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4.1 Introduction

Of all the external policies located in the ‘middle layers’ of the Union, for the greatest part embedded in Part V of the TFEU, the Common Commercial Policy (CCP) stands out most notably.

For starters, we here encounter one of the oldest fields of external competence, already present in the original EEC Treaty at the very dawn of European integration. Also, the CCP has given rise to a colourful and most dynamic jurisprudence, which in turn gave birth to many broader principles that have become of relevance for other fields of external competence as well. Moreover, from an economic perspective, the CCP carries the most weight of all, as growth of the gross national income of Member States depends to a large extent on a successful conduct of the

Union's international trade policy.¹ The same goes for the myriad third countries that are EU trading partners, further underlining the CCP's importance.

Box 4.1 A Formidable Economic Powerhouse

As the European Commission regularly underlines, the EU constitutes an economic powerhouse that is more than a match for the likes of China, the US and Japan. For quite some time now, it has been the largest exporter and importer of goods and services in the world, the greatest dispenser of foreign direct investment, as well as the most important destination for foreign direct investment. It consequently ranks as the biggest trading partner for about 80 countries across all continents; for another 40, it qualifies as the second most important partner. In light of these statistics, the EU unquestionably deserves its place at the table of the G7, G8 and G20.

Lastly, the CCP represents one of the broadest external policies of the EU, which is capable of covering numerous types of agreements, even those that might appear to lie within a wholly different domain. This has inevitably led to turf wars, whereby the Court of Justice has had to sort out matters through the procedure of 'border surveillance', discussed earlier.² Unfortunately, the potential for conflicts has not diminished with the Treaty of Lisbon's realignment of that procedure, and grand refurbishing of Title V TEU.

In what follows, we will first touch upon some general aspects, among which the rationale and general objectives of the CCP (Sect. 4.2). Next, we engage in a study of its exact scope and purview (Sect. 4.3). Then, we look at the interplay between the CCP and international trade rules (Sect. 4.4). Finally, we discuss some of the trade policies enacted under the CCP, with particular emphasis on EU anti-dumping rules (Sect. 4.5).

4.2 General Aspects of the CCP

4.2.1 Rationale

As remarked above, the Common Commercial Policy was put in place in the 1950s, and it has therewith been in existence since the inception of the European Communities. For the *pères-fondateurs*, the setting up of such a policy formed part of an inescapable logic: with the launch of a customs union between the Member States, a common customs tariff was established for all goods coming

¹Of course, the actual pursuit of trade opportunities remains their own individual responsibility; but the competence for enacting legal agreements is largely transferred to, and closely circumscribed, by European (EU) and international (GATT/WTO) trade rules.

²See Chap. 1, Sect. 1.6.

from third countries; a common external trade policy would then be highly beneficial for the good functioning of that customs union, as well as for the common market more generally. After all, if the Member States joined forces and would try to take a united stand on the dossiers concerned, their bargaining power would be much greater. As a result, favourable trade conditions could more easily be negotiated, with external business partners as well as in international forums.

4.2.2 Objectives and Principles

The inseverable link between the customs union and the Common Commercial Policy is repeated in the central provision that states the latter's purpose. As proclaimed in Article 206 TFEU, the main objectives of the CCP are threefold, namely to contribute to the harmonious development of world trade, to the progressive abolition of restrictions on international trade and foreign direct investment, and to the lowering of customs tariffs and the removal of other types of barriers.

In the pursuit of its objectives, the EU has to formulate uniform principles, in particular where it concerns changes in tariff rates, the conclusion of tariff and trade agreements relating to goods, services and commercial aspects of intellectual property. These principles also extend to foreign direct investment, uniform liberalisation measures, export policies and protective measures (e.g., counteracting unlawful subsidies and dumping).³ This essentially means that the EU should adopt legal measures on all these topics, and that it subsequently has to uphold and abide by them.

The inclusion of foreign direct investment denotes a completely new feature introduced by the Lisbon Treaty.⁴ The upshot is that the Member States, unlike before, can no longer conclude bilateral investment treaties without the Union's consent. Secondary law has been adopted to address the status of these treaties, as well as the possibility to maintain, conclude or amend them.⁵ At the same time, the new competence was not seen to cover all types of investment.⁶ To realise its regulatory ambitions, the EU may by consequence still have to resort to its earlier powers in the fields of establishment and capital.

In its 2015 'Trade for All' communication, the Commission declared that the Union attaches a special horizontal importance to sustainability in this domain: henceforth, it aims to ensure that economic growth goes hand in hand with social justice, respect for human rights, working conditions, environmental standards,

³See Article 207(1) TFEU.

⁴Though the EC already possessed related legislative powers as regards the freedom of establishment and free movement of capital.

⁵Regulation 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ [2012] L 351/40.

⁶Cf. Dimopoulos (2011), p. 75 et seq.

health and safety protection.⁷ The EU has meanwhile been a leading advocate of integrating such broader public interests into trade policy, turning the CCP into an effective tool for promoting sustainable development worldwide.

4.2.3 Types of Measures

Over the past decades, the legal measures envisaged by Article 207 TFEU have been enacted indeed. Most of these are periodically revised, and virtually every year new ones are added. We can basically distinguish between two main categories, namely Regulations adopted on the basis of Article 207(2) TFEU, in accordance with the ordinary legislative procedure,⁸ and international agreements concluded on the basis of Article 207(3) TFEU, in accordance with the general procedure but with a few modifications.⁹ The agreements may be bilateral or multilateral, and can be concluded with either countries or international or regional (economic) organisations.

An example of the many Regulations adopted under the CCP is the so-called Trade Barriers Regulation (TBR).¹⁰ This instrument is specifically geared towards removing obstacles to trade in third countries and tackling unfair foreign trade practices. In situations where European businesses experience extraordinary hardships with barriers to trade in third countries, such as restrictions on sales in export markets, discriminatory taxation systems, or difficulties in acquiring and enforcing patent rights, the TBR provides them with direct access to the European Commission. Upon receiving a complaint, the Commission can proceed to investigate the matter and eventually seek the elimination of the indicated obstacles (in consultation with the countries concerned and/or, if necessary and appropriate, within the wider framework of the World Trade Organization).

Over the years, a great number of bilateral and multilateral trade agreements have been enacted.¹¹ Even where the improvement and expansion of economic relations are the main underlying incentives, these agreements have often also covered aspects such as development cooperation and human rights issues. Fine examples offer the successive treaties concluded with the African, Caribbean and Pacific group of states, which have gradually become more comprehensive, from

⁷Communication from the Commission: Trade for All – Towards a More Responsible Trade and Investment Policy, COM 2015(497) final.

⁸Detailed in Articles 289 and 294 TFEU. Delegated or implementing acts may follow, on the basis of Articles 290 and 291 TFEU.

⁹Article 218 TFEU. Cf. Chap. 1, Sect. 1.5.

¹⁰Regulation 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, OJ [1994] L 349/71.

¹¹To mention but one mundane example, the Agreement between the European Community and Australia on trade in wine, OJ [2009] L 28/3.

the conventions of Yaoundé (1963) and Lomé (1975, 1979, 1989) to the Cotonou Agreement (2000).¹²

Box 4.2 EU Free Trade Agreements: The ‘Next Generation’

The EU has concluded (or is preparing and negotiating) free trade deals with partners across all continents. As part of an impressive ‘new generation’ of agreements, advanced deals have been initiated with South Korea, Singapore, Vietnam, Peru, Ecuador, Georgia and Moldova, among others. In 2015, the agreements in force covered more than a third of the EU trade total. This has been envisaged to extend to two-thirds, if all the ongoing negotiations were to be successfully completed. A rising counter-current could radically undermine the anticipated progress; especially the controversies surrounding the planned ‘super-regional’ accords with Canada and the US, which ignited at roughly the same time, may well have cast a long shadow ahead.

4.2.4 Decision- and Treaty-Making

To the frustration of some stakeholders, the CCP used to be a special area of law where exceptional rules of decision- and treaty-making applied. The discontent was the bitterest with regard to the fact that the European Parliament was almost completely kept out of the fray. With the entry into force of the Treaty of Lisbon, much changed for the better: as already noted, the ordinary legislative procedure applies for the adoption of any internal CCP legislation, meaning that the Parliament has been granted a full say.¹³ Nevertheless, certain exceptions do still apply. These pertain to the modalities of decision-making in the Council and the (successive steps in the) procedure for negotiating and concluding treaties.

As Article 22 TEU stipulates, the European Council is to identify the strategic interests and objectives of the Union and to adopt the relevant decisions. This provision pertains to the EU’s external action as a whole, so it also includes the formulation of the Union’s strategic objectives with regard to the Common Commercial Policy. In essence then, the European Council plots the course at macro-level here, taking its decisions by unanimity.

¹²Specific Economic and Partnership Agreements are currently being concluded with groups of ACP states, in order to replace the relevant Cotonou provisions with WTO-compatible rules on reciprocal trade liberalisation.

¹³As regards the adoption of implementing measures, trade has been brought under the umbrella of the revised comitology procedure, whereby the Commission’s autonomous powers have increased considerably. As before, for the adoption of certain implementing acts, it will need a positive opinion from the relevant comitology committee, made up of national experts, but it has become relatively more difficult for the latter to block proposals.

The decisions on CCP issues with more immediate impact are to be taken by the Council acting by QMV, as confirmed by Article 207(4) TFEU.¹⁴ However, that same section states that unanimity will be required for the negotiation and conclusion of agreements in the fields of trade in services, the commercial aspects of intellectual property, and foreign direct investment—at least where such agreements include provisions for which unanimity is required for the adoption of internal rules. Moreover, unanimity will also be required for the negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services where these risk prejudicing the Union’s cultural and linguistic diversity. Lastly, unanimity is also in order for agreements in the field of trade in social, education and health services if they threaten to seriously disturb the national organisation of such services and prejudice the responsibility of Member States to deliver them.

As outlined before, when it comes to the opening of negotiations for new international agreements, ordinarily the Commission or the High Representative submits recommendations to the Council. The latter may then authorise the opening of negotiations, and nominate the EU negotiator or head of the negotiating team.¹⁵ In the Common Commercial Policy, the High Representative has no role to play. Instead, the Commission is assisted by a committee of Member State representatives, appointed by the Council. This Trade Policy Committee (TPC—formerly known as the ‘133 Committee’, after the old TEEC article on the CCP) not only provides assistance, but also serves as an agent of the Member States. Specifically, it has been installed to keep the Commission in check. After all, in the CCP, the latter is solely responsible for making recommendations to the Council on the opening of negotiations; and if the Council gives its blessing, the Commission is also entrusted with the conduct thereof. The Commission however has to report regularly to the TPC, and is required to consult it. Often, the Council will have laid down extensive guidelines and drawn some red lines. The Commission then needs to take heed of those instructions, and listen carefully to the input of the TPC.¹⁶ The arrangement ought to ensure that the eventual outcome of the process will still be to the liking of the Member States. Additionally, the Commission is bound to regularly report on the progress of the negotiations to the Parliament’s committee on international trade.

Officers at the legal services of the Council, Commission and Parliament evidently have to keep the *lex specialis* rules of Article 207(3) TFEU well in mind. Their alarm bells ought to start ringing whenever a proposed agreement concerns external trade issues, economic relations, foreign investments or e.g. commercial aspects of intellectual property since in those cases, a deviant regime

¹⁴When convened to discuss CCP issues, the Council will be chaired by the representative of the country holding the six-monthly rotating Presidency of the Council, pursuant to Article 2(5) of Council Decision 2009/937/EU of 1 December 2009 adopting the Council’s Rules of Procedure, OJ [2009] L 325/35.

¹⁵Article 218 TFEU. Cf. Chap. 1, Sect. 1.5.

¹⁶On this, see also Gstöhl and Hanf (2014).

applies. Were the provisions to be disregarded in any way, the invalidity of the end product could be pronounced, due to the infringement of an essential procedural requirement.¹⁷ Moreover, as exemplified by the fate of ACTA, failure to ensure the backing of MEPs at an early stage could incite them to eventually pull the plug.

4.3 Scope of the CCP

With regard to the scope of the Common Commercial Policy, two aspects are of relevance: firstly, whether the field is exclusive, or whether instead the Member States retain some room to enact trade measures themselves; secondly, to what extent CCP rules and instruments may stretch out to cover topics that (partially) reside in other fields of EU external competence, e.g. on the environment, development cooperation or humanitarian aid. In this section, we focus mostly on the first strand, leaving the second for further exploration in the chapters to come.

For a long time, the Treaties kept their readers in the dark as regards the exact ambit of the CCP. The EU Courts have hence more than once been requested to express themselves on the issue. Over the years, however, their answers varied, testifying to the dynamic nature of this particular policy area.

In Opinion 1/75, the ECJ defined the scope of the CCP with reference to the external policy of a state, pronouncing that it concerns a broad field which develops progressively through a combination of internal and external measures, without any one taking priority over the other.¹⁸ The ECJ seemed, in other words, to be of the opinion that a successful CCP could only be built gradually, through the adoption of internal legislation, and through the conclusion of international agreements. Rather surprisingly then, the CCP was considered to be a principally exclusive competence: ultimately, the Court stressed that any solution that would give the Member States a concurrent power in this area would lead to disparities in the conditions of competition between enterprises on the common market or on export markets. This it saw as incompatible with the idea of a common commercial policy as such.

This line of exclusivity was subsequently adhered to with vigour,¹⁹ albeit not always entirely rigidly.²⁰ Commentators attempting to uncover the true motivation of the Court usually assume that it wanted to secure a solid foundation for the EEC in the international trade arena. From 1973 to 1979, the seventh cycle of GATT negotiations took place, the ‘Tokyo Round’, which focused on tariff reductions, technical standards and government procurement issues. The Community could

¹⁷Cf. Article 263 TFEU.

¹⁸Opinion 1/75, *Draft Understanding on a Local Cost Standard*.

¹⁹See e.g. Opinion 1/78, *International Agreement on Natural Rubber*, and Case 45/86, *Commission v Council* (Generalised Tariff Preferences).

²⁰Thus, for example, Member States were permitted to deviate from uniform import rules, as long as they had obtained specific authorisation from the EC: see Case 41/76, *Criël, née Donckerwolcke and Schou v Procureur de la République au tribunal de grande instance de Lille and Director General of Customs*.

especially become an influential player during these negotiations if it were able to proceed efficiently, i.e. exclusively.²¹

One decade on, international trade patterns had shifted considerably. In the mid-1980s, services increasingly accounted for a greater share of commerce flows than goods. This led the GATT contracting parties to initiate a new cycle of multilateral negotiations, the ‘Uruguay Round’ (1986–1994). For the first time ever, trade in services, trade-related aspects of intellectual property rights and trade-related investment measures were placed (high) on the agenda. Additionally, an old desire resurfaced, namely to set up a new comprehensive, more transparent and powerful regime to regulate world trade, replacing and succeeding the weary GATT system. These ambitions neatly came together in 1994, in the proposal to establish a world trade organisation.

At that point, a fierce difference of opinion emerged between the EU Member States on the one hand and the European Commission on the other. The dispute concerned not so much the establishment of the WTO as such, but rather the competence to conclude the related trade agreements. Some of these were new, such as the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the Agreement on Technical Barriers to Trade (TBT) and the Agreement concerning Sanitary and Phytosanitary Measures (SPS); others were revised, for example the GATT itself. Initially, the Commission had been authorised to conduct all negotiations. Yet, to the mind of the Member States, some of the resulting conventions touched upon matters that still lay squarely within their own field of competence. The ECJ was approached to settle the matter, and it duly expressed its point of view in Opinion 1/94.²²

Opinion 1/94 marked an unexpected retreat. The ECJ proclaimed that all WTO agreements pertaining to goods fell indisputably within the exclusive scope of the Common Commercial Policy. Agreements on trade in services could not immediately, as a matter of principle, be excluded from the CCP’s scope. However, the definition of trade in services included in the GATS was of relevance here, since three out of four modes of service provision (consumption abroad, commercial presence, presence of natural persons) were covered by EU internal market rules, governing trade between Member States—but not by the CCP as such—governing trade between the Member States and third countries. Only cross-border services and service provision were considered to lie within the (exclusive) scope of the CCP, with the Member States retaining their competence to regulate other modes of service supply. For that reason, competence was shared as regards the conclusion of

²¹Another popular explanation takes its cue from the stagnation resulting from the ‘Luxembourg compromise’ (1966), which averted a surge in qualified majority voting in the Council. Exclusivity in the CCP could then at least guarantee that the Commission would have a prominent role to play there.

²²Opinion 1/94, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*.

the GATS.²³ Largely the same went for the TRIPs agreement. To the mind of the Court, intellectual property rights did not relate specifically to international trade; these affect internal trade just as much (if not more). Also, the TRIPs agreement had as its aim to harmonise the protection of IP rights on a world scale. If then the EC could participate in this endeavour through its Common Commercial Policy, i.e. in exclusivity, the internal procedural constraints and requirements could be circumvented (different voting rules could apply, and the involvement of Parliament would have been negligible). Thus, the ambit of the CCP was considered to be limited to measures designed to prevent the import of counterfeit goods—meaning that the competence to conclude the TRIPs agreement was shared as well. All this came down to a drawing of some firm lines in the sand; Opinion 1/94 clearly put a stop to a prolonged external ‘competence creep’ to the detriment of the Member States.

With the Treaty of Amsterdam (1999), the situation was roughly consolidated, albeit that the Council was expressly empowered to extend the scope of the CCP where necessary or desirable. With the Treaty of Nice, however (2003), the ambit of the CCP was considerably expanded. At this point, the competence to conclude GATS- and TRIPs-type agreements was reserved for the European Community after all. Exceptions were however furnished for trade in cultural and audiovisual, educational, social and human health services, at least, in so far as these remained within shared competence and had not been ‘swallowed up’ earlier. This meant that the CCP would still not become fully exclusive, but continued to retain a shared character.²⁴

The Treaty of Lisbon attested to the fact that Opinion 1/94 represented merely a temporary fallback. In the provisions that since then make up the Union’s *Kompetenzkatalog*, Article 3(1)(e) TFEU lists the CCP as an area of exclusive competence. The sensitivities of the Member States that surfaced with such vigour in 1994 have nonetheless been duly taken into account: as we noted above, deviating from the main rule of qualified majority voting, the Council may only proceed with unanimity when it concerns the negotiation and conclusion of agreements in the fields of trade in services, the commercial aspects of intellectual property, trade in cultural and audiovisual services, trade in social, education and health services.²⁵ This way, a delicate balance has been struck: the EU can now act

²³Transport services also rested outside the scope of the CCP, with the external competences in this field being subject to the operation of the *ERTA* (implied powers) mechanism. Thus, for the time being, competence was also shared to conclude these (parts of the) agreements. This changed with Opinion 2/15, *Competence to conclude the EU-Singapore free trade agreement*.

²⁴As confirmed in Opinion 1/08, *Conclusion of agreements pursuant to Article XXI GATS*. The EU could never operate as a wholly exclusive actor within the WTO anyway, since trade agreements on transport services would have to be agreed upon by both the Union and the Member States (see the previous footnote).

²⁵Trade in cultural and audiovisual services however only in those situations where the envisaged agreements risk prejudicing the Union’s cultural and linguistic diversity, and trade in social, education and health services only where these agreements risk to seriously disturb the national organisation of such services and prejudice the responsibility of Member States to deliver them.

as an efficient and effective global player on all topics that lie within the scope of its Common Commercial Policy (in line with the ideology behind Opinion 1/75), while at the same time, the Member States can drag their feet once it ventures into areas where particular national traditions and interests are affected. Treaties lying entirely within the scope of the CCP however may be enacted exclusively by the EU, and the Member States only take part in those *qualitate qua*; in contrast with the situation in the mid-1990s, such trade agreements will no longer be mixed.²⁶ Again, this greatly benefits the CCP's efficacy, as these agreements no longer have to be signed individually and be subjected to cumbersome ratification by the Member States.

In a way, the political institutions have unhelpfully muddied the waters in coming up with the 'new generation' of trade agreements mentioned above. Importantly, the Court has held that the sustainable development elements can still be covered by the exclusive CCP power. On the other hand, the intended regulation of investment, comprising the 'portfolio' type and dispute settlement procedures, means that, even in the post-Lisbon era, such comprehensive deals would still need to be concluded jointly by both the Union and the Member States.²⁷ The experiences with CETA indicate that, so as to avoid getting stuck in an endless obstacle course, recourse may better be had to a leaner package.

4.4 The Interface Between EU and International Trade Law

A classic issue in EU external relations law concerns the effect of international agreements within the European and the national legal order, the interaction between norms of different origin, their hierarchy, possible frictions, overlaps and the resolution thereof. These matters will be explored more fully in a later chapter.²⁸ What interests us right now is the more specific issue of how international trade rules connect and blend in with the EU and the domestic legal systems. In principle, any agreements concluded by the Union bind not only the institutions, but also the Member States. This was evidently always the case for mixed agreements—to which the latter are, after all, parties themselves—but pursuant to Article 216(2) TFEU, this also holds true for any treaties that the EU has concluded under an exclusive competence. Yet, this bindingness does not automatically translate into a full absorption of the norms concerned in the respective legal orders.

²⁶For the time being however, both the EU and the Member States participate individually in the WTO, if only because the Union has not yet acquired exclusivity for every topic on the agenda. Yet, as one author has observed, in the daily practice of the WTO, the mixed membership is hardly visible: at least where the dispute settlement procedures are concerned, the EU operates as a single actor, with the Commission firmly in the hot seat. See Neframi (2010), p. 358.

²⁷Opinion 2/15, *Competence to conclude the EU-Singapore free trade agreement*.

²⁸See Chap. 9.

In general, the EU Courts have taken a fairly obedient, monist view towards rules of an international origin.²⁹ Of late, there are nevertheless signs of retreat from that position.³⁰ For the longest time, the connection between GATT/WTO norms on the one hand and the EU legal system on the other has represented a peculiar 'outlier case', if not to say headache dossier. The stance of the ECJ never fitted in well with its general approach, and at the present day still defies a convincing legal justification. This story is quite complex but highly instructive.

The EEC was not a contracting partner to the original GATT 1947, since the Community only saw the light of day a decade after the latter agreement was established. Nevertheless, it considered itself to be informally bound by the rules enacted within the GATT framework. Also, the Commission took part in the negotiation rounds from the 1960s on, and was allowed to do so for those dossiers with a distinct relevance for an EEC competence.

Next, in the *International Fruit Company* case of 1971, the ECJ moved on to declare that the Community had assumed the powers that were previously exercised by the Member States in the areas governed by GATT rules.³¹ Accordingly, the EEC de facto succeeded the Member States in most dossiers, except for the (still fairly numerous) ones where competences were shared. Therewith, the prerogatives of the Commission were more or less officially acknowledged. With regard to the possible direct effect of GATT norms, the *International Fruit Company* was appreciably less adventurous. The ECJ assessed the spirit, the general scheme and wording of the GATT 1947 in order to determine whether individuals could rely on its provisions to contest the validity of a Community measure. For various reasons, including the great flexibility of its provisions, the possibilities of derogation and the power of unilateral withdrawal from its obligations, the Court concluded that it lacked direct effect: the provisions were insufficiently precise and unconditional, in the sense that they permitted the obligations contained therein to be modified, and they allowed for a too great degree of flexibility. A similar reasoning was later applied to other (albeit bilateral) trade agreements.³²

The ECJ softened its stance slightly in *Fediol*³³ and *Nakajima*,³⁴ allowing for the invocation of a GATT provision when claiming the incompatibility of an EU measure in two situations, respectively, if the challenged EU measure expressly

²⁹See e.g. Case C-286/90, *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp*; Case C-341/95, *Gianni Bettati v Safety Hi-Tech Srl*; Case C-162/96, *A. Racke GmbH & Co. v Hauptzollamt Mainz*.

³⁰See e.g. Joined Cases C-402/05 P & C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*; Case C-308/06, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*.

³¹Joined Cases 41-44/70, *NV International Fruit Company and others v Commission*.

³²See e.g. Case 181/73, *Haegeman v Belgium*; Case 270/80, *Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited*.

³³Case 70/87, *Fédération de l'industrie de l'huilerie de la CEE (FEDIOL) v Commission*.

³⁴Case C-69/89, *Nakajima All Precision Co. v Council*.

refers to the specific GATT provision,³⁵ or if the EU measure was intended to implement a specific GATT obligation.³⁶ In all other situations, claimants would be left empty-handed; the Court displayed no willingness to give way and abandon the negative stance of *International Fruit Company* altogether.³⁷

The architecture of the WTO, set up in 1994, differed in countless respects from that of the GATT 1947. For one thing, the system of (invoking) safeguards had been overhauled, and the mechanism for resolving conflicts completely reconfigured (in the guise of the new Dispute Settlement Understanding). Most commentators assumed that this would lead to the ECJ adjusting its case law, and adapting to the new reality. In 1996, the issue of the effect of WTO norms in the EU legal order arrived at the Court's docket. In the case concerned, an attempt was made to challenge the legality of a decision of the Council for breaching provisions contained in the GATT 1994 and the Agreement on Textiles and Clothing, annexed to the WTO Agreement. To the dismay of many, in its judgment in *Portugal v Council*, the Court stuck to its earlier position and denied the direct effect of the international trade agreements.³⁸ Its reasoning ran along two lines: firstly, that the agreements did not specify what their own methods of enforcement were, since compensation is permitted in certain circumstances as an alternative to direct enforcement of the rules, and since there is room for negotiation over the recommendations of the WTO Dispute Settlement Body; secondly, that the agreements continued to be founded on mutually advantageous negotiations, with a particular lack of reciprocity as regards enforcement—entailing that the EU would be placed at a disadvantage once European courts would start demanding that WTO rules are observed at all times, when in contrast, the Union's trading partners of the EU could retain a full scope for manoeuvre.

At its core, the latter argument evidenced the intrinsically political motivation of the Court: it seems as if the ECJ was well aware that e.g. the United States and Japan, in the absence of direct effect of WTO rules in their domestic legal system, could reap huge commercial advantages if they could freely follow their own preferences, while the rules at stake had to be fully implemented and effectuated in Europe.³⁹ Yet, from a legal-systematic point of view, the assessment of the ECJ

³⁵At stake in *Nakajima* was the legality of provisions contained in the Community's Anti-Dumping Regulation, adopted in accordance with Article VI GATT 1947 and the GATT Anti-Dumping Code.

³⁶In *Fediol*, this was established on a broad reading of a provision from the Trade Barriers Regulation, in conjunction with two recitals from its preamble.

³⁷See e.g. Case C-280/93, *Germany v Council*.

³⁸Case C-149/96, *Portugal v Council*.

³⁹In absolute terms, half of the WTO members recognise the direct effect of the WTO agreements. Measured in trade volumes however, the group denying direct effect is much larger than the other, roughly representing 70% of the world trade in goods and 80% of that in services. Unsurprisingly, in its decision concluding the WTO agreements, the Council expressed its view that the accords were incapable by nature of being directly invoked in EU or Member State courts (see Council Decision 94/800/EC concerning the conclusion on behalf of the European Community, as regards

is plainly erroneous: the novel WTO dispute settlement regime is patently more judicial than its predecessor, and much less discretionary in practice than the Court made it out to be. The ECJ opined that the compensation and retaliation schemes provided for in the DSU are alternatives to compliance with WTO rules. The DSU, however, clearly exhibits a preference for full compliance: compensation and retaliation are merely means to *force* a WTO member to comply with WTO rules.⁴⁰ To add insult to injury, the enforcement mechanisms of most of the agreements that had so far set up ‘special relationships’ between the EU and third countries pale in comparison to the DSU—whereas the defects of those enforcement mechanisms were never considered a bar for awarding direct effect to the rules laid down in those agreements.⁴¹

In legal doctrine, *Portugal v Council* was greeted with an avalanche of negative feedback.⁴² Once again though, academic criticism proved to be of no avail: the EU Courts have stubbornly persisted, and even hardened their negativist point of view, denying inter alia the direct effect of the TRIPs, TBT and SPS Agreements,⁴³ WTO Panel Reports,⁴⁴ actions for damages against the EU,⁴⁵ reliance on Article 351 TFEU,⁴⁶ on the principle of *pacta sunt servanda*,⁴⁷ or rulings of the DSB.⁴⁸

Box 4.3 Reticence Exemplified: ‘Thou Shalt Not Frustrate Negotiations’

In the *Van Parys* litigation, a notable fact appeared to be that, after a decision of the DSB, the EC had explicitly undertaken to comply with the WTO rules. Yet, in the eyes of the Court, in so doing the Community still did not intend to

(continued)

matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986–1994), OJ [1994] L 336/1, final recital of the preamble).

⁴⁰On top of this, the adoption of WTO panel reports can only be blocked by the DSB with a unanimous decision, which makes it nearly impossible for the DSB to overturn decisions of the WTO panels or the WTO Appellate Body – which thus function as genuine and competent adjudicators.

⁴¹E.g. the Cotonou Agreement with the ACP countries, or the agreement establishing a customs union with Turkey. See further Chap. 8, Sect. 8.2.4, and Chap. 9, Sect. 9.2.2.

⁴²See e.g. Griller (2000); Zonnekeyn (2000); van den Broek (2001). Among the supporters of the Court’s position are Kuijper and Bronckers (2005); Mendez (2010).

⁴³See respectively Case C-337/95, *Parfums Christian Dior SA v Evora BV*; Joined Cases C-27/00 & C-122/00, *The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd and Omega Air Ltd, Aero Engines Ireland Ltd and Omega Aviation Services Ltd v Irish Aviation Authority*; Case C-93/02 P, *Biret International SA v Council*.

⁴⁴Case T-18/99, *Cordis Obst und Gemüse Großhandel v Commission*.

⁴⁵Joined Cases C-120/06 P & C-121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Others v Council and Commission*.

⁴⁶Case T-2/99, *T. Port GmbH & Co. KG v Council*.

⁴⁷Case T-383/00, *Beamglow Ltd v European Parliament and Others*.

⁴⁸Case C-377/02, *Léon van Parys NV v Belgisch Interventie- en Restitutiebureau*.

Box 4.3 (continued)

assume a particular obligation capable of justifying a direct reliance on WTO law. The ECJ argued that, even where a DSB decision holds that a measure adopted by a member is incompatible with the WTO rules, the dispute settlement system attaches considerable importance to negotiations between the parties. Allowing for direct effect would therefore hinder contracting parties attempting to reach a negotiated settlement, however temporary.

Prima facie, the picture is not exactly cheerful. Apart from the rare occasions where a successful appeal to the *Fediol* or *Nakajima* exceptions proves possible, no (national or third country) trader can challenge EU measures head-on with any chance of success—even if it is certain that they clash with international trade rules. Even when a report from a WTO panel or the WTO Appellate Body establishes that an EU act conflicts with WTO obligations, neither those reports nor the WTO rules can be pleaded before EU or national courts in proceedings brought against the measure in question.⁴⁹

A remedy that does bring salvation, albeit in smaller doses, was handed out in the *Hermès* case.⁵⁰ In this judgment, the ECJ did admit the existence of a duty of indirect effect or harmonious interpretation, conceding that EU rules have to be interpreted in the light of international law and binding international agreements. This doctrine, well-known to EC law since the judgment in *Von Colson*,⁵¹ was explicitly declared to extend to the GATT and other WTO treaties (e.g. the TRIPs Agreement).⁵² This had the consequence of enhancing their effectiveness under certain circumstances. Indeed, in a growing number of cases, harmonious interpretation has emerged as a viable alternative, nearly obviating the need for direct effect there.⁵³ At the same time, the remedy forms no panacea, since the doctrine cannot be applied *contra legem*, and is limited by general principles of law, among which that of legal certainty.⁵⁴ Notwithstanding its basic utility, when it comes to legality review, it is unable to offer a complete substitute. Thus, when EU legal measures are challenged for violating international trade rules, one may ask (at a European or

⁴⁹It should be noted that this holds too for any national rules adopted pursuant to EU measures, which thus also become unassailable. However, national rules that lie outside the scope of EU competence can freely be attributed effects in the domestic legal order in accordance with the particular national (monist or dualist) tradition: see Case C-431/05, *Merck Genéricos – Produtos Farmacêuticos Lda v Merck & Co. Inc. and Merck Sharp & Dohme Lda*.

⁵⁰Case C-53/96, *Hermès International v FHT Marketing Choice BV*.

⁵¹Case 14/83, *Von Colson and Kamann v Land Nordrhein-Westfalen*.

⁵²See Case C-337/95, *Parfumes Christian Dior SA v Evora BV*.

⁵³See e.g. Joined Cases C-320/11, C-330/11, C-382/11, and C-383/11, *Digitalnet OOD, Tsifrova kompania OOD and M SAT CABLE AD v Nachalnik na Miticheski punkt - Varna Zapad pri Mititsa Varna*; Joined cases C-288/09 and C-289/09, *British Sky Broadcasting Group plc and Pace plc v The Commissioners for Her Majesty's Revenue & Customs*.

⁵⁴See e.g. Case C-105/03, *Criminal proceedings against Maria Pupino*.

national court) that the former are interpreted in accordance with the latter, but should that prove impossible, the measures survive unscathed and will continue to apply all the same.

It should be stressed that with the aid of conform interpretation, the Court has been willing to give due regard to international trade law, despite the negation of direct effect. By consequence, it cannot be accused of a categorical ‘WTO unfriendly’ posture.⁵⁵ Yet, at the end of the day, the interface between international trade rules and the European legal order does remain rather one-sided. The EU is a party to the WTO agreement, bound by the various non-discrimination principles (in particular the Most-Favoured Nation clause⁵⁶ and the principle of National Treatment⁵⁷) and any specific provisions it has agreed to observe. Of themselves though, these norms rarely sting or bite, as the EU Courts have given priority to the interest of assuring a maximum scope for manoeuvre for the EU at the negotiating table—to the detriment of all importers or exporters negatively affected by EU rules contravening WTO rules and principles. Save for the *Fediol* or *Nakajima* devices and the palliative of indirect effect, the remedy they are left with is the administrative route of lodging a complaint with the competent institutions. While some might contemplate resorting to the mechanism contained in the Trade Barriers Regulation,⁵⁸ it should be realised that the Commission is not held to respond if the experienced obstacles derive from EU rules themselves.⁵⁹

Ultimately then, it is left to the political, not the judicial, institutions to ensure full compliance with international trade rules, which includes implementing adverse WTO rulings.⁶⁰ It deserves mentioning that the political institutions can in fact lay claim to a generally positive record, and that considerations concerning the compliance of (prospective) European rules with WTO norms have received an increasingly prominent role in the legislative process.⁶¹ The conclusion to this tale is thus not entirely gloomy.

⁵⁵See Bronckers (2008).

⁵⁶Prohibiting discrimination between third countries who are members of the WTO: any favours extended to one member country should automatically be extended to all other member countries.

⁵⁷Prohibiting discrimination against imported products originating from third countries that are WTO members: if no reservations have been made, these should principally be treated as being similar to domestic products.

⁵⁸See *supra*, footnote 10.

⁵⁹This option might nonetheless seem feasible when third countries have set up trade barriers in response to illegal conduct from the side of the EU; but instead of an instant solution, an endless game of shifting the blame might ensue. See also Perišin (2015).

⁶⁰The EU can decide on its possible follow-up to adverse rulings of the DSB on the basis of Regulation 1515/2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters, OJ [2001] L 201/10.

⁶¹See respectively Wilson (2007) and Bourgeois and Lynskey (2008).

4.5 Substantive Trade Policies: A Taste

Now that the constitutional underpinnings of the CCP have been demystified, let us briefly look into some of the trade policies that have actually been enacted by the EU.

As mentioned earlier, the establishment of a customs union between the Member States brought with it the establishment of a common customs tariff (CCT). It is left to national customs authorities to apply the CCT, in conjunction with any other relevant provisions of European law. Those provisions consist of a sweeping array of technical rules, mostly laid down in Regulations, the most important of which is the Union Customs Code (UCC).⁶² The UCC contains detailed schemes and pointers for the classification of goods, value assessment, and provisions that help to establish the origin of products. The interpretation of the Code can be less than clear-cut, and the corresponding difficulties have given rise to an extensive body of case law from the EU Courts.⁶³

The current rules on tariff preferences can be found in the Regulation on Generalised Tariff Preferences.⁶⁴ Also known as the ‘GSP Regulation’, it aims at lowering the barriers for particular third country trade as much as possible, facilitating the import of certain products from countries in need. Its prime objective is to contribute to the reduction of poverty and the promotion of sustainable development and good governance, the idea being that preferential rates enable developing countries to participate more fully in international trade and generate additional export revenue, which supports them in developing industry and jobs. Therefore, the GSP Regulation ensures a full or partial reduction or suspension of CCT customs duties. It eliminates all quotas and duties on all products from the world’s least-developed countries.⁶⁵ There is no expectation or requirement that this access be reciprocated. The latest instalment in this series of instruments was adopted in 2012, and has applied since 2014.

Box 4.4 Revising the GSP Scheme: The New Approach

Compared to its predecessors, the current GSP Regulation is an advanced, much more flexible tool. As a welcome and very efficient innovation, it allows countries to potentially come in and out of the ‘target group’. This entails that the lists of beneficiaries identified in the document, as well as the

(continued)

⁶²Regulation 952/2013 laying down the Union Customs Code, OJ [2013] L 269/1.

⁶³See e.g. Case C-395/93, *Neckermann Versand AG v Hauptzollamt Frankfurt/Main-Ost*; Case T-243/01, *Sony Computer Entertainment Europe Ltd v Commission*; Case C-56/08, *Pärlitigu OÜ v Maksu- ja Tolliameti Põhja maksu- ja tollikeskus*.

⁶⁴Regulation 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation 732/2008, OJ [2012] L 303/1.

⁶⁵Excluding weaponry and military equipment (the ‘Everything But Arms’ arrangement).

Box 4.4 (continued)

different thresholds that are linked to the beneficiary pool, have been made susceptible to swift amendment. The text of the new GSP foresees that these elements, included in different annexes, can be adapted via delegated acts enacted by the European Commission—bypassing the ordinary legislative procedure that would probably prove too cumbersome for these limited purposes.

Next, there is the so-called General Import Regulation.⁶⁶ This Regulation applies to imports into the EU in general, and enshrines the basic principle that these are free, meaning that they must not be subjected to any quantitative restrictions. At the same time, the Regulation allows for the adoption of safeguard measures, and specifies under which conditions these can be taken (in line with the WTO Agreement on Safeguards). Apart from the above-mentioned GSP scheme that aims to benefit the developing countries, specific Regulations may be adopted that set up special arrangements for products from particular countries or regions.⁶⁷

A great number of measures have also been adopted that regulate exports from the EU. An example is the Regulation that establishes a special regime for the control of dual-use items and technology.⁶⁸ It lists certain types of materials, equipment and technology that may not be sent abroad freely, but for the export of which a special administrative procedure has to be followed. Under this regime, controlled items may not leave the EU customs territory without an export authorisation. Additional restrictions have also been put in place concerning the provision of brokering services with regard to dual-use items and concerning the transit of such items through Union space.

To counteract dumping, the EU has adopted its own Anti-Dumping Regulation.⁶⁹ Although the academic debate is still ongoing whether anti-dumping actions are truly fair and justified from an economic perspective,⁷⁰ the legal view has been

⁶⁶Regulation 3285/94 on the common rules for imports, OJ [1994] L 349/53.

⁶⁷E.g. Regulation 570/2010/EU making imports of wireless wide area networking (WWAN) modems originating in the People's Republic of China subject to registration, OJ [2010] L 163/34.

⁶⁸Regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ [2009] L 134/1.

⁶⁹Currently Regulation 2016/1036 on protection against dumped imports from countries not members of the European Community, OJ [2016] L 176/21. The EU may impose countervailing duties to neutralise the benefit of subsidies granted by third countries on the basis of Regulation 2016/1037 on protection against subsidised imports from countries not members of the European Union, OJ [2016] L 176/55.

⁷⁰Some commentators maintain that if certain products are sold at an extremely low price, this is still the outcome of the interplay between ordinary market processes; the fact that the receiving market attributes more economic value to the goods concerned ought not *ipso facto* to lead to any extra duties being slapped onto them. For an in-depth discussion, see Bentley and Silberston (2007).

solidly anchored: Article VI of the GATT 1994 and the related WTO Anti-Dumping Agreement have authorised the practice,⁷¹ as long as one stays within the specified bandwidth. In the wake thereof, the EU and the US have adopted their own anti-dumping rules, providing further details on concepts such as ‘normal value’, ‘like product’ and ‘injury’. The application of the EU Anti-dumping Regulation poses wicked challenges, requiring a sharp insight into principles of econometrics, financial business administration and sales and pricing practices. The Commission investigates whether dumping (or subsidies) is involved, together with the question of injury, and may impose a provisional duty where this is in the overall EU interest. Definitive duties may subsequently be imposed within a specific time limit.⁷²

Disputes on the (non-)imposition of anti-dumping duties generate much litigation at both EU and national courts.⁷³ The challenges come from the firms that lodged the original complaint, the producers of the products subjected to the duty imposed, or the traders importing them. Unfortunately, the lack of direct effect attributed to GATT/WTO rules renders it difficult to proceed against EU anti-dumping measures that go against the rules and margins established in the applicable international trade rules.⁷⁴ Surprisingly though, the EU Courts have taken a rather lenient stance with regard to the admissibility of such annulment actions. Due to the strict reading of the *locus standi* conditions for natural and legal persons spelled out in Article 263 TFEU, the hurdles for proving that one is directly and individually concerned often prove insurmountable. In contrast, the EU Courts have taken a conspicuously more liberal position in anti-dumping cases.⁷⁵ This stance is all the more remarkable considering the fact that the subsequent substantive review of the disputed measures leads infrequently to an establishment of invalidity. Commonly, the Courts display great deference towards the assessments made by the Commission and the Council at the imposition of the duties, refusing to scrutinise these to great lengths. In addition, the procedural rights involved (e.g. the right to a fair hearing) are often interpreted with considerable rigour.⁷⁶ As a result, the EU’s system of

⁷¹With Article VI GATT 1994 defining dumping as ‘the practice by which products of one country are introduced into the commerce of another country at less than the normal value of the products’.

⁷²Where previously this power lie with the Council, the Commission has since 2014 been made responsible for adopting both provisional and definitive measures (subject to Member State control through comitology).

⁷³See e.g. Case 264/82, *Timex Corporation v Council and Commission*; Case C-358/89, *Extramet Industrie SA v Council*; Case C-239/99, *Nachi Europe GmbH v Hauptzollamt Krefeld*; Case T-1/07, *Apache Footwear Ltd and Apache II Footwear Ltd v Council*; Case T-122/09, *Zhejiang Xinshiji Foods Co. Ltd and Hubei Xinshiji Foods Co. Ltd v Council*; Case T-157/14, *JingAo Solar and Others v Council*.

⁷⁴Save for possible reliance on the *Fediol* or *Nakajima* doctrines.

⁷⁵Facilitated post-Lisbon by the inclusion of the ‘regulatory act’ category in Article 263 TFEU, which merely requires direct concern.

⁷⁶For further illustrations and criticism, see Koutrakos (2015), pp. 367–377.

protection against unfair trade practices appears to suffer from a certain degree of unfairness itself.

4.6 Conclusion

On that mildly depressing note, we conclude this tour of the Common Commercial Policy. Indisputably, the CCP remains one of the mainstays of the EU's relations with the rest of the world. Its position as one of the oldest external competences, and as an exclusive one at that, merited discussing it as the first of the policy areas located in the 'middle layers' of the Union. A few other salient aspects deserve to be rehearsed one last time.

As remarked, the quirky methods of decision- and treaty-making in the CCP require that EU officials pay close attention to the proper 'centre of gravity' of a proposed act. Should the intended measure have a predominant CCP dimension, its adoption will have to conform to various *lex specialis* provisions, outlined above, at the risk of invalidity. At the Commission's DG Trade, this caveat is usually taken to heart. National departments keep a close watch, and notwithstanding the principal exclusivity of the Policy, do not hesitate to insist on mixity when a prospective agreement would otherwise undercut the 'vertical' division of competence.

We also saw that the common CCP implies a uniform conduct of trade relations with third countries, in particular by means of the common customs tariff and common import and export regimes. In line with its official objectives, the EU aims to support harmonious, liberalised global trade that serves the interests of all international players. The Union equally supports the abolition of trade restrictions and customs barriers, while simultaneously paying special regard to the most disadvantaged countries. In this spirit, it has granted, and continues to grant, general and specific preferences. Coupled with the attention for sustainability, in the modern understanding covering not just environmental goals, but also social standards and human rights, laudable steps have been taken to enhance the CCP's ethical dimension.

To defend the EU market, the Union has slightly more dubious tools at its disposal, such as the Trade Barriers Regulation, sophisticated safeguard clauses and an anti-dumping instrument; but in their day-to-day application, there is room for improvement. Moreover, the constricted possibilities for judicial review strengthen the case for a reconfiguration of the interface between EU and WTO law, if only for the sake of consistency. Of course, the EU Courts find themselves in a decidedly unenviable position, considering the hazardous economic and political ramifications of a different, more open attitude. Yet, if the Union's commitment of contributing to a harmonious development of world trade is to be taken seriously, a change may have to be made here sooner rather than later.

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