

EU TRADE AND INVESTMENT POLICY SINCE THE TREATY OF LISBON

Achievements and
future priorities

CEPS Research Report

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EU Trade and Investment Policy since the Treaty of Lisbon: Achievements and future priorities

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Abstract

This paper analyses the most salient developments in the EU's trade and investment policy since the entry into force of the Treaty of Lisbon, and sketches the key trade challenges and priorities for the current Commission. In particular, it analyses how the EU institutions applied their newly conferred competences within a new institutional set-up in order to address the various internal and external challenges facing EU trade policy.

The paper demonstrates that since the entry into force of the Treaty of Lisbon more than a decade ago, the EU institutions have had to constantly use their newly conferred competences within a new institutional set-up to address the various internal and external challenges. Moreover, it argues that a more assertive trade policy under the 'geopolitical' von der Leyen Commission will be consolidated and further reinforced in the ongoing trade review of the EU's trade policy, which will aim to contribute to the EU's post-Covid 19 recovery in line with the EU's new 'Open Strategic Autonomy' model.

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Executive Summary

This paper analyses the most salient developments in the EU's trade and investment policy since the entry into force of the Treaty of Lisbon, and sketches the key trade challenges and priorities for the current Commission. In particular, it analyses how the EU institutions have applied their newly conferred competences within a new institutional set-up to address the various internal and external challenges posed to EU trade policy.

The Treaty of Lisbon not only reclassified the common commercial policy (CCP) by submitting it to the general policy objectives of the Union's external action (Article 21 TEU); it also significantly reformed both its scope and its procedures. The most important changes brought about relate to the broadened scope of exclusive CCP competences under Article 207 TFEU (e.g. in relation to foreign direct investment), and the increased role of the European Parliament.

The EU had to roll out its reformed CCP in an increasingly challenging internal political environment. Mainly as a consequence of negotiations with the US on a transatlantic trade and investment partnership (TTIP), a heated debate emerged within the EU on the benefits and the consequences of the Union's embrace of trade-promoting FTAs. Several member state governments, numerous Members of the European Parliament, as well as national parliaments of member states and civil society groups questioned the appropriateness of the Union's trade policy.

Externally, the Union was also confronted with challenging developments: China's unique combination of one-party system and almost uncurtailed free market economy has diminished the relevance of several WTO rules, motivating the Union to undertake significant reform of its trade defence arsenal. The crisis of the WTO's rulebook went beyond subsidies and trade remedies law. Apart from some minor technical successes, reform of the WTO agreement remained elusive. With the 45th US president taking office, US scepticism towards the multilateral trading system has given way to open hostility, leading to the demise of the appellate body, and therefore a shattered dispute settlement mechanism, and a deep crisis of the multilateral trading system.

More recently, global trade and international supply chains have faced an unprecedented shock following the social and economic shutdown caused by Covid-19. The Commission's 2020 spring economic forecast estimates that the EU economy will contract by 7.4% in 2020, while global GDP is predicted to shrink by 3.5%, and global trade by more than 10% in that period. A V-shaped recovery by 2021 has become unlikely.

In June 2020, i.e. during the height of the pandemic, the European Commission launched a review of the EU's trade and investment policy,¹ aiming to assess the potential contribution of international trade to a rapid and sustainable socio-economic recovery of the Union. The 'geopolitical' Commission of President von der Leyen has declared 'Open Strategic Autonomy'

¹The review can be read here: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1058

to be the strategic goal to be implemented through a new trade strategy.² Originally scheduled for autumn 2020, the new trade strategy is now expected by the end of the year, to ensure the new Trade Commissioner's input and endorsement.³ Against this background, this paper analyses the key developments in the EU's trade and investment policy since the entry into force of the Treaty of Lisbon, and outlines the most important trade challenges and priorities for the current Commission.

This paper demonstrates that while under the Barroso II Commission trade policy was framed as a key instrument in delivering the growth needed to emerge from the global financial crisis (GFC), the 'Trade for all' strategy developed under the Juncker Commission further broadened the trade agenda by aiming to strengthen the effectiveness, transparency and value-dimension of the EU's CCP, against the background of internal and external contestation of the EU's trade policy.⁴ This strategy resulted in the conclusion of a new generation of FTAs, more transparency during FTA negotiations, a new system for investor-state disputes, and reformed trade defence instruments. Attempts to rebuild the multilateral system for trade and investment, through proposals on WTO reform and the MIC, remained unsuccessful. From the very outset, the 'geopolitical' von der Leyen Commission envisaged a more assertive trade policy, focussing on ensuring a level playing field and proper enforcement of EU trade instruments, as for example evidenced by the creation of the position of Chief Trade Enforcement Officer, and proposals regarding a reinforced foreign direct investment screening mechanism, an instrument on foreign subsidies, an international procurement instrument, and the modernisation of the enforcement regulation. This paper argues that the ongoing review of the EU's trade policy is likely to confirm and further consolidate this approach. On the basis of 'Open Strategic Autonomy', which is at the heart of the current CCP review and is the new *leitmotif* for post-Covid-19 recovery, the EU will aim assertively to protect European business and consumers, while contributing to a fair and more sustainable globalisation on the basis of modernised multilateral rules.

² See <https://ec.europa.eu/info/sites/info/files/communication-europe-moment-repair-prepare-next-generation.pdf>.

³ See: https://trade.ec.europa.eu/consultations/index.cfm?consul_id=266.

⁴ European Commission, "Trade for all" (https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf).

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Does Europe not, now that is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples? (Laeken Declaration, 2001)

1. Introduction

The Laeken Declaration – which spurred a decade of treaty change that ultimately led to the Treaty of Lisbon – is an optimistic document: it anticipated for the European Union an important role in the concert of nations, and proposed to enable the Union to carry out an effective and coherent foreign policy in order to address the challenges brought by a “globalised; yet also fragmented world”.⁵ Many of these aspirations in the field of foreign relations have not yet materialised. When the Treaty of Lisbon entered into force in December 2009, Europe struggled with the global financial crisis and the ensuing eurozone crisis, which weakened its ability to speak to the rest of the world with one voice. Also, the Union, created to ensure peace between its member states, had to deal with war and occupation at its eastern border. The satisfaction of contributing to China’s re-integration into the multilateral trading system was soon overshadowed by what has been perceived as overly aggressive Chinese efforts to assert itself as a global power. The European Union, in contrast, has lost influence in many parts of the world, nowhere more visibly than in the Middle East and Africa, and has seen a permanent member of the security council give up its member state status.

The somewhat mixed success of establishing the EU as a global actor in all fields of international governance has not affected its influence as an economic power of the first order: when it comes to trade and investment, the Union – which is, after all, the world’s largest trader – matters internationally.

Before the Treaty of Lisbon, the EU’s common commercial policy (CCP), more commonly referred to as the EU’s trade policy, was essentially a stand-alone external policy, decoupled from other EU external policy objectives and instruments. The European Commission and Council had a quasi-duopoly on trade issues as the European Parliament had a very limited role to play in the adoption of trade legislation or treaties. The scope of the CCP initially covered only trade in goods. Through treaty revisions, and in particular the ECJ-sanctioned expansive practice of the Commission, this scope became broader. However, in Opinion 1/94, the court rejected the view advanced, that the common commercial policy pursuant to Article 133 TEC granted the community the competence to act in all areas of the multilateral trading system, which since the creation for the WTO encompassed trade in services, intellectual property rights, and potentially investment protection. The community’s trade agenda reflected this more limited legal fundament, focusing essentially on trade defence and the conclusion of basic

⁵ European Council, “Laeken Declaration of 15 December 2001 on the future of the European Union”, 15 December 2001.

free trade agreements – covering mainly trade in goods– with a clear focus on the neighbouring countries and former colonies of some member states.

The Treaty of Lisbon brought significant changes to the common commercial policy (CCP). It re-established the parallelism between the multilateral trading system and the external economic trade competence of the Union. Internally, it submitted it to the general policy objectives of the Union’s external action (Article 21 TEU) and significantly reformed both its scope and its procedures. The most important changes brought about relate to the broadened scope of exclusive CCP competences under Article 207 TFEU (e.g. in relation to foreign direct investment) and the increased role of the European Parliament: without the latter’s approval, the Council may not conclude trade agreements. Moreover, Parliament became a co-legislator for CCP legislation pursuant to the ordinary legislative procedure.

The EU had to roll out its reformed CCP in an increasingly challenging internal political environment. Mainly as a consequence of negotiations with the US on a transatlantic trade and investment partnership (TTIP) a heated debate emerged within the EU on the benefits and the consequences of the Union’s embrace of trade-promoting FTAs. Several member state governments, numerous Members of the European Parliament, national parliaments of member states, and civil society groups contested elements of the Union’s trade policy. Concerns were raised publicly about the negative impact on the Union’s environmental and labour standards, and the sell-out of democratic choices of citizens (‘right to regulate’). The debate reached its climax in October 2016 when Wallonia threatened to block the signing of the comprehensive economic and trade agreement with Canada (CETA).

Externally, the Union was also confronted with challenging developments: China’s unique combination of one-party system and almost uncurtailed free market economy has diminished the relevance of several WTO rules, motivating the Union to undertake a significant reform of its trade defence arsenal. The crisis of the WTO’s rulebook went beyond subsidies and trade remedies law. Apart from some minor technical successes, reform of the WTO agreement remained elusive. With the 45th US president taking office, US scepticism towards the multilateral trading system has given way to open hostility, leading to the demise of the appellate body, and therefore a shattered dispute settlement mechanism, and a deep overall crisis of the multilateral trading system.

More recently, global trade and international supply chains have faced an unprecedented shock following the social and economic shutdown caused by Covid-19. The Commission’s 2020 spring economic forecast estimates that the EU economy will contract by 7.4% in 2020, while global GDP is predicted to shrink by 3.5%, and global trade by more than 10% during that period. A V-shaped recovery by 2021 has become unlikely. The Union and many of its trading partners have adopted export restrictions with regard to essential goods (in particular medical supplies and personal protective equipment (PPE)). Potentially more worrisome, local content requirements and the creation of domestic capacity are being discussed as a way to decrease the dependence on countries that are now perceived as being unreliable partners in times of crisis. In addition, governments have instituted crisis support schemes designed to preserve employment and

economic stability (pre-Covid-19), often not fully compatible with the disciplines of the WTO subsidy regime. While typically intended to be temporary, these state measures risk becoming permanent trade barriers, thereby further eroding the international rules-based trading system.

In June 2020, during the height of the pandemic, the European Commission launched a review of the EU's trade and investment policy⁶ aiming to assess the possible contribution of international trade to a rapid and sustainable socio-economic recovery for the Union. The 'geopolitical' Commission of President von der Leyen has declared 'Open Strategic Autonomy' to be the strategic goal to be implemented through a new trade strategy.⁷ Originally scheduled for autumn 2020, the new strategy is now expected by the end of the year to ensure the new trade commissioner's input and endorsement.⁸

The tenth anniversary of the Treaty of Lisbon thus marks an appropriate moment to take stock of the EU's reformed CCP. This paper will analyse the most salient developments in the EU's CCP since the entry into force of the Treaty of Lisbon. In particular, it will address how the EU institutions have applied their newly conferred competences within a new institutional set-up to address the various internal and external challenges posed to the EU trade policy. The paper first discusses the trade policies and instruments adopted under the Barroso II Commission (2.1) and the Juncker Commission (2.2). Then, the priorities and challenges for the EU's trade and investment policy for the 'geopolitical' von der Leyen Commission are explored, taking into account the trade-related challenges brought by the Covid-19 pandemic and the ongoing review process of the EU's trade policy.

2. An overview of EU trade and investment policies since the Treaty of Lisbon

2.1 EU trade policy under the Barroso II Commission

The first decade of the Treaty of Lisbon overlapped almost exactly with two Commission terms, the Barroso II Commission (2009-2014) and the Juncker Commission (2014-2019).

2.1.1 *The new generation of Comprehensive FTAs*

The Barroso II Commission's trade and investment policy was guided by Trade Commissioner Karel De Gucht. Under his 'Trade, Growth and World Affairs' strategy,⁹ the EU's trade policy was supposed to become more assertive, and to deliver the growth needed to emerge from the global financial crisis (GFC). This strategy was largely a continuation of the 2006 'Global

⁶ See : https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1058

⁷ See: <https://ec.europa.eu/info/sites/info/files/communication-europe-moment-repair-prepare-next-generation.pdf>

⁸ See: https://trade.ec.europa.eu/consultations/index.cfm?consul_id=266

⁹ European Commission, "Trade, Growth and World Affairs. Trade Policy as a Core Component of the EU's 2020 Strategy", COM (2010) 612, 9 November 2010.

Europe' strategy¹⁰ which, in the context of the stalled WTO Doha round, had prioritised the conclusion of a new generation of comprehensive trade agreements with key partners. These FTAs were to be “comprehensive and ambitious in coverage, aiming at the highest degree of trade liberalisation including far-reaching liberalisation of services and investment”.¹¹ In light of the growing integration of global supply chains and increased importance of ‘behind-the-border’ issues, the new generation FTAs had to cover, in addition to the liberalisation of trade in goods, *inter alia*, services and establishment, investment, competition policy, regulatory issues, intellectual property rights (IPR), trade-related energy, trade and sustainable development, and public procurement.

Starting with the FTA with South Korea in 2010, the Union concluded a number of ambitious ‘new generation’ FTAs with key trading partners, including Colombia and Peru (2012), and Central America (2012). The EU also concluded a specific type of deep and comprehensive free trade agreements (DCFTAs) with Ukraine, Moldova, and Georgia (2013) in the context of establishing comprehensive association relationships. These DCFTAs aim to gradually and partially integrate these countries into the EU internal market on the basis of legislative approximation.¹² Negotiations with other key trade partners were started, including the United States (TTIP), Canada (CETA), Japan, ASEAN member countries and China (Comprehensive Agreement in Investment (CAI)).

2.1.2 The role of the European Parliament

In this context, the coming of age of the European Parliament in all trade matters under the reformed CCP merits attention. Under its first post-Lisbon chairman, Professor Vital Moreira, Parliament's International Trade Committee (INTA) established that Parliament's consent pursuant to Article 218 (6) TFEU had to be “informed consent”, in light of Article 218 (10) TFEU's demand that the European Parliament needs to be “immediately and fully” informed at all stages of the negotiation procedure. Parliament and Commission gave full effect to these treaty provisions in their bilateral 2010 framework agreement.¹³ This framework agreement provides that the Commission needs to inform the European Parliament about its intention to propose the start of negotiations at the same time as it informs the Council, to present draft negotiating directives to European Parliament, and to “take due account of European Parliament's comments throughout the negotiations”. Moreover, the Commission committed itself to keeping European Parliament regularly and promptly informed about the conduct of negotiations, and to explain whether and how Parliament's comments were taken into account

¹⁰ European Commission, “Global Europe: Competing in the World”, COM (2006) 567 final, 4 October 2006.

¹¹ *Ibid.*

¹² On this issue, see G. Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: A new legal instrument for EU integration without membership* (Brill Nijhoff, 2016), p. 1-416 and the trilogy of handbooks on these DCFTAs, prepared in the context of CEPS' 3DCFTA project: <https://3dcftas.eu/publications/>.

¹³ Framework Agreement on relations between the European Parliament and the European Commission, OJ 2010 L 304/47.

in the texts under negotiation. In the case of international agreements that require the European Parliament's consent (such as FTAs), the Commission also agreed to provide to Parliament during the negotiation process all relevant information that it provides to the Council, including draft amendments to adopted negotiating directives, draft negotiating texts, agreed articles, the agreed date for initialling the agreement, and the text of the agreement to be initialled. Not surprisingly, the Council was critical of these arrangements, since, it argued, they gave the Parliament a role in FTA negotiations that was not provided for in the treaties.¹⁴

The duty to keep Parliament properly informed led to a number of disputes between the Council and Parliament, some of which ended up before the ECJ, and in which the European Parliament ultimately prevailed.¹⁵ In the 2016 Better Law-Making Agreement, all three EU institutions commit to dealing with this issue by envisaging special negotiations on improved practical arrangements for cooperation and information sharing in the context of international agreements.¹⁶ However, the negotiations on this delicate issue have stalled.¹⁷ In any case, the European Parliament has already demonstrated that it does not shy away from rejecting international agreements even in the final ratification stage, such as in the case of ACTA, the SWIFT Agreement, and the 2011 EU-Morocco Fisheries Partnership Agreement.

2.1.3 Other policies

Despite the Barroso Commission's declared commitment to prioritise the multilateral trading system, the efforts to adapt the WTO to the changing environment had limited success. The Doha development agenda negotiations remained largely blocked, with the sole exception of the 'Bali Package' concluded in December 2013, which consisted of the trade facilitation agreement and several ministerial decisions focussing on agricultural trade.¹⁸

Other noteworthy proposals by the Barroso Commission related to the EU's international investment policy (in the light of the EU's new competences in that area):¹⁹ the international

¹⁴ In a letter sent to both the President of the Commission and of the Parliament, the President of the General Affairs Council complained that "the Framework Agreement has the effect of modifying the balance established by the Treaties between the Institutions, according powers to the Parliament not conferred by the Treaties and limiting the autonomy of the Commission and its President" (Council of the European Union, 12964/10 JUR 384 INST 302).

¹⁵ Case C-658/11, *Parliament v Council*, EU:C:2014:2025; Case C-263/14, *Parliament v Council*, EU:C:2016:435.

¹⁶ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making[2016] OJ L123/1.

¹⁷ The European Parliament's co-negotiators on this issue wrote a letter to the Council Presidency on 18 April 2019 in which they conveyed their "deep disappointment at the lack of successful conclusion of the interinstitutional talks [...] in accordance with the provisions of Paragraph 40 of the Interinstitutional Agreement on Better-Law making" and stressed that "it is highly regrettable that, throughout the process, the Council has maintained an intransigent attitude, in sharp contrast with the constructive attitude of the other three negotiating parties".

¹⁸ Council of the EU, WTO: "Council approves protocol on trade facilitation", press release, 1 October 2015.

¹⁹ European Commission, "Towards a comprehensive European international investment policy", COM (2010) 343 final.

procurement instrument,²⁰ increased efforts to reform the Union's trade defence instruments,²¹ and the EU's conflict mineral regulation.²² Moreover, the EU reformed its general system of preferences (GSP) in Regulation (EU) 978/2012:²³ it broadened the list of international conventions relevant for the GSP+-treatment, going beyond the core labour conventions and also covering sustainable development and human rights. It also developed stricter economic eligibility criteria, reflecting the changed focus on least developed countries.

Leaving office with a bang, the Barroso Commission and its Trade Commissioner Karel De Gucht decided on their last day in office to bring a test case, to clarify once and for all the scope of the reformed CCP by requesting an ECJ Opinion pursuant to Article 218 (11) TFEU. In its Opinion 2/15, the Court largely supported the Commission's expansive view of the scope of the Union's exclusive competence pursuant to Article 207 TFEU, with the notable exception of portfolio investment and investor-state dispute settlement mechanisms, which remain competences the Union shares with the member states.

2.2 The Juncker Commission

When the Juncker Commission took office, several elements of the EU's trade and investment policy were being contested internally and put under strain externally. The Commission reacted with several important initiatives. In the 2015 'Trade for All' strategy, Trade Commissioner Cecilia Malmström laid down the blueprint for strengthening the effectiveness, transparency, and value-dimension of the EU's trade policy.²⁴ 'Trade for all' also spelled out the objective of focussing on new trade-related issues affecting the economy, such as services and digital trade. Particular attention was paid to ensuring that small and medium-sized enterprises (SMEs) benefitted from more open markets, for example by including SME chapters in the new generation of EU trade agreements.

2.2.1 Sustainable development

The Juncker Commission undertook increased efforts to implement the mandate of Article 21 TEU to link the EU's trade policy with its values by, *inter alia*, strengthening the EU FTAs'

²⁰ European Commission, "Proposal for a Regulation on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries", COM (2012) 060 final.

²¹ European Commission, "Communication on Modernisation of Trade Defence Instruments Adapting trade defence instruments to the current needs of the European economy", COM (2013) 191 final.

²² European Commission, "Proposal for a Regulation setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas", COM (2014) 111 final.

²³ 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 (OJ 2012, L 303).

²⁴ European Commission, "Trade for all. Towards a more responsible trade and investment policy", COM(2015) 497 final, 14 October 2015.

commitments in the field of environmental, social and labour protection, and human rights,²⁵ and by reforming its GSP scheme to target LDCs. It also reduced benefits for countries unwilling to subscribe to sustainable development policies, and for countries that might be developing overall, but which are home to competitive industries that operate at arm's length with EU industries. For example, trade and sustainable development (TSD) chapters, which contain commitments to respect multilateral labour and environmental agreements, and ensure that standards are not lowered to attract trade, have become standard in EU FTAs. Critics have questioned the Commission's commitment to these obligations, highlighting their exemption from the general dispute settlement mechanism established by FTAs.²⁶ Instead, they are subject to a juridically more flexible ('weaker') procedure, involving monitoring groups, representatives of civil society, and a panel of experts. In 2018 Commissioner Malmström presented a 15-point plan to increase the effectiveness of TSD chapters.²⁷ A year later, the Commission launched its first TSD enforcement case, regarding Korea's alleged violation of its TSD obligations pursuant to the 2010 EU-Korea FTA.²⁸

2.2.2 Contestation of the EU's trade policies

Negotiations on the new generation of EU FTAs, in particular those on CETA and TTIP, triggered a heated debate about the benefits and consequences of these far-reaching trade agreements. These discussions went beyond the familiar pro- and anti-trade constituencies such as business groups or far-left political quarters. Trade issues were discussed on the front pages of newspapers, and triggered some of Europe's biggest demonstrations of the past decades. Parliaments, governments, political parties and other civic groups contested the desirability and the added value of the envisaged new generation of EU FTAs, highlighting the danger of negative externalities for environmental and consumer protection, public services and labour standards. Another topic that attracted wide attention beyond the usual anti-globalisation and anti-investment lobbyists was the claim that investors benefitted unduly from positive discrimination. It was asserted that investors could stifle the democratic process (right to regulate) by being allowed to circumvent regular courts by bringing claims to investment tribunals, targeting in particular the initial proposals for investor-state dispute settlement (ISDS) mechanisms in TTIP and CETA.

The Commission responded with efforts to increase the transparency of trade negotiations: inviting the Council to disclose all FTA negotiating directives; publishing its own proposals during the negotiations; and reporting the preliminary results of each negotiation round, and

²⁵ See for example "Non-paper of the Commission services - Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)", 11 July 2017.

²⁶ A. Marx, *et al.*, "Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements", Leuven Centre for Global Governance Studies (2017), (<https://ghum.kuleuven.be/ggs/publications/books/final-report-9-february-def.pdf>).

²⁷ European Commission, "Commissioner Malmström unveils 15-point plan to make EU trade and sustainable development chapters more effective", Press Release, 27 February 2018.

²⁸ See: <https://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/bilateral-disputes/> and <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1803>

of the consolidated negotiation text.²⁹ Moreover, MEPs successfully used the Access to Documents Regulation 1049/2001 to challenge Council and Commission refusals to grant access to information during negotiations of international trade agreements.³⁰

In an effort to accommodate the concerns about ISDS in TTIP, the Commission fundamentally modified its position on ISDS by introducing a proposal for a new investment court system' (ICS, cf. *infra*). The Commission increased civil society participation in the EU's decision-making process, allowing, for example, engagement in the sustainability impact assessments (SIAs) prepared for envisaged trade agreements.

2.2.3 The FTA agenda

Several FTAs with key trade partners were signed, among them Canada (2016), Japan (2018), Singapore (2018), and Vietnam (2019). Moreover, negotiations with Mexico and MERCOSUR were finalised and trade talks with Australia, New Zealand, Chile, and Tunisia intensified.³¹ However, not all EU FTA negotiations launched in this period have been successful.

Negotiations with the US on TTIP were suspended shortly after Donald Trump took office in 2017. EU-US trade relations deteriorated further following the unilateral trade measures imposed by the Trump administration. Invoking the national security clause of its Trade Act ('Section 232'), the US government imposed duties of 25% and 10% respectively on imports of steel and aluminium from the EU on 1 June 2018, thereby exceeding its bound tariffs pursuant to Article II GATT. The EU's response has been three-pronged, in line with a strategy outlined by the Commission in March 2018.³² Firstly, the EU reacted by adopting rebalancing measures under the safeguards agreement that target a list of US products worth €2.8 billion, including steel and aluminium products, agricultural goods and various other products.³³ Second, the EU, together with several trade partners, launched legal proceedings against the US at the WTO by filing a request for consultations. Despite the current US administration's invocation of essential security interests (Art. XXI GATT), the EU considers these tariffs to be safeguard measures in disguise, and not compatible with US obligations under the WTO agreement.³⁴ Third, in

²⁹ For an overview, see A. Marx, G. Van der Loo, "Transparency in EU Trade Policy: Achievements and Challenges", RECONNECT Working Paper (*forthcoming* 2020).

³⁰ Case T-529/09, in 't Veld v Council [2012] ECLI:EU:T:2012:215, para.39; and Case C-350/12 P, Council v in 't Veld para. 58.

³¹ For an overview, see (https://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf).

³² European Commission, "European Commission outlines EU plan to counter US trade restrictions on steel and aluminium", press release, 7 March 2018; for an early analysis of such an approach cf. M. Hahn, "Balancing or Bending? Unilateral Reactions to Safeguard Measures", *Journal of World Trade* 39 (2006), pp. 301-326.

³³ Commission Implementing Regulation (EU) 2018/886 of 20 June 2018 on certain commercial policy measures concerning certain products originating in the United States of America and amending Implementing Regulation (EU) 2018/724 (OJ 2018, L 158).

³⁴ WTO, "United States - Certain Measures on Steel and Aluminium Products; Request for consultations by the European Union", WT/DS548/1, 1 June 2018.

February 2019 the Commission imposed safeguard measures on imports of steel products,³⁵ exempting only the EEA countries, as imports of steel products into the EU had increased sharply due to the diversion of pertinent products to the EU market as a consequence of the US measures. President Juncker's visit to Washington in July 2018 led to the Trump administration's holding back on imposing additional tariffs of 20% on EU automobiles and auto parts.³⁶ The EU and the US agreed, *inter alia*, to work on "zero tariffs, zero non-tariff barriers, and zero subsidies on non-auto industrial goods" and tasked an executive working group with finding common ground. As a consequence, the Commission adopted proposals in January 2019 for negotiating directives on conformity assessment and on the elimination of tariffs for industrial goods,³⁷ which were adopted by the Council.³⁸ Negotiations are yet to begin: whereas the US aims at abolishing tariffs for both industrial and agricultural goods, the EU is not prepared to include agricultural goods in the discussions. The Airbus-Boeing saga³⁹ continued, with successes (and corresponding losses) on both sides, and surprisingly with recent hopes that an arrangement can be found *pro futuro*.⁴⁰

For economic or political reasons, a lack of progress also characterised FTA negotiations with several Asian countries, including Indonesia, the Philippines and Myanmar. After the military takeover in Thailand, the EU suspended negotiations with that country in 2014; after almost six years of efforts, talks with India were brought to a *de facto* standstill in the summer of 2013 due to a mismatch in levels of ambition. Despite a commitment by both sides at the 2017 EU-India summit to end this impasse, no new progress has so far been made.⁴¹ Due to the political situation in Turkey, the Council has yet to agree to begin formal negotiations on the modernisation of the EU-Turkey customs union. Progress with regard to the EU-Morocco DCFTA has been hampered by several ECJ rulings on the application of the existing EU-Morocco

³⁵ Commission Implementing Regulation (EU) 2019/159 of 31 January 2019 imposing definitive safeguard measures against imports of certain steel products (OJ 2019, L 31/1).

³⁶ "Joint U.S.-EU Statement following President Juncker's visit to the White House", 25 July 2018.

³⁷ European Commission, "Commission publishes proposal for agreement on conformity assessment with United States", press release, 22 November 2019.

³⁸ Council of the EU, "Trade with the United States: Council authorises negotiations on elimination of tariffs for industrial goods and on conformity assessment", press release, 15 April 2019.

³⁹ See, e.g., M. Hahn, "'It's a Bird, It's a Plane'": Some Remarks on the Airbus Appellate Body Report (EC and Certain Member states – Large Civil Aircraft, WT/DS316/AB/R)', *World Trade Review* 12 (2013), pp. 139-161.

⁴⁰ Statements by the United States at the August 28, 2020, DSB Meeting (<https://geneva.usmission.gov/2020/08/28/statements-by-the-united-states-at-the-august-28-2020-dsb-meeting/>): "The United States is committed to obtaining a long-term resolution to this dispute. The United States recently showed great restraint in its review of WTO-authorized countermeasures for the EU's WTO-inconsistent launch aid subsidies. *And the United States intends to begin a new process with the EU in an effort to reach an agreement that will remedy the conduct that harmed the U.S. aviation industry and workers and will ensure a level playing field for U.S. companies*" [emphasis added]. This cryptic statement is understood by some to mean a softening of the US position. See also https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1405.

⁴¹ Council of the EU, "EU-India summit: joint statement and joint declarations", press release, 6 October 2017.

trade agreements to the Western Sahara. However, in the summer of 2019 both parties declared their willingness to relaunch negotiations.⁴²

Progress with regard to signing and implementing the Economic Partnership Agreements (EPAs) with the African, Caribbean and Pacific (ACP) countries was also slow. Among the seven regional groups, only the CARIFORUM has so far concluded a full regional EPA. Some members of the Southern African Development Community (SADC), the Economic Community of West African States (ECOWAS), the East African Community and the other groups have concluded regional or bilateral interim EPAs restricted to trade in goods. However, many EPAs still await conclusion and implementation; the interim EPAs are supposed to develop into full regional agreements.⁴³

Since September 2018, the EU and the ACP countries are in the process of redefining their partnership for the time after the expiration of the Cotonou Agreement in 2020. In December 2017, the Commission proposed an umbrella agreement establishing common values and interests ('common foundation') and three geographically distinct protocols ('regional partnerships') with, respectively, African, Caribbean, and Pacific member states of the ACP group.⁴⁴ Pursuant to the Commission, EPAs are supposed to remain the central instruments for EU-ACP trade and should allow flexibility as to the number of participants and the respective substantive ambition. Negotiations at the level of the three regional components were officially started in early 2019. With regard to the African pillar of the new EU-ACP partnership, it is noteworthy that the member states of the African Union have established the African Continental Free Trade Area (AfCFTA). On that basis, the EU Commission is starting exploratory work with regard to a continent-to-continent free trade area.⁴⁵

The architecture of EU trade and investment agreements changed following the Wallonian government's temporary blockade of CETA in 2016. After this 'CETA saga', a broader discussion ensued on whether in addition to the EU, all member states need be involved in the conclusion and ratification of trade agreements (as so-called 'mixed agreements') or whether these FTAs should only be concluded by the EU (as so-called 'EU-only agreements'), thus avoiding the risk that one member state could block at the last minute the conclusion of an EU FTA for the entire EU.⁴⁶ This discussion took place in parallel with the landmark Opinion 2/15, in which the court gave a broad reading of the EU's post-Lisbon trade competences, and concluded that almost

⁴² On this issue, see G. Van der Loo, "The Dilemma of the EU's Future Trade Relations with Western Sahara: Caught between strategic interests and international law?", CEPS Policy Brief, 20 April 2018.

⁴³ For an overview of the state of play of the EPAs (http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf).

⁴⁴ European Commission, "Recommendation for a Partnership Agreement between the European Union and countries of the African, Caribbean and Pacific Group of States", COM(2017) 763 final.

⁴⁵ See for example, European Commission, "State of the Union 2018: Towards a new 'Africa - Europe Alliance' to deepen economic relations and boost investment and jobs", press release 12 September 2018.

⁴⁶ On this issue, see G. Van der Loo, "The role of national parliaments in mixed trade agreements", *CLEER paper 2018/1*; G. Van der Loo, R. A. Wessel, "The non-ratification of mixed agreements: Legal consequences and solutions", *Common Market Law Review* 54(3), 2017, pp. 735–770.

the entire EU-Singapore FTA fell within the exclusive competences of the EU, with the exceptions of portfolio investment and ISDS.

In light of Opinion 2/15, the Commission proposed to separate (“split”) future trade and investment agreements in EU-only FTAs, addressing issues for which the EU has been vested with exclusive competence, and a separate investment agreement, concluded as mixed agreement. Such an approach would clearly reduce the situations in which (now) 28 ratification procedures – by the Union and by all member states – would be needed.⁴⁷ In May 2018, the Council largely agreed with this proposal, but reserved the right to decide on a case-by-case basis whether to separate international economic agreements. Also, FTAs concluded in the context of association relationships would remain mixed (e.g. the FTAs with Mercosur, Mexico, and Chile).⁴⁸ In the meantime, the Union has signed its first ‘split’ FTAs and investment protection agreements (IPAs) with Singapore (2018) and Vietnam (2019).

2.2.4 Investment protection: the Investment Court System and Opinion 1/17

In response to the contestation of the ISDS mechanism initially envisaged in TTIP and CETA, the Commission submitted in 2015 a proposal for a new system to resolve disputes between investors and states. Drawing on the results of a 2014 public consultation on the EU's approach to investment protection and investment dispute settlement,⁴⁹ the Commission proposed and rapidly implemented the Investment Court System (ICS) in its treaty practice. The ICS has already been integrated into CETA and in the EU's IPAs with Vietnam, Singapore, and the negotiated trade agreement with Mexico. The ICS is characterised by a two-step adjudicative architecture (not unlike the now non-operational WTO dispute settlement mechanism), with a tribunal of first instance and an appeals tribunal. It aims to address the main concerns about the traditional ISDS mechanism by, *inter alia*, limiting the grounds on which an investor can challenge a state measure by laying down more precise standards for acceptable state measures; ensuring governments' right to regulate and to pursue legitimate public policy objectives; and by including specific rules on transparency and the qualification of judges.

In parallel to the integration of the ICS in its bilateral FTAs or IPAs, the Commission proposed in 2017 to establish a multilateral investment court (MIC).⁵⁰ This MIC would be a permanent independent international court tasked with resolving investment disputes between investors and states that had accepted its jurisdiction. Negotiations are taking place in the context of Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) on ISDS reform. The next session is planned for October 2020. As a long-term goal, the EU aims

⁴⁷ European Commission, “A Balanced and Progressive Trade Policy to Harness Globalisation”, COM(2017) 492 final.

⁴⁸ Council of the European Union, “Conclusion on the negotiations of trade agreements”, 8 May 2018.

⁴⁹ European Commission, “Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)” (https://trade.ec.europa.eu/consultations/index.cfm?consul_id=179).

⁵⁰ European Commission, “Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes”, COM (2017) 493 final.

to replace its bilateral ICSs with the MIC.⁵¹ Significantly, the ECJ ruled in Opinion 1/17 that that CETA's ICS was compatible with EU law, in particular with the 'autonomy of the EU legal order', with the general principle of equal treatment and the requirement of effectiveness, and lastly with the right of access to an independent tribunal.⁵² By concluding that the ICS included in the new generation of EU FTAs or IPAs can be reconciled with EU constitutional requirements, the court backed the Commission's efforts to modernise ISDS. It should however be noted that the establishment of a MIC has yet to attract the support of major investor countries such as China, Japan, or the US.

A key reason for the court to accept ICS were several treaty provisions safeguarding the 'autonomy' of the Union legal order and the ECJ's last word on all aspects of EU law. These clauses, which relate, *inter alia*, to the applicable law for the ICS Tribunals and to the determination of the respondent and the parties' right to regulate, were included in light of the far-reaching autonomy jurisprudence⁵³ to avoid any encroachment by the ICS tribunal on the ECJ's ability to authoritatively interpret EU law and, therefore, on the autonomy of the EU legal order. The court considered that these clauses were sufficient – and essential – for their compatibility with EU law. Therefore, it appears that future trade agreements including ICS-like mechanisms may only pass ECJ scrutiny if they are flanked by similar autonomy safeguards on applicable law, the determination of the respondent, the right to regulate, and financial accessibility for natural persons and SMEs. Also in the area of investment protection, the impact of Opinion 1/17 on existing and future intra- and extra-EU BITs will need to be considered and addressed. With regard to extra-EU BITs, the member states should take the necessary steps to align their extra-EU BITs with Opinion 1/17 by including CETA-like autonomy safeguard clauses. Significantly, the Council's negotiating directives for a convention setting up a MIC state that the convention should allow the member states to bring their extra-EU BITs under the jurisdiction of the MIC.⁵⁴

The future of the existing intra-EU BITs are facing extinction. Since the court's ruling in *Achmea* in 2018, they looked like an endangered species, a status now confirmed by Declarations of the member states on 15 and 16 January 2019 on the legal consequences of *Achmea*,⁵⁵ and the 'Agreement for the termination of Bilateral investment Treaties between the member states of the European Union', signed by 23 member states.⁵⁶ However, member states could not agree

⁵¹In March 2018, the Council authorised the Commission to open negotiations for a Convention establishing such an MIC: Council of the EU, "Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes", 12981/17, 1 March 2018.

⁵² Opinion 1/17 (*CETA*), ECLI:EU:C:2019:341.

⁵³See the contributions of M. Hahn and G. Van der Loo in M. Hahn & G. Van der Loo (eds.), *Law and Practice of the Common Commercial Policy*, Brill 2020.

⁵⁴ Council of the EU, "Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes", 12981/17 ADD 1 DCL 1, 20 March 2018, para. 17.

⁵⁵ Declaration of the Member states of 15 and 16 January 2019 on the legal consequences of the *Achmea* judgment and on investment (https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en).

⁵⁶OJ L 169/1-41 of 29 May 2020; cf. Also https://ec.europa.eu/info/files/200505-bilateral-investment-treaties-agreement_en. Several member states did not sign the agreement. The Commission has announced that it will

on the implications of *Achmea* for the Energy Charter Treaty (ECT). Against this background, one of the challenges for the negotiations for a modernised energy charter treaty, which started in July 2020, will be to comply with the criteria laid down in Opinion 1/17.

Further in the area of investment, the EU recently adopted a screening framework for foreign direct investments. Regulation (EU) 2019/452 provides a framework for the screening of direct investments from non-EU countries on grounds of security or public order.⁵⁷ It allows member states to have transparent, predictable, and non-discriminatory mechanisms for examining incoming foreign direct investment on grounds of security or public order, and establishes cooperation procedures between the member states and the European Commission.

2.2.5 WTO reform

The quest for WTO reform received added urgency under the Juncker Commission. Against a background of a stalling Doha round, trade tension increased further due to what was perceived by many as Chinese circumventions of trade rules, and aggressive protectionism and rejection of the rule of law in international economic relations by the current US administration. Efforts by the Commission, often joined by like-minded countries such as Canada or Switzerland, to prevent the complete demise of the multilateral trading system have only had limited success. Beyond the current crisis of the WTO appellate body (see below), a comprehensive reform and modernisation of the WTO is called for: certain old disciplines enshrined in the multilateral trading system, such as those related to subsidies and state-owned enterprises, have not been adapted sufficiently to the new realities of international trade. Also, many new topics (such as data, climate change, and competition) have received attention only in recent bilateral FTAs. The EU has continued its efforts to keep the WTO relevant with regard to substantive rules: so, for example, plurilateral WTO negotiations on e-commerce were launched in Davos in January 2019 after a year of exploratory talks. Also some modest progress seems to have been made with regard to fisheries subsidies.

In September 2018, the Commission published proposals for WTO reform, focussing on (i) rulemaking and development; (ii) regular work and transparency; and (iii) dispute settlement,⁵⁸ and advocated its approach in various fora, including the EU-China working group on WTO reform, the trilateral ministerial working group with Japan and the US, and the G20. Several countries have aligned themselves with specific elements of the Union's proposals. For example, in November 2018 the Commission submitted a concrete proposal for the reform of the WTO appellate body, anticipating the current crisis of the dispute settlement mechanism that has been triggered by the complete blockade of appellate body appointments and the

initiate infringement procedures against EU member states that do not terminate their intra-EU bilateral investment treaties (European Commission, "EU Member States agree on a plurilateral treaty to terminate bilateral investment treaties", Statement, 24 October 2019). For example in May 2020, the Commission sent letters of formal notice to Finland and the UK for failing to effectively remove intra-EUBITs from their legal orders.

⁵⁷ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (OJ 2019, L 79/1).

⁵⁸ European Commission, 'EU Concept Paper on WTO Reform', 18 September 2018.

ensuing breakdown of the body in December 2019.⁵⁹ This has paved the way for the conclusion of a multi-party interim appeal arbitration arrangement, pursuant to Article 25 of the DSU, which has so far attracted Australia, Benin, Brazil, Canada, China, Chile, Colombia, Costa Rica, Ecuador, the European Union, Guatemala, Hong Kong, Iceland, Mexico, Montenegro, New Zealand, Nicaragua, Norway, Pakistan, Singapore, Switzerland, Ukraine, and Uruguay.⁶⁰ Of course neither the member responsible for the appellate body's demise, nor frequent users such as India, Indonesia, Japan, and Thailand could be integrated, let alone Russia. The agreement mirrors the WTO Dispute Settlement Understanding's appeal rules and can be used between any member of the WTO willing to join, as long as the WTO appellate body is not fully functional.⁶¹

2.2.6 Trade defence and other policies

One of the legacies of the Juncker Commission in the field of trade has been the reform of its trade remedies arsenal as well as of other trade-related legislation. In the area of trade defence, the EU modernised its toolbox by adopting Regulation (EU) 2018/825 (the 'modernisation package'),⁶² which, *inter alia*, enables the EU to impose higher duties in some cases by limiting the scope of application of the lesser duty rule, shortens the investigation period to accelerate the procedure, increases the relevance of social and environmental standards in anti-dumping investigations, and introduces 'pre-disclosure' to soften the blow for traders being investigated. Prior to that, the EU had already adopted a new anti-dumping methodology in Regulation (EU) 2017/2321, introducing a new way of calculating dumping margins in case of 'significant distortions' in the market of the exporting country.⁶³ Moreover, in order to find approval by the legislator for its 2012 proposal, the Commission adopted in 2016 an amended version for an international procurement instrument that would enable it to open investigations into alleged discrimination against EU parties in foreign public procurement markets.⁶⁴ In addition, it would allow the Commission to enter into consultations with the third country concerned to obtain reciprocal concessions on the partner's procurement market. As a last resort, the

⁵⁹ European Commission, "WTO reform: EU proposes way forward on the functioning of the Appellate Body", Press Release, 26 November 2018.

⁶⁰ Council of the European Union, 2 April 2020, Doc. No. 112/20 (<https://www.consilium.europa.eu/media/43334/st07112-en20.pdf>).

⁶¹ European Commission, "Trade: EU and 16 WTO members agree to work together on an interim appeal arbitration arrangement", press release, 24 January 2020.

⁶² Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union (OJ 2018, L 143/1).

⁶³ Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union (OJ 2017, L 338).

⁶⁴ European Commission, 'Amended proposal for a Regulation on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries' COM (2016) 34 final.

proposal foresees the imposition of a price penalty on tenders originating in the third country concerned. However, member states remain deeply divided over this issue, and the Commission proposal has so far not received the approval of the legislator. A last important legislative act worth mentioning is the Conflict Minerals regulation (Regulation (EU) 2017/821), adopted in May 2017.⁶⁵ This regulation aims to ensure that EU importers of tin, tungsten, tantalum, and gold (3TG) meet international responsible sourcing standards set by the Organisation for Economic Co-operation and Development (OECD), and is supposed to break the link between conflict and the illegal exploitation of minerals by, *inter alia*, requiring EU companies to ensure they import these minerals and metals from responsible and conflict-free sources only.

3. Priorities and challenges for the EU's CCP under the 'geopolitical' von der Leyen Commission

The section above illustrates the fast pace that has characterised the EU's foreign economic relations since the Treaty of Lisbon entered into force a decade ago. Without much phasing-in, the EU institutions had to apply their newly conferred competences (such as in the area of investment) within a new institutional set-up in order to address the various internal and external challenges sketched above. Several of the post-Treaty of Lisbon CCP legislative initiatives and reforms or trade agreements entered into force just before or after the tenth birthday of the Lisbon Treaty. It would seem therefore too early for a comprehensive ex-post-implementation assessment of several key features of the current CCP regulatory environment (e.g. the ICS included in bilateral FTAs or IPAs), although for several elements an official interim review has already taken place (e.g. for the GSP).⁶⁶ However, these trade instruments will play an important role in the next decade of the EU's CCP, together with legislative and treaty proposals that are already quite advanced (such as, e.g., in relation to the MIC, WTO reform and the International Procurement Instrument). In addition, President von der Leyen's statements and actions so far seem to indicate that a more assertive approach will characterise the EU's trade and investment policy in the coming years. The stated goal is to better align the EU's internal and external action and to create a Union which is more strategic, more assertive, and more united in promoting its values and interests around the world.⁶⁷

This will be reflected in the new trade strategy expected by the end of 2020, which is supposed to contribute to "a swift and sustainable socio-economic recovery, reinforcing competitiveness in the post-Covid-19 world, and to explore how trade policy can help build a stronger EU based

⁶⁵ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum, and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (OJ 2017, L 130).

⁶⁶ European Commission, "Mid-Term Evaluation of the EU's Generalised Scheme of Preferences (GSP)", 8 October 2018.

⁶⁷ European Commission, "Mission Letter from the President-elect of the European Commission to Commissioner-designate for Trade", 10 September 2019.

on a model of ‘Open Strategic Autonomy’”.⁶⁸ The review is ongoing, and will be one of the first tasks of the incoming Trade Commissioner Dombrovskis.

Some of the key priorities for the EU’s trade and investment policy follow.

3.1 Restoring the multilateral trading system

Against the background of the US-China trade dispute, the various forms of foul play practised by some trading partners, a paralysed WTO appellate body, and the success of identity politics and aggressive nationalism outside the Union, one of the key priorities for the new Commission will be to preserve and develop the current public international law of international commerce. The obvious first endeavour will be to revitalise a semi-comatose rules-based multilateral trading system, possibly accepting second-best solutions. Thus, the EU will continue to lead efforts to reform the WTO, not only in relation to its dispute settlement mechanism, but also with regard to its rulebook, *inter alia*, in the area of services, subsidies, forced technology transfer, and the ‘Special and Differential Treatment’ for developing countries. The EU will also aim to conclude the plurilateral negotiations on e-commerce and other crucial WTO negotiations on, for example, fisheries subsidies, investment facilitation, and domestic regulation. Moreover, together with like-minded countries, the EU will further lead different initiatives that aim to strengthen WTO membership to deal with the trade-related (restrictive) measures in response to the Covid-19 pandemic. For example, in June 2020 the EU and 12 partner countries (the ‘Ottawa Group’) adopted a statement which puts forward six policy actions, ranging from transparency and the withdrawal of trade-restrictive measures and initiatives on medical supplies to predictable trade in agricultural and agri-food products.⁶⁹ This group has already made specific proposals in the area of transparency, encouraging the WTO secretariat to intensify the monitoring and increase the frequency of reporting, and also by leading by example. The EU has already notified to the WTO temporary trade measures taken in the context of the coronavirus (e.g. export authorisation of supplies of personal protective equipment (PPE)).⁷⁰ In the area of investment protection, the EU will further pursue its multilateral MIC project in the framework of UNCITRAL. While its partner countries have so far been less than enthusiastic, the Commission counts on the success of its perseverance.

3.2 Enforcement and maintenance of a level playing field

The more assertive approach of the new geopolitical Commission is already discernible from its increased efforts to establish a level playing field at the multilateral level and in its bilateral partnerships, with a new focus on reciprocity and enforcement. For example, in order to protect to the EU’s trade interests in times of a potentially paralysed WTO DSM, the new Commission adopted in December 2019 a proposal to amend the enforcement regulation. The

⁶⁸European Commission, “A renewed trade policy for a stronger Europe - Consultation Note”, 16 June 2020.

⁶⁹See: https://trade.ec.europa.eu/doclib/docs/2020/june/tradoc_158777.pdf

⁷⁰For an overview, see: https://www.wto.org/english/tratop_e/Covid19_e/notifications_e.htm and <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2131>

main focus and objective of this reform proposal is to prepare "for situations where, after the Union has succeeded in obtaining a favourable ruling from a WTO dispute settlement panel, the process is blocked because the other party appeals a WTO panel report 'into the void' and has not agreed to interim appeal arbitration under Article 25 of the WTO DSU."⁷¹ In addition, the EU aims to better protect its trade interests by actively using its recently adopted investment screening framework, increasingly relying on the DSMs included in its bilateral FTAs (as evidenced by the recent cases launched under the DCFTA with Ukraine and the EU-SADC EPA), establishing an international procurement instrument, and by developing an instrument to tackle the distortive effects caused by foreign subsidies.⁷² In order to streamline these different enforcement policies, in July 2020 the EU appointed Denis Redonnet as the EU's first Chief Trade Enforcement Officer (CTEO) with the rank of a Deputy Director-General. The CTEO will supervise and direct the implementation and enforcement of the EU's trade agenda, including the enforcement of EU FTAs (including the TSD chapters), trade defence, dispute settlement, market access policies, and the investment screening framework.

3.3 Trade relations with the US

A review of the Union's trade policy would be incomplete without a review of the efforts to recalibrate its trading partnerships with two partners that also happen to be genuine superpowers: China and the US.

Regarding the latter, the slow progress in the negotiations on the proposed agreement on industrial goods illustrates that improving or even stabilising trade relations with the US will be an extraordinarily challenging undertaking. This is a truism for the current Trump administration; however, while a Biden presidency could reintroduce rationality into the foreign policy of the Union's most important partner, and would probably correct the cavalier attitude vis-à-vis legal obligations, a Biden-Harris administration would have to accommodate the traditionally trade-sceptic American trade unions.

For all these reasons, it is unlikely that the EU will come up with ambitious trade initiatives with regard to the US before spring 2021. The impossibility of any grand bargain does not exclude important technical developments: in August 2020 the EU and the US agreed on a small package of tariff reductions. The EU will eliminate tariffs on live and frozen products, starting in the calendar year 2020, and the US will reduce by 50% its tariff rates on certain products which are exported by the EU. Both trade liberalisations are taken on an MFN basis.⁷³ Heralded as the first negotiated tariff reduction between the EU and the US, this modest agreement

⁷¹ European Commission, "Proposal for a Regulation amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules", COM (2019) 623 final.

⁷² European Commission White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final.

⁷³ Joint Statement of the United States and the European Union on a Tariff Agreement, 21 Augusts 2020 (https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1512); for the EU implementation cf. "Proposal for a Regulation of the European Parliament and of the Council on the elimination of customs duties on certain products", COM(2020) 496 final.

should be understood as an attempt by the EU to defuse the trade tensions, including the ongoing Airbus-Boeing dispute, and to avoid new (WTO-incompatible) US tariffs on other products such as cars. In a similar fashion, a recent agreement between the EU and the US revisits the truce following *EC-Hormones* and constitutes another attempt to de-escalate EU-US trade tensions. The existing import quota for hormone-free beef will be modified so as to ring-fence 35,000 tonnes out of the total 45,000 tonne TRQ for United States exports.

The comprehensive North Atlantic trade agreement (TTIP) envisaged under the Obama-Biden administration remains a very tall order, even if the former Vice-President is elected as the 46th US President. Be that as it may, for the time being, the US remains the indispensable Western power in the WTO: the EU will need this ally in order to, *inter alia*, address constructively structural reforms of the WTO.

3.4 Trade relations with China

The EU's 2019 China Strategy labelled China as a key partner for cooperation, but also a "systemic rival" and a "strategic competitor" in the trade context. The Commission highlighted the protectionist measures benefitting its industrial champions, shielding them from competition through selective market opening, licensing, and other investment restrictions; heavy subsidies to both state-owned and private sector companies; closure of its procurement market; localisation requirements and the favouring of domestic operators in the protection and enforcement of IPR, and other domestic laws.⁷⁴ With the benefit of hindsight, it is clear that the Union's past reluctance to adapt to an increasingly aggressive China did not produce the intended result. In the future, the EU will seek a recalibration of the bilateral relationship and in particular a more balanced and reciprocal economic exchange. The new enforcement mechanisms (e.g. the investment screening framework, the public procurement instrument, a foreign subsidies instrument, and the enforcement regulation) are tools for achieving these goals. The conclusion of the EU-China comprehensive agreement on investment (CAI) should address some of the current asymmetries in market access. The agreement on geographical indications, signed in the margins of the (virtual, given Covid-19) EU-China Summit on 14 September 2020, may be perceived as a first modest success in levelling the playing field.⁷⁵

During the June 2020 EU-China high-level trade and economic dialogue (HED) the EU registered "significant progress made on the CAI's level playing field-related issues", while highlighting that significant work still remained to be undertaken with regard to key issues such as market access and sustainable development.⁷⁶ Moreover, the EU reiterated the urgent need for China to engage in future negotiations on industrial subsidies.

⁷⁴ European Commission, "EU-China: a Strategic Outlook", JOIN(2019)5 final.

⁷⁵ On this agreement, see Weinian Hu, "Dinner for Three. EU, China and the US round the geographical indications table", CEPS Policy Insight, No. 2020-07, April 2020.

⁷⁶ European Commission, EU and China discuss trade and economic relations, 28 July 2020.

The prospect of a trade war between the US and China and the collateral damage inflicted on the rest of the world shows the need for a modernised WTO. It will be crucial to have both countries on board in crucial areas such as subsidies and SoE, forced technology transfer, and special and differential treatment for developing countries. In contrast, a mere patchwork of plurilateral agreements without the US and China will not be able to create a sustainable multilateral trading system. The EU therefore welcomed during the June 2020 EU-China Summit the confirmation by China that the recent China-US ‘phase 1’ deal will be implemented “in full compatibility with WTO obligations and without discrimination against EU operators”. Of course, it remains to be seen how this agreement will be applied in practice and whether it will infringe on other WTO members rights.

3.5 Expanding the FTA agenda

In its bilateral relationships, the immediate task at hand is a successful conclusion of the trade and investments agreements currently under negotiation, including with Australia, New Zealand, Tunisia, and Mercosur. Ambitions for a continent-to-continent free trade area, bridging the EU internal market and the AfCFTA, and an FTA with India and other Asian partners, will take more time and sustained efforts. Whereas the FTA negotiations with Australia and New Zealand appear to be realistic deliverables, several member states and groups in the European Parliament have already flagged that they will not support the negotiated Mercosur FTA which, being part of a comprehensive mixed association agreement, will require ratification by 27 member states.

The recent EU FTA implementation report shows that there is room for improvement with regard to preference utilisation rates for EU exports to trade partners under FTAs.⁷⁷ The new Chief Trade Enforcement Officer could choose to improve the implementation of trade agreements through measures facilitating the use of preferential rates, especially by SMEs.

With regard to transparency, the Commission has made significant progress in opening up trade negotiations towards the European Parliament and civil society. One specific area where there is room for improvement is in relation to the implementation of FTAs by decisions of joint bodies (e.g. committees). While international agreements concluded by the EU have always set up common bodies to facilitate their own amendment and implementation, the new generation of EU FTAs provide for frequent use of such bodies. The far-reaching and extensive competences include legislative powers to amend the trade agreement, to change the institutional architecture of the agreement, to adopt regulatory decisions, or to authoritatively interpret the provisions of the agreement. Generally speaking, the European Parliament is not involved in the decisions taken by joint treaty bodies to become binding on parties, as it is neither represented on the bodies nor allowed to participate in their internal procedures.⁷⁸ In a resolution of 30 May 2018 on the interpretation and implementation of the 2016 Interinstitutional Agreement on Better Law-Making, Parliament calls on the other institutions

⁷⁷ European Commission, “Report on the Implementation of FTAs”, SWD(2019) 370 final.

⁷⁸Article 218(9) TFEU.

to ensure that it is “accurately informed and involved in the implementation stage of the agreements, especially in regard to the decisions taken by the bodies set up by agreements”.⁷⁹ Broadening the reporting of committees established under FTAs to enhance public visibility and public accountability was one of the key elements of the new transparency package announced by then Trade Commissioner Hogan in February 2020.

3.6 Brexit

The EU aims to negotiate and ratify an agreement on a new partnership with the United Kingdom. Both sides have indicated that such an arrangement needs to be reached by October 2020 so that parliamentary approval by all parliaments involved can be obtained before the transition period expires on 31 December 2020. However, such an outcome is becoming increasingly unlikely. In August 2020, the EU chief negotiator stated that he was “disappointed and concerned” about the progress made and “surprised” by the lack of willingness on the UK’s side to make progress on key issues agreed in the joint political declaration on the future partnership.⁸⁰ The intention of the Johnson government to violate the terms of the withdrawal agreement with regard to Northern Ireland and citizens’ rights has led to the resignation of the head of the UK government’s legal department, who wanted to avoid breaking the UK civil service code by violating international law.⁸¹ Against this background, it is hardly surprising that little progress has been made on key issues such as state aid, equivalence, fisheries, and dispute settlement. On the occasion of the latest round of negotiations, EU chief negotiator Barnier recalled the principles agreed upon in the EU-UK political declaration: that the future agreement must encompass “robust commitments to prevent distortions of trade and unfair competitive advantages”. It must also uphold the common high standards applicable in the Union and the UK at the end of the transition period in the areas of state aid, competition, social and employment standards, environment, climate change, and relevant tax matters. Even a basic FTA limited to goods and services (which seems to be the preferred option for the current UK government) will not be easy to achieve, as the maintenance of a level playing field is a precondition for the EU, but conflicts with the ‘red lines’ of the Johnson government.

3.7 Sustainable development

The Commission is likely to continue to reinforce the sustainable development dimension of its trade policy. With regard to the TSD chapters in its FTAs, the Commission’s 2018 15-point plan provided a blueprint for increasing their effectiveness. However, it appears that there is appetite for more ambitious commitments in this area. For example, a May 2020 Franco-Dutch

⁷⁹European Parliament, Interpretation and implementation of the Interinstitutional Agreement on Better Law-Making, para. 75 (https://www.europarl.europa.eu/doceo/document/TA-8-2018-0225_EN.html).

⁸⁰ M. Barnier, Remarques de Michel Barnier suite au septième round de négociations sur un futur partenariat entre l’Union européenne et le Royaume-Uni, 21 August 2020.

⁸¹See Statement/20/1607 by the European Commission following the extraordinary meeting of the EU-UK Joint Committee (https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1607).

non-paper on trade, socio-economic effects and sustainable development proposes to incentivise effective implementation of these chapters by rewarding partner countries that live up to TSD commitments⁸² by introducing a staggered implementation of tariff reduction linked to the effective implementation of TSD provisions, and by laying down precisely and in advance the conditions to be met as a precondition for advantageous customs tariffs. The proposal also discusses the possibility of withdrawal of those specific tariff lines in the event of a breach of those provisions. While these proposals may be a bridge too far for some member states, the integration of the Paris climate agreement commitments into the EU's FTAs has become standard practice. The new CTEO is expected to monitor compliance with both the TSD chapters and the conditions for GSP(+) benefits. For example, in August 2020 the EU withdrew for the first time EBA preferences from Cambodia due to serious and systematic concerns related to the human rights situation in the beneficiary country. As the current GSP regime will expire on 31 December 2023, the European Commission has launched preparations to decide on the future of the GSP scheme.

One of the most important – but also controversial – elements of the European Commission's 'Green Deal' is the proposal for a carbon border adjustment mechanism (CBAM). It aims to reduce the risk of carbon leakage by ensuring that the price of imports reflect more accurately their carbon content by imposing, for example, tariffs on the carbon content of materials and goods imported into the EU from countries that do not meet the EU's environmental standards. Despite concerns as to the WTO-compatibility of the CBAM, the Commission views the CBAM as an important income source for financing the 'Next Generation EU' post-Covid-19 recovery package. A legislative proposal for a CBAM is expected in 2022. Finally, the Commission has announced that it will present by 2021 a legislative initiative on mandatory human rights and environmental due diligence obligations for EU companies. This will include liability and enforcement mechanisms and access to remedy provisions for victims of corporate abuse.⁸³

3.8 A renewed post-Covid-19 trade policy based on 'open strategic autonomy'

The ongoing review of the EU's trade policy is taking place in the broader context of the proposed post-Covid-19 recovery package 'Next Generation EU', which puts forward a model of 'open strategic autonomy' for the EU.⁸⁴ This means "shaping the new system of global economic governance and developing mutually beneficial bilateral relations, while protecting ourselves from unfair and abusive practices".⁸⁵ The Commission's consultation note on the review process identifies the following six priorities for the EU's trade agenda: (i) building more resilience; (ii) supporting socio-economic recovery and growth; (iii) supporting SMEs; (iv) supporting the green transition and making trade more sustainable and responsible; (v)

⁸²See: <https://www.rijksoverheid.nl/documenten/publicaties/2020/05/14/non-paper-from-the-netherlands-and-france-on-trade-social-economic-effects-and-sustainable-development>

⁸³ See: <https://responsiblebusinessconduct.eu/wp/2020/05/27/ep-rbc-working-group-eu-is-well-placed-to-show-leadership-with-its-future-due-diligence-legislation/>

⁸⁴See: <https://ec.europa.eu/info/sites/info/files/communication-europe-moment-repair-prepare-next-generation.pdf>

⁸⁵ European Commission, "Europe's moment: Repair and Prepare for the Next Generation", COM/2020/456 final.

supporting the digital transition and technological development; and (vi) ensuring fairness and a level playing field. A quick read of this document reveals that the ‘open strategic autonomy’ model for the EU’s trade policy will largely be a continuation of the more assertive EU trade policies already pursued or envisaged. It tries to combine the commitment to the rules-based multilateral trading system by establishing multilateral, plurilateral, and bilateral trade agreements and stabilising strategic engagement with key trading partners (the US and China) with a decidedly non-naïve attitude vis-à-vis unfair trade practices through, for example, are in forced foreign direct investment screening mechanism, an instrument on foreign subsidies and an international procurement instrument.

Two elements that will receive more attention in the EU’s trade policy as a result of the (post-) Covid-19 economic context will be global supply chains and the green and digital transition. This twin transition is at the heart of the Commission’s recovery package, and will require the integration of objectives and policy instruments of the EU’s green deal and digital strategy into the CCP. With regard to global supply chains, the CCP will aim to strengthen supply-chain resilience and sustainability with a combination of diversification of supply at country and company level, strategic reserves and stockpiling, as well as the shortening of supply chains or increased domestic production. This will require the blending of the EU’s industrial strategy objectives and instruments into to the Union’s trade policy: the recent action plan on critical raw materials (proposed on 3 September 2020) is a good example of this approach.⁸⁶

4. Conclusion

This paper demonstrates that since the entry into force of the Treaty of Lisbon more than a decade ago, the EU institutions have had to constantly use their newly conferred competences, such as in the area of investment, within a new institutional set-up to address the various internal and external challenges sketched above. Several of the post-Treaty of Lisbon CCP legislative initiatives and reforms or trade agreements are so new (some are even still under negotiation) that it seems premature to undertake a comprehensive assessment of the post-Treaty of Lisbon CCP regime. However, these trade instruments will play an important role in the next decade of the EU’s CCP, together with legislative and treaty proposals that are already quite advanced.

Whereas under the Barroso II Commission trade policy was framed as a key instrument to deliver the growth needed to emerge from the global financial crisis, in particular by developing a new generation of broad FTAs with the EU’s key trade partners, the ‘Trade for all’ strategy developed under the Juncker Commission aimed to strengthen the effectiveness, transparency and value of the EU’s CCP against the background of internal and external contestation of the EU’s trade policy. This is mirrored in the scope of a new generation of FTAs, more transparency during negotiations, a new system for investor-state disputes and a reformed trade defence

⁸⁶ European Commission, “Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability”, COM(2020) 474 final.

instruments' arsenal. Attempts to rebuild the multilateral system for trade and investment, through proposals on WTO reform and the MIC, remain so far unsuccessful.

From the very outset, the 'geopolitical' von der Leyen Commission seems to envisage a more assertive trade policy, doubling down on ensuring a level playing field and proper enforcement of EU trade instruments, as evidenced by major developments such as the creation of the position of a Chief Trade Enforcement Officer (CTEO) and proposals regarding a reinforced foreign direct investment screening mechanism, an instrument on foreign subsidies, an international procurement instrument and the modernisation of the enforcement regulation. The ongoing review of the EU's trade policy will only confirm and further consolidate this approach. On the basis of the concept of 'Open Strategic Autonomy', which is at the heart of the current CCP review and is the new leitmotif for post-Covid 19 recovery, the EU will aim to assert its protection for European business and consumers.



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