They then flow from the agreements themselves: indeed, by their own characteristics, the EU's new FTAs create new uncertainties, which in turn reflect on the EU's legal framework (2).

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[2] European Commission, 'Global Europe: Competing in the world. A Contribution to the EU's Growth and Jobs Strategy' (Communication) COM (2006) 567 final.

[3] European Commission, 'Trade for All: Towards a More Responsible Trade and Investment Policy' (Communication) COM (2015) 497 final.

[4] Marise Cremona, 'Guest Editorial. Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' (2015) 52 Common Market Law Review 351.

[5] For a fairly precise overview and an update on the status of EU free trade agreements concluded, signed or under negotiation, see, on the website of the European Commission's DG Trade, the document entitled 'Overview of FTA and other Trade Negotiations' (updated March 2019) http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf, accessed 20 August 2019.

1 THE EU'S LEGAL FRAMEWORK OF EXTERNAL ACTION: A SOURCE OF UNCERTAINTY FOR NEGOTIATING AND CONCLUDING NEW FTAS

It is worth, first of all, remembering that the division of competences between the EU and its Member States in external matters remains one of the most sensitive and controversial issues in EU law (1.1). Secondly, it should be stressed that despite certain improvements, the Lisbon Treaty maintains a number of institutional and procedural ambiguities affecting the negotiation and conclusion of new FTAs (1.2).

1.1 Uncertainties Surrounding the EU's Competence to Conclude FTAs

When the question of the EU's external competence is raised, two closely intertwined aspects must be and have been considered with regard to the EU's conclusion of new FTAs, i.e. the scope of the competence and its nature, which can be exclusive or shared with the Member States. Although the two are obviously linked, in that an agreement that is considered to fall within the scope of trade policy will come within the exclusive competence of the Union, scope and nature can be dissociated because their resolution raises separate issues.

1.1.1 The scope of the EU's commercial competence

First, with regard to the scope of EU competence, it has to be considered in relation to the field to which the proposed policy belongs. In terms of trade policy, this is a long-standing issue, which has always given rise to lively discussions between the Commission and the Council and Member States and to an abundance of case-law produced by the Court. The reason why this is a hotly debated subject is the vagueness of the terms used by Article 207 of the Treaty on the Functioning of the European Union (TFEU), which merely states that the EU's trade policy is based on uniform principles and introduces the list of areas covered by this policy[6] with the adverb 'particularly', thus allowing all kinds of more or less extensive interpretations. In the *Daiichi Sankyo* judgment,[7] the Court was called upon once again to clarify, in the post-Lisbon

[6] Article 207(1) TFEU defines these as '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 liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies'.

[7] Case C–414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland* ECLI:EU:C:2013:520.

context, the rule relating specific measures to the EU's commercial policy, in keeping with its previous case-law rejecting a purely instrumental view of the common commercial policy (CCP).[8] Thus, 'a European Union act falls within the common commercial policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade ...'.[9]

However, the new wording of the Treaty provisions adopted in the Lisbon Treaty has raised new questions about the scope of the CCP, which have had a particular impact on the new FTAs envisaged by the EU. These issues were addressed quite vividly by the Court in Opinion 2/15[10] on the EU's conclusion of an FTA with Singapore. This Opinion, which only concerns the EU's competence to conclude this agreement and therefore does not prejudge the question of its compatibility with the Treaties or the compatibility of any other similar agreement with EU law,[11] can be considered as one of the most important opinions delivered by the ECJ since the entry into force of the Lisbon Treaty.[12] The Court confirms an extensive understanding of the scope of the CCP: Article 207 TFEU thus covers in particular the commitments of the Agreement on market access, with the exception of certain transport services,[13] those relating to the commercial aspects of intellectual property, those relating solely to the protection of foreign direct investment,[14] commitments on competition and finally on sustainable development. This last aspect is perhaps where the Court's approach is the most innovative with regard to the field of commercial policy, while at the same time creating uncertainty as to the scope of its opinion. While the opinion in itself is not really surprising in view of the Court's traditional case-law on the different objectives that commercial policy

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[8] See Opinion 1/78 *International Agreement on Natural Rubber* ECLI:EU:C:1979:224.

[9] *Daiichi Sankyo and Sanofi-Aventis Deutschland* (n 7) paras 50, 52. See also Case C–137/12 *Commission v Council* ECLI:EU:C:2013:675, paras 57, 58.

[10] Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore* ECLI:EU:C:2017:376.

[11] Such a question has been ruled by the Court in Opinion 1/17 concerning the conformity with EU law of the ISDS mechanism set up by the agreement with Canada.

[12] This is reflected in the impressive number of discussions of this Opinion. Among these, see in particular Marise Cremona, 'Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017' (2018) 14 European Constitutional Law Review 231; Alan Hervé, 'L'avis 2/15 de la Cour de justice – et maintenant, que faire du partage des compétences entre l'UE et ses Etats membres?' (2017) 3 Cahiers de Droit Européen 693.

[13] In accordance with Article 207(5) TFEU.

[14] The Court adopts a literal interpretation of Article 207(1) TFEU.

can pursue,[15] the Court's reasoning extends the scope of Article 21 TEU, as introduced by the Lisbon Treaty. This provision lists the principles and objectives on which the EU's external action is based and establishes, in a way, the 'doctrine' that serves as an overriding framework for its international action. This provision is reflected in Article 205 TFEU,[16] which opens Part V of the Treaty on the Union's external action. Articles 21 TEU and 205 TFEU, the scope of which is still largely to be determined, thus offer a new perspective on the relationship between objectives and competence in the field of the EU's external action law.[17] The various external policies, which were previously governed by separate provisions, according to specific rules and objectives, are now united around a set of common objectives and principles around which the material coherence of the Union's action is built. Thus, with regard to trade policy, Article 207(1) TFEU provides that this policy 'shall be conducted in the context of the principles and objectives of Union's external action'. Article 21 TEU is therefore now the *ultima ratio* by which the various external competences – whether explicit or implicit – are interpreted and implemented and it therefore allows competence to be adapted according to the specific objectives of the action taken. The question of the impact of this new legal framework on the scope of the Union's competence in commercial matters was considered in Opinion 2/15. As a new generation agreement, the FTA with Singapore, like all other similar agreements, includes a chapter on 'Trade and Sustainable Development', in which the parties undertake to promote sustainable development and cooperate to strengthen their levels of social and environmental protection. The issue was therefore to determine whether Article 207 TFEU could cover such provisions or whether, on the contrary, they fell under the EU's competence in social and environmental matters. Contrary to the opinion of its Advocate General,[18] the Court considers that the Treaty of Lisbon has changed the way in which the scope of the Union's trade policy is to be understood, insofar as 'it includes new aspects of contemporary international trade in that policy. The extension of the field of the CCP by the FEU Treaty

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[15] See, by analogy, the way in which the Court considered that the CCP could, before the introduction by the Maastricht Treaty of a specific legal basis, be used to pursue development cooperation objectives: Case C–45/86 *Commission v Council* ECLI:EU:C:1987:163.

[16] 'The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in [Article 21 TEU].'

[17] Eleftheria Neframi, 'The Dynamic of EU Objectives in the Analysis of External Competence' in Eleftheria Neframi and Mauro Gatti (eds), *Constitutional Issues of EU External Relations Law* (Nomos 2018) 63.

[18] Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore* ECLI:EU:C:2016:992, Opinion of AG Sharpston.

constitutes a significant development of primary EU law'.[19] Articles 205 and 207 TFEU state that the Union now has 'the obligation to integrate those objectives and principles into the conduct of its commercial policy'.[20] Among these objectives is the development of international measures to 'preserve and improve the quality of the environment and the sustainable management of global natural resources in order to ensure sustainable development'.[21] It follows that 'the objective of sustainable development henceforth forms an integral part of the common commercial policy'.[22] Having established this, the Court goes on to examine the specific provisions of the agreement on the protection of workers and the environment: it returns to a more traditional analysis of the scope of trade policy to determine that these provisions have a specific link with trade between the EU and Singapore and that they are likely to have direct and immediate effects on such trade. This reference to Article 21 TEU, which seems unnecessary in the light of its previous case-law, highlights the importance that the Court intends to give to this provision. Admittedly, the Court is careful to specify that this commercial competence, which includes considerations of sustainable development, cannot go so far as to 'regulate the level of social and environmental protection' within the EU and that it does not therefore affect its competences in these fields. The Court's reasoning raises questions about the potential for the recognition of external competence in social and environmental matters, even though Article 21(3) TEU clearly states that the objectives referred to in paragraph 2 must be achieved not only in the context of the EU's external policies – such as the CCP – but also in the context of the external aspects of its other policies. Above all, given the general nature of the terms used in Opinion 2/15, this reasoning remains ambiguous as to the limits of trade policy in relation to the objectives, which are dealt with very broadly, not to say vaguely, by Article 21 TEU.

1.1.2 The nature of EU competence

Contrary to the question of scope, the question of the nature of the EU's competence in commercial matters appears to have been long settled by the Court's case-law, in particular since Opinion 1/75,[23] and is now codified by the Lisbon Treaty. Under Article 3(1) TFEU, the Union has an exclusive and comprehensive competence in the conduct of its CCP, including external aspects. It follows that Member States are in principle not authorised to conclude agree-

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[19] Opinion 2/15 (n 10) para 141.
[20] ibid para 143.
[21] Article 21(2)(f) TEU.
[22] Opinion 2/15 (n 10) para 147.
[23] Opinion 1/75 *OECD Understanding on a Local Cost Standard* ECLI:EU:C:1975:145.

ments in this field, unless expressly authorised to do so. In addition, the Lisbon Treaty clarifies the nature of competence, since it now covers all policies that lie exclusively within the Union's remit: it has therefore removed the hypothesis of '*mixité contre nature*'[24] that had been introduced by the Nice Treaty in the fields of services and trade-related intellectual property rights. Any attempt by Member States and/or the Council to enforce a legal basis involving shared competence – such as, for example, Article 114 TFEU on the internal market – has therefore been doomed to failure, as the Court has confirmed the exclusive competence of the EU.[25] This issue might therefore be expected to generate less uncertainty. In actual fact, the situation is more complex, given the scope of the new FTAs.

With regard to investment, the nature of external competence was a sensitive issue, in particular because the extension of the scope of the CCP could seem inadequate in the light of the international rules that the EU is considering adopting. The new FTAs not only contain substantial investment provisions, going beyond foreign direct investment alone, but also provide for an investor-state dispute settlement (ISDS) mechanism. It is not, therefore, surprising that the EU-Singapore FTA again gave the Court the opportunity to rule. In Opinion 2/15, it considered that foreign investments other than foreign direct investments do not fall within the exclusive competence of the EU under Article 207 TFEU but fall within the scope of Article 63 TFEU on capital movements. This did not exclude exclusive competence but made it more uncertain. It still had to be determined whether the provisions of the agreement met the conditions of exclusivity by exercise laid down in Article 3(2) TFEU.[26] In this instance, the Court considered that this was not the case and that the chapter of the agreement on portfolio investment fell within the shared competence between the EU and its Member States, as do the institutional provisions relating to ISDS. Consequently, the Court concluded that the

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[24] Catherine Flaesch-Mougin, 'Les compétences externes de l'Union européenne' *in Les accords internationaux de l'Union européenne, Commentaires J. Megret* (Editions de l'Université de Bruxelles 2019) 13. The fields concerned were those of trade, cultural and audio-visual services, education services and social and human health care services.

[25] See *Daiichi Sankyo and Sanofi-Aventis Deutschland* (n 7), in the case of trade-related intellectual property rights and *Commission v Council* (n 9), in the case of services based on, or consisting of, conditional access.

[26] Pursuant to Article 3(2) TFEU, '[t]he Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope'.

agreement 'cannot be approved by the European Union alone'.[27] This Opinion considerably complicates the legal framework of any new FTAs, since it leads either to the conclusion of a mixed agreement or – as has been the case in practice – to the conclusion of two separate agreements, one covering trade, concluded by the EU alone, and the other concluded by the EU and its Member States on investment protection.[28] Above all, this solution was considered surprising and open to criticism insofar as it seemed to consider that whenever there is a sharing of competence, there must necessarily be a mixed agreement. It therefore opened up uncertainties as to the use of what the doctrine has described as 'facultative mixity',[29] i.e. as opposed to the hypotheses of compulsory mixity,[30] the situation where, in the event of a division of competence, the conclusion of the agreement jointly by the EU and its Member States is the result of a choice made by the Council. Even though the Court qualified its position six months after Opinion 2/15 in the *COTIF* judgment,[31] recent

[27] Opinion 2/15 (n 10) para 245.

[28] This was applied in the case of Singapore (Council Decision (EU) 2018/1599 of 15 October 2018 on the signing, on behalf of the European Union, of the Free Trade Agreement between the European Union and the Republic of Singapore [2018] OJ L 267/1; Council Decision (EU) 2018/1676 of 15 October 2018 on the signing, on behalf of the European Union, of the Agreement on investment protection between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part [2018] OJ L 279/1), and also in the case of Japan (Council Decision (EU) 2018/966 of 6 July 2018 on the signing, on behalf of the European Union, of the Agreement between the European Union and Japan on an Economic Partnership [2018] OJ L 174/1; Council Decision (EU) 2018/1907 of 20 December 2018 on the conclusion of the Agreement between the European Union and Japan on an Economic Partnership [2018] OJ L 330/1).

[29] Several typologies have been suggested with regard to mixed agreements. See for instance Allan Rosas, 'The European Union and Mixed Agreements' in Alan Dashwood and Christophe Hillion, *The General Law of E.C. External Relations* (Sweet and Maxwell 2000) 203; Marc Maresceau, 'A Typology of Mixed Bilateral Agreements' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and Its Member States in the World* (Hart Publishing 2010) 11; see also, Chamon, Chapter 3 in this book.

[30] The mandatory mixity hypotheses refer to those where the mixity is determined by the scope of the agreement, which, in part, falls within the exclusive competence of the EU and in part within the reserved competence of the Member States. In this case, the Union and its Member States must conclude the agreement jointly.

[31] Case C–600/14 *Germany v Council* ECLI:EU:C:2017:935. See Eleftheria Neframi, 'Article 216(1) TFEU and the Union's Shared External Competence in the Light of Mixity: Germany v Council (COTIF)' (2019) 56 Common Market Law Review 489.

case-law shows the difficulty of legally determining the conditions and criteria for such a choice.[32]

This clearly shows that, while the ambition of the Lisbon Treaty was to simplify the legal framework for the Union's external action, enabling it to strengthen its capacity as an international player, the framework still retains a great deal of uncertainty and is extremely complex with regard to the organisation of the Union's external competences. The same applies to the institutional and procedural framework.

1.2 Ambiguities in the Institutional and Procedural Framework

Like all EU external agreements, new FTAs must be concluded in accordance with Article 218 TFEU, which establishes a 'unified and general procedure for the negotiation and conclusion of international agreements that the Union is competent to conclude in its fields of action'.[33] The existence of this new procedural legal basis for the conclusion of all EU external agreements does not exclude 'special procedures'.[34] Thus, Article 218 TFEU applies 'without prejudice to the specific provisions of Article 207' and, at the same time, Article 207(3) TFEU provides that Article 218 TFEU is applicable to commercial agreements 'subject to the specific provisions of this Article'. These mainly concern the Commission's powers and voting rules in the Council.

First of all, with regard to the Commission,[35] Article 207(3) TFEU preserves its exclusive power to recommend the opening of negotiations and then to negotiate the future agreement. It follows, by way of derogation from Article 218(3) TFEU, that the Council may not, in commercial matters, choose the head of the negotiating team. This is necessarily the European Commission and more particularly, within the Commission, the European Commissioner for Trade. At the same time, Article 207 TFEU specifically organises the arrangements for the Council to supervise the Commission. While paragraph

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[32] Joined Cases C–626/15 and C–659/16 *Commission v Council* ECLI:EU:C:2018:925. See Catherine Flaesch-Mougin, 'L'arrêt sur les aires marines protégées dans l'Antarctique jette un froid sur la capacité d'action de l'Union dans les instances internationales' (2019) 1 Revue trimestrielle de droit européen 125.

[33] Case C–658/11 *Parliament v Council* ECLI:EU:C:2014:2025, para 52.

[34] On this point, see Cécile Rapoport, 'La procédure de conclusion des accords externes de l'Union européenne: quelle unité après Lisbonne?' in Inge Govaere, Erwan Lannon, Peter Van Elsuwege and Stanislas Adam (eds), *The European Union in the World. Essays in Honor of Marc Maresceau* (Martinus Nijhoff Publishers 2014) 149.

[35] Isabelle Bosse-Platière, 'Les pouvoirs de la Commission européenne en matière d'action extérieure: surmonter le repli institutionnel par l'optimisation fonctionnelle?' in Josiane Auvret-Finck (ed.), *La Commission européenne en voie de redynamisation?* (Pedone 2016) 163.

4 of Article 218 TFEU provides that the Council may issue directives to the negotiator and appoint a committee which will take part in the negotiations with the Commissioner, Article 207(3) TFEU requires the Council to appoint a special committee and requires the Commission to report 'regularly to the special committee and to the European Parliament on the progress of the negotiations'. This obligation, which is systematically included in the directives adopted by the Council prior to the opening of negotiations on all agreements, is therefore directly grounded in primary law, particularly in the case of trade agreements. It should also be noted that the Treaty of Nice was the first to provide the Commission with a framework for negotiating trade agreements, before the Treaty of Lisbon extended it, albeit in a more flexible way, to all external agreements. In a judgment of 16 July 2015, the Court was asked to clarify the distribution of powers between the Commission and the Council, or more particularly the special committee it appoints, which is composed of representatives of the governments of the Member States, with regard to the negotiation of external agreements.[36] Although the case concerned an agreement in the field of the environment[37] and therefore the interpretation of Article 218(3) and (4), the general rules laid down in this case-law would probably be applicable for the interpretation of similar provisions of Article 207(3) TFEU. Moreover, this case took place in a sensitive political context characterised by the underlying climate of mistrust of the Member States towards the Commission and public pressure regarding the transparency of the global trade agreement negotiations, in particular those relating to CETA and TTIP.[38] Nevertheless, this case-law shows that the Court's position is fairly or even finely balanced, when it comes to articulating the two '*principes directeurs*'[39] of institutional balance and loyal cooperation. Indeed, the Court

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[36] Case C–425/13 *Commission v Council* ECLI:EU:C:2015:483.

[37] This was an agreement between the EU and Australia on the mutual recognition of European and Australian greenhouse gas emission allowance trading schemes.

[38] See the letters addressed by the European Ombudsman, Ms O'Reilly, to the Council and the European Commission calling for greater transparency in the negotiation of the TTIP and requesting that the negotiating directives adopted on 9 October 2014 be made public, which became effective on 17 June 2015 http://www.ombudsman.europa.eu/fr/press/release.faces/fr/54636/html.bookmark (English: https://www.ombudsman.europa.eu/en/press-release/en/54636) accessed 20 August 2019. See on this subject Catherine Flaesch-Mougin, 'Commerce et démocratie – quelques réflexions sur l'ère post-Lisbonne' in *Mélanges en l'honneur du Professeur Henri Oberdorff* (LGDJ 2015) 107. More recently, on the specific issue of investments, see 'USA/Canada: Civil Society Still Fighting against Investor Protection in TTIP and CETA' (*Europe Daily Bulletin*, 23 February 2016) 9.

[39] Claude Blumann and Louis Dubouis, *Droit institutionnel de l'Union européenne* (6th edn, Lexis Nexis 2016) 193.

considers, on the one hand, that 'Article 218(4) TFEU must be interpreted as authorising the Council to lay down, in the negotiating directives, procedural arrangements governing the information, communication and consultation process between the Special Committee and the Commission, such rules being consistent with the objective of ensuring proper internal consultation'.[40] But, on the other hand, it considers that the fact that the Council and the Committee establish and impose on the Commission 'detailed negotiating positions'[41] goes beyond the powers conferred on them by the Treaty and undermines the principle of institutional balance. In other words, in the name of the principle of loyal cooperation, the Council may impose certain procedural obligations on the Commission, as confirmed by Article 207(3) TFEU,[42] but, in the name of institutional balance, it cannot go so far as to demand more substantial and detailed obligations.

As regards the voting rules in the Council, Article 207(3) TFEU maintains a number of derogations to the general rule of qualified majority voting applicable for the conclusion of external agreements, including trade agreements. In particular, the Council must vote unanimously for the conclusion of agreements in the field of services, commercial aspects of intellectual property and foreign direct investment, where such agreements 'include provisions for which unanimity is required for the adoption of internal rules', which is consistent with Article 218(8) TFEU. Moreover, unanimity is also required for the conclusion of agreements in the fields of cultural and audio-visual services[43] and also social, educational and health services[44] which, given the scope of the new FTAs, is by no means an inconsequential requirement. In both cases, however, the use of unanimity is subject to the condition that such agreements would either undermine cultural and linguistic diversity in the EU or seriously disrupt the organisation or provision of such services at the national level. One of the changes brought about by the revisions of former Article 133 EC following Opinion 1/94 of the ECJ,[45] has been the deletion in Article 207 TFEU of the reference to the mixed nature of agreements in these areas introduced by the Nice Treaty. However, it has maintained a certain degree of complexity

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[40] *Commission v Council* (n 36) para 78.

[41] ibid para 90: 'whilst it is true that Article 218(4) TFEU authorises the Council to draw up negotiating directives, it does not, on the other hand, … invest that institution with the power to impose "detailed negotiating positions" on the negotiator'.

[42] It should be recalled that under this provision, the Commission 'shall regularly report to the Special Committee ... on the progress of the negotiations'.

[43] Article 207(4)(3)(a) TFEU.

[44] Article 207(4)(3)(b) TFEU.

[45] Opinion 1/94 *Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property* ECLI:EU:C:1994:384.

in determining the voting rules in the Council, considering that the conditions for applying these derogations remain unclear and will undoubtedly require clarification by the ECJ.

Finally, with regard to the role of the European Parliament, the reference in Article 207(3) TFEU to the requirement that the Commission must keep Parliament informed during the negotiations is now clearly redundant in the light of Article 218(10) TFEU, a new provision introduced by the Lisbon Treaty according to which the European Parliament is 'fully and immediately informed at all stages of the procedure'. It is also a codification of a long-standing practice for trade agreements, since the Luns-Westerterp procedure established in 1973, supplemented in 1995 by a Code of Conduct[46] and extended by a framework agreement signed in July 2000. It already provided that 'the Commission shall keep Parliament, through its parliamentary committee, regularly and fully informed of the progress of the negotiations'.[47] Obviously, the most important contribution to the procedure for concluding external agreements in the commercial field concerns the European Parliament's power of approval. While the CCP was, for many years, one of the least democratic policies of the EU, since the decisions belonged to the Council alone, the European Parliament suddenly brought to bear its full competence in the field of commercial policy, thanks to the powers conferred on it by the Lisbon Treaty. This now common role of the European Parliament stems from a 'between the lines' reading of Article 218(6) TFEU, which provides that the latter approves agreements 'covering areas to which the ordinary legislative procedure applies ...'. While the definition of the word 'covering' in this context may well be open to discussion, there is no doubt that, from now on, internal acts in the field of commercial policy are adopted, in accordance with Article 207 TFEU, jointly by the European Parliament and the Council. Of course, this democratisation of the CCP is to be welcomed, particularly for the adoption of the new FTAs. Indeed, the latter cover areas such as environmental and sustainable development, which directly affect the lives of European citizens and are considered as key issues by the European Parliament. This is why, as soon as the Lisbon Treaty entered into force, the European Parliament clearly stated its ambition to use its new powers and to

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[46] Code of Conduct adopted on 9 March 1995 between the European Parliament and the Commission [1995] OJ C 89/68.

[47] Framework Agreement on relations between the European Parliament and the Commission [2001] OJ C 121/122, Annex II of which concerns the transmission of information by the Commission on international agreements. For a commentary on the framework agreement, see Stéphane Rodrigues, 'La paix des braves? À propos du nouvel accord-cadre Commission–Parlement européen' (2000) 442 Revue du marché commun et de l'Union européenne 590.

influence the negotiations and content of future trade agreements.[48] One of the very few cases when the European Parliament has refused to approve an external agreement has been a trade agreement.[49]

From this point of view, there is a paradox in the fact that, despite the improvement in the democratic process leading to the adoption of external agreements, the opposition to the new FTAs negotiated and concluded by the EU has been stronger than ever, precisely because of the democratic deficit. But this paradox may only be apparent and is, above all, due to the ambiguities of this new generation of FTAs, since they have a profound impact on the EU's external action itself.

2 FTAS AS A SOURCE OF NEW UNCERTAINTIES

In addition to the EU's post-Lisbon legal framework, which remains unclear about the outcome of the negotiations, FTAs have recently become a source of legal uncertainty. This results from the EU's new approach towards free trade (2.1) and its implications in terms of procedural challenges (2.2). In order to avoid new uncertainty in naturally uncertain diplomatic processes, the EU needs to invent appropriate answers with a view to preserving its credibility on the international scene (2.3).

2.1 A New Free Trade Approach

The so-called 'new generation of FTAs' has generated, within the EU, a great mobilization of players (citizens, national and regional parliaments etc.) who are not, traditionally, very much involved in trade policy making. There are two main reasons behind this. The first one is undoubtedly linked to the identity of the EU's negotiating partners. This new FTA approach departs from the one initiated in the 1990s. Back then, the European Community mainly established free trade relations within the framework of association agreements concluded with partners with a lower level of economic development, such as Mediterranean countries or Eastern and Central Europe economies. Apart

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[48] Isabelle Bosse-Platière, 'Le Parlement européen et la procédure de conclusion des accords internationaux' in Josiane Auvret-Finck (ed.), *Le Parlement européen après l'entrée en vigueur du traité de Lisbonne* (Larcier 2013) 79.

[49] European Parliament, 'Legislative Resolution on the Draft Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, the Republic of Korea, the United States of America, Japan, the Kingdom of Morocco, the United Mexican States, New Zealand, the Republic of Singapore and the Swiss Confederation' (P7_TA-PROV(2012)0287, 4 July 2012).

from the European Economic Area with European Free Trade Association (EFTA) States, the EC free trade policy thus used the asymmetric liberalisation of trade as an instrument for the economic development of the EC's partners. The liberalisation essentially concerned non-sensitive goods. Both economic operators and citizens had not much to fear from these negotiations, since the internal market could deal with the competitive pressure resulting from these FTAs. Likewise, the FTAs concluded in the 2000s and early 2010s with Latin American,[50] Caribbean[51] or African[52] partners were not perceived as a threat in public opinion.

The new FTAs represent a paradigm shift as they now concern highly competitive industrialised or emerging countries. The turning point in the EU's trade strategy happened in 2006 with the 'Global Europe' Communication,[53] which acknowledged that 'the key economic criteria for new FTA partners should be market potential (economic size and growth) and the level of protection against EU export interests (tariffs and non-tariff barriers)'.[54] This strategy was updated in 2015 with the 'Trade for All' Communication,[55] which recommends that the negotiation of FTAs with major trade actors – i.e. the USA, Canada and Japan – be prioritised, in addition to negotiations with Southern Asian Countries.

It is clear that the EU now targets FTA partners of a different kind, since free trade pursues an economic – more than a political – objective: improving the mutual market access between competitive economies. Undoubtedly, this perspective is, on the one hand, an opportunity for European operators to benefit from a privileged access to foreign markets and to boost the EU's economy. Nevertheless, it will, on the other hand, increase the competitive pressure on the internal market and might threaten weaker operators. Consequently,

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[50] See for example Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part [2000] OJ L 276/45; Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part [2002] OJ L 352/3; Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L 354/3.

[51] See for example the Economic Partnership Agreement, between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part [2008] OJ L 289/3.

[52] See for example the Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part [1999] OJ L 311/3.

[53] 'Global Europe' Communication (n 2).

[54] ibid 9.

[55] 'Trade for All' Communication (n 3).

whether or not the benefits anticipated in the impact assessments occur, public opinion worries about the characteristics of the EU's new trade partners and the actual economic outcome of these agreements. The deep and comprehensive scope of the new FTAs contributes to nurture these concerns.

The second reason that explains the mobilisation of unexpected players in the FTA negotiation process indeed lies in the renewed content of these agreements. Both the substantial and institutional provisions generate new issues for the EU legal framework.

Firstly, the substantial content of the new bilateral FTAs reveals that the EU and its partners intend to deepen the liberalisation of sectors they are not able to deepen within the World Trade Organization (WTO) multilateral framework. Thus, intellectual property, public procurement, competition, regulatory cooperation, investment, trade and sustainable development have become typical chapters of the EU's FTAs.

Secondly, the content of FTAs is also renewed from an institutional perspective. Whereas the EU used to cooperate with these partners through soft law and political instruments, the new FTAs establish a structured and binding institutional framework, including common institutions, which guarantee the good functioning of the agreement. Some of these institutions have a decision-making power while others provide recommendations; some involve civil society while others interact with bodies created by multilateral organisations. Despite this variety, the FTAs clearly aim at establishing a permanent bilateral institutional framework dedicated to the implementation of the agreements and to the development of their potential. This will allow the parties to cooperate on a long-term basis, as an alternative to the WTO system, even if, in practice, the use of these institutional tools will be a matter of political will. In any case, the institutional bodies will have to comply with the principles and objectives enshrined in the FTAs, which – despite variations from one agreement to another – usually require that the promotion and the facilitation of bilateral trade and investment remain compatible with the parties' commitments to multilateral environmental and labour norms. In addition to their ambitious substantial content and to their institutional tools, the new FTAs consist of a permanent bilateral legal system designed to deal with issues and disputes that rise at the implementation stage. Thus, their concrete and long-term effects remain hard to predict apart from the liberalisation commitments.

The EU's new and ambitious approach towards FTAs, whose effects are partially unpredictable, triggered protests beyond the TTIP negotiation. Even if TTIP certainly raised awareness of the deep and comprehensive FTAs

(DCFTAs) phenomenon, it has not been the only agreement to be challenged.[56] The questions raised and highlighted by TTIP actually need to be answered beyond TTIP.

2.2 New Interferences to Face

The negotiators of the EU's new generation of FTAs (NGFTAs) have been confronted with several procedural actions triggered by various players, both at national and EU level. This new trend reveals interferences in the treaty-making process that may come from an innovative use of participatory democracy instruments or that may result from judicial actions.

2.2.1 Innovative use of participatory democracy

Firstly, the European instruments of participatory democracy have been used to contest EU FTAs. Some instruments are new, such as the European Citizens' Initiative (ECI),[57] which entered into force with the Lisbon Treaty. The 'Stop TTIP' initiative[58] was the first ECI used to demand the interruption of an ongoing negotiation or for the withdrawal of acts related to the international negotiation process. Given the aim and the scope of this initiative, the General Court was asked to establish its admissibility.[59]

The involvement of the European Ombudsman is also worth mentioning for it remains unusual in the field of external action, especially in the negotiation of international agreements, despite the Anti-counterfeiting Trade Agreement (ACTA) inquiry[60] precedent. Admittedly, the European Ombudsman does not deal with participatory democracy. The Ombudsman's remit covers maladministration issues within the EU institutions. Nevertheless, it can be extended to tackle issues such as transparency and access to documents in the field of international negotiations, which are directly linked to the democratic functioning of the EU. In this regard, through requests and self-referrals dealing with the TTIP negotiations, the European Ombudsman significantly contributed to better information for the public and, therefore, to a more democratic debate.

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[56] Both CETA, between the EU and Canada, and the FTA between EU and Vietnam have also faced opposition. See Section 2.2.

[57] See Chauvel, Chapter 9 in this book.

[58] Page of the 'Stop TTIP' initiative on the European Commission website: http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2017/000008 accessed 25 March 2019.

[59] Case T–754/14 *Michael Efler v Commission* ECLI:EU:T:2017:323.

[60] European Ombudsman, Decision closing his inquiry into complaint 90/2009/(JD)OV against the Council of the European Union (2009) https://www.ombudsman.europa.eu/fr/decision/en/5146 accessed 20 August 2019.

Since the TTIP negotiations, the involvement of the European Ombudsman throughout the negotiation of FTAs is no longer an exception. Indeed, Ms O'Reilly dealt with the assessment the European Commission conducted on the protection of human rights in Vietnam[61] before it released its proposal for negotiating the EU-Vietnam FTA.[62] More recently, she also dealt with a complaint against the Japan-EU free trade agreement negotiations.[63]

In addition to the ECI and to the European Ombudsman, instruments of participatory democracy may also be activated within the Member States. The negative outcome of the consultative referendum[64] organised in the Netherlands on the ratification of the EU-Ukraine association agreement[65] has revealed that the conclusion of FTAs, as long as they are mixed agreements,[66] can also be threatened by a group of citizens belonging to one single Member State. This appeared as a dangerous precedent. A similar procedure could have occurred again for any mixed DCFTA if the Netherlands had not subsequently abolished this procedure.[67]

2.2.2 Innovative use of judicial instruments

Secondly, several judicial procedures have been initiated at the national and EU levels in order to stop the negotiation and the conclusion of CETA. At the national level, supreme courts have been asked to scrutinise the compatibility of CETA with constitutional provisions. The German *Bundesverfassungericht*

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[61] European Ombudsman, Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement (2014) https://www.ombudsman.europa.eu/fr/decision/en/64308 accessed 20 August 2019.

[62] This agreement was signed on 30 June 2019. See: https://trade.ec.europa.eu/doclib/press/index.cfm?id=2041 accessed 20 August 2019. See European Commission, 'Proposal for a Council decision on the signing, on behalf of the European Union, of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam' COM (2018) 692 final.

[63] European Ombudsman, Decision in case 624/2018/TE on how the European Commission dealt with a request for access to a list of meetings with stakeholders on the Japan-EU Free Trade Agreement (2018) https://www.ombudsman.europa.eu/fr/decision/en/93636 accessed 20 August 2019.

[64] Initiated by a group of citizens.

[65] Among other aspects, this agreement establishes a deep and comprehensive free trade agreement.

[66] See Chamon, Chapter 3 in this book.

[67] See 'Dutch Senate Approves Scrapping Advisory Referendum' (*Nltimes*, 11 July 2018) https://nltimes.nl/2018/07/11/dutch-senate-approves-scrapping-advisory-referendum accessed 20 August 2019; 'Dutch Parliament Agrees to Abolish Referendum' (*Nltimes*, 23 February 2018) https://nltimes.nl/2018/02/23/dutch-parliament-agrees-abolish-referendum accessed 20 August 2019.

considered in a preliminary ruling[68] that the German government could sign CETA and agree to its provisional application as long as the provisions concerned fell under exclusive competences of the EU.[69] The French *Conseil constitutionnel*[70] ruled that it could only scrutinise the CETA provisions that fell under shared or national competences and concluded that these specific provisions were compatible with the French Constitution.[71] Finally, CETA was referred to the Canadian Federal Court on the grounds that the 'Canadian executive has no jurisdiction to sign, ratify, nor implement treaties without prior parliamentary consent of the Provincial Legislatures and/or the Federal Parliament'.[72] In view of these elements, it is worth noting that all these cases were initiated by opponents of FTAs, either directly[73] or through Members of Parliaments.[74]

At the EU level, the Belgian Government committed itself[75] to ask for the Opinion of the ECJ on the compatibility of CETA with the Treaties,[76] in exchange for the consent of Wallonia to the signature and the provisional application of the agreement. This shows that political pressure and threats upon the ratification process of mixed agreements at the national level can lead Member States to activate the procedure enshrined in Article 218(11) TFEU for internal reasons. In the present case, it allows the ECJ to assess the

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[68] BVerfG, 13 October 2016, 2 BvR 1368/16, 2 BvE 3/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvR 1444/16 ECLI:DE:BVerfG:2016:rs20161013.2bvr136816.

[69] See Jelena Baumler, 'Yes, but…– for now! The German Federal Constitutional Court's Judgment on CETA' (*IELP Blog*, 14 October 2016) http://worldtradelaw.typepad.com/ielpblog/2016/10/jelena-b%C3%A4umler-on-the-german-federal-constitutional-courts-judgment-on-ceta-.html accessed 20 August 2019.

[70] Conseil constitutionnel, 31 July 2017, 2017–749 DC *Accord économique et commercial global entre le Canada, d'une part, et l'Union européenne et ses États membres, d'autre part* ECLI:FR:CC:2017:2017.749.DC.

[71] See Marie-Cécile Cadilhac and Cécile Rapoport, '"In Between Seats…" The Conseil Constitutionnel and CETA' (2018) 3(2) European papers 811.

[72] Federal Court of Canada, 21 October 2016, T-1789-16 *P. Helleyer, A. Emmet & G. Cromwell v J. Trudeau, Prime Minister of Canada* (Statement of Claim).

[73] This was the case in Germany and Canada.

[74] In France, individuals cannot refer matters directly to the *Conseil constitutionnel* on the grounds of Article 54 of the French Constitution, which is the provision applicable to control the compatibility of an envisaged international undertaking with the Constitution.

[75] See Statement by the Kingdom of Belgium on the conditions attached to full powers, on the part of the Federal State and the federated entities, for the signing of CETA [2017] OJ L 11/21.

[76] Opinion 1/17 *Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU* [2017] OJ C 369/2. See Opinion 1/17 *EU–Canada CET Agreement* ECLI:EU:C:2019:341, Opinion of AG Bot.

compatibility of the new Investment Tribunal with the autonomy principle.[77] The European Parliament, which gives its consent to the conclusion of FTAs, might also more frequently use the opinion procedure, notably on the grounds of fundamental rights issues.[78] It is thus foreseeable that the ECJ will have a greater say in the concluding of external agreements.

The anticipated content of CETA and TTIP generated different forms of interference that impacted the negotiation process in practice, even though the procedural steps set out in Article 218 TFEU remained unchanged. Several adjustments are being made both on and within the legal framework of the EU's external action. These adjustments are meant to prevent internal mechanisms, both at national and EU level, from undermining international negotiations.

2.3 New Remedies to Invent

Remedies against potential obstacles to the concluding process have mainly been introduced at EU level, and occasionally at national level. They mostly intend to deal with the transparency and mixity issues.

The transparency issue concerns the access to documents and the official information provided by the Commission on the ongoing negotiations. The objective is to gain sufficient support from public opinion while avoiding fake news and leaks that damage the quality of the public debate and may jeopardise the negotiation and conclusion process. Without questioning the procedure of Article 218 TFEU, the Commission has committed itself to more transparent and open negotiations. Since September 2017, its proposals for negotiating directives have immediately been published on its website. It is then up to the Council to decide when the definitive negotiating directives can be made public. In line with its declaration of 10 March 2015, this still happens after 'a careful analysis, based on the facts and merits of each specific case'.[79] In general, directives concerning the negotiation of trade agreements (or of agreements including trade matters) are now made public shortly after adoption.[80]

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[77] ibid.

[78] With Opinion 1/15, the European Parliament gave the Court the opportunity to assess the compatibility of the EU-Canada PNR agreement with the Charter of Fundamental Rights of the European Union. See Opinion 1/15 *EU–Canada PNR Agreement* ECLI:EU:C:2017:592.

[79] See Council of the EU, 'Statement annexed to minutes of the meeting of the Council of the European Union held in Brussels on 10 March 2015' (Doc. 7060/1/15 REV 1) 5.

[80] Negotiating directives of FTAs with Australia and New Zealand were adopted on 8 May 2018 and made public on 25 June 2018. Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes were adopted

This tends to show that this issue has become less sensitive, in trade matters at least. It can be explained by the fact that EU FTAs are quite similar in terms of structure and substance, which means that most of their content can be anticipated. Moreover, the Commission now publicly reports after each round of negotiation,[81] allowing the public to get an idea of what could be negotiated within the annexes and protocols accompanying the agreement. Efforts are also being made to address the national parliaments of the Member States. In addition to the information they get through the aforementioned mechanisms, trade Commissioner Malmström engaged in dialogue with national parliaments on EU trade negotiations and has been auditioned by most of them.

As far as access to documents is concerned, recent FTA cases confirm both the interest of citizens in obtaining more information on the ongoing negotiations, and the need to preserve a degree of confidentiality. On this specific aspect, the General Court recently confirmed its traditional approach according to which 'initiating and conducting negotiations in order to conclude an international agreement fall, in principle, within the domain of the executive, and that public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations'.[82]

The EU now seems to have properly addressed the transparency issue and reached a balanced approach allowing the European Parliament, the citizens and the national parliaments to be informed throughout the negotiating process.

Secondly, in addition to the transparency issue, the EU has to deal with the mixity issue. Eliminating mixity is not an option in trade and investment matters. Opinion 2/15 made it clear that Member States must be contracting parties alongside the EU whenever non-direct investments are concerned. Moreover, the choice of a mixed agreement is sometimes made for political reasons, even though there is no legal requirement.[83] Accordingly, managing mixity is less about reducing its frequency than about diminishing its impact on the concluding process. One solution, currently experienced with Japan, consists in dividing the FTA into two separate agreements: on the one hand,

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on 1 March and made public on 20 March 2018. The negotiating directives of a modernised association agreement with Chile adopted on 9 November 2017 were declassified on 22 January 2018.

[81] See for instance the negotiation round reports regarding JEFTA available on the DG trade website http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/meetings-and-documents accessed 20 August 2019.

[82] See Case T–644/16 *Client Earth v European Commission* ECLI:EU:T:2018:429, para 56. This judgment confirms previous solutions: Case T–529/09 *In't Veld v Council* ECLI:EU:T:2012:215, para 88, and Case T–301/10 *In't Veld v Commission* ECLI:EU:T:2013:135, para 120.

[83] See Chamon, Chapter 3 in this book.

an EU-only agreement dealing with matters falling under the EU's exclusive competence; on the other hand, a mixed agreement dealing with investment matters falling under shared competences. It prevents a long, drawn out provisional application[84] of the FTA due to ratification delays. However, all EU partners might not accept this 'two-pillar approach'. There is no guarantee that the investment agreement will have a better chance of being concluded in the end. Indeed, the investment issue remains sensitive in several Member States and the opposition of a national parliament or the negative outcome of a referendum could still prevent the EU from concluding these agreements.

[84] See Suse and Wouters, Chapter 10 in this book.