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The EU as global trade and investment actor – The times they are a- changin’

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1. Introduction

The European Union is facing a multitude of crises: the euro and financial crisis, staggering (youth) unemployment rates, mounting public and private debts and not to forget the refugee crisis. All these have put European values to a test and given rise to nationalist parties all over Europe, mistrust against the European elites is spreading and EU-sceptic referendums are on the rise, culminating (for now) in the result of the British referendum to leave the European Union. Another negative referendum took place in the Netherlands on the EU-Ukraine Association Agreement. So far, the Dutch Parliament followed this outcome and rejected to sign the Agreement, however a potential compromise may be possible since end 2016 by some additional clarifications explicitly stating that the association agreement does not imply a candidate status for EU membership to Ukraine.¹ Finally, long lasting negative attitude of the civil society made the signing of the EU-Canadian Trade Agreement CETA difficult.

While inner challenges impact the EU, the world around it is also changing, as emerging powers gaining in strength claim new positions in the international system.

A wide range of political, economic and cultural policy instruments can address these internal and external challenges. Though this working paper focusses only on one, it may be the EU's most powerful instrument: trade and investment policy, combined by the Lisbon treaty in 2009.

Economic integration has always been the leading instrument of European unification. Does this dominant policy still fit with the challenges arising recently?

To address this question, we will first look at the current setting of trade policy to understand the context within which trade policy is taking place, then, we will evaluate EU trade policy based on its openness and legitimacy. Thereafter, two specific issues addressed by trade and investment agreements, regulatory cooperation and investors protection, are analysed before summarizing the most important challenges lying ahead of the EU:

- The policy shifted towards increasingly complex agreements and the partner countries became more and more economically strong over time: Concerning trade and investments, both dimensions developed differently: regarding trade the EU reacts on economic crises by closing markets, whereas on investments it tends to become more open.
- Regarding the allocation of power across European institutions, the Parliament became a real veto player, as it has to approve each agreement. On the contrary, the national parliaments lost power in the area of investments falling under EU competence. Although stakeholders were increasingly involved over time there is still an imbalance in favour of industrial representatives who have less

¹ Radio FreeLiberty, Netherlands, EU Reach Deal On Ukraine Association, 15 Dec 2016, at <http://www.rferl.org/a/eu-netherlands-ukraine-association-agreement/28178787.html>

formal access to decision procedures and bodies within agreements.

- Especially some areas within trade agreements characterize the new EU approach of “deep and comprehensive free trade agreements”: regulatory cooperation and investment protection are both addressed parts of the younger agreements and reflect the most criticized areas as shown by the opposition facing CETA and TTIP. How to address the issues in future agreements will be one of the relevant challenges for EU trade policy. Another one will be to support multilateralism by extending mechanisms of bilateral agreements, i.e. making these agreements open for new members.

2. The institutional, economic and political setting of European trade and investment policy over time

2.1 Institutional frame: Free trade and exceptions set by the WTO as benchmark

Following classical economic criteria, the overarching principle to evaluate a trade policy is welfare. Traditional trade theories often suggest that a free exchange of goods, services and investments is the most effective tool to maximize welfare. This dominant economic idea has served as theoretical justification for liberalization and for institutions to set and enforce rules like the World Trade Organization (WTO).²

However, economic theory also knows cases of market failure with regard to public goods or spillovers, as well as in the case of asymmetric information or incomplete competition.³ Accordingly, the WTO rules' primary objective is aiming at free trade, but knows as well numerous exceptions: these cover unforeseen economic developments, threats to food security, threats to exhaustible resources and human, plant and animal life.⁴

Politically, *free trade* can be understood as public good to be supported by respective global rules set by institutions like the WTO. In the perspective of the prisoner's dilemma, *cooperation* is the strategy for opening markets by, for example, abolishing tariffs or other non-tariff measures (NTMs). *Conflict* on the contrary would mean establishing or increasing such barriers. According to the prisoner's dilemma, it could be beneficial for individual countries to keep up its own barriers but to profit from other countries' liberalization as so-called “free riders”. To prevent this kind of behaviour there are strong and enforceable rules like those set up globally by the WTO or by the EU for the internal market. One major WTO rule

² See for instance E.U. Petersman and A.M. Slaughter, Liberal International Relations Theory and International Economic Trade Law, in: The American University Journal of International Policy and Law, 1995, p. 717-743.

³ Hla Mynt, “The classical theory” of international trade and underdeveloped countries, The Economic Journal 68, 270 (1958).

⁴ Bettina Rudloff, Trade rules and food security. Scope for domestic support and food stocks, p. 5ff

since its beginning as GATT in 1947 is the *non-discrimination or most-favourite nation principle* (GATT Article I). This serves as an immanent trade-liberalizing mechanism: any market opening of one country towards another should be offered to all other WTO members. Exceptions exist for free trade unions and free trade areas – they may offer individual liberalization to selected partners only (GATT Article XXIV). However, certain conditions are defined to initiate more liberal trade within the union compared to tariffs against third countries. For example, the overall liberalization effect should be large, i.e. addressing “substantially all trade”, and it should not exclude large areas of trade like a complete sector. The exact meaning of “substantially all” is often negotiated or disputed in trade conflicts. Another immanent liberalizing-mechanism often used in trade agreements is the so-called “ratchet-mechanism”: This avoids falling behind a certain achieved level of liberalization. Thereby, in principle, no increase in tariffs should be possible once their reduction is defined.

However, some exceptions exist for deviating from the liberalization goal in terms of a general permission for usually prohibited measures like quantity limitations (import or export bans) limited to a set of defined reasons: Among these are the protection of human, animal or plant life, the support of public morals and the protection of exhaustible resources (GATT Article XX). Additionally, in case of problems for the payments of balance (GATT XII) import restrictions may be imposed, as well as emergency actions if imports explode (GATT Art. XIX). Especially food export bans are allowed in case of a threat to supply (GATT Art. XI). In case of dumping or wrongly applied subsidies affected trade partners may impose trade defence measures in terms of tariffs (Art. VI, figure 1).

2.2 EU's overall strategies and institutions

Using the model of the global trade as prisoner's dilemma, the EU can choose a cooperative, i.e. a liberal strategy or a conflicting approach, i.e. a protectionist strategy. The strategy for this choice has changed over time: Especially the relationship between tariffs and non-tariffs developed. “Non-tariff measures” (NTMs) encompass a large set of different instruments like quantitative restrictions, standards, labelling requirements and controlling procedures. The EU has a long tradition in handling these measures: whereas the original customs union only addressed tariffs, the common market's explicit aim is to abolish NTMs. Different approaches exist to target at this aim - loose coordination of policies or complete harmonization (chapter 4.1).

The EU represents the most liberalized trade block worldwide with a lot of experience in abolishing different types of both tariff and NTMs. This experience has led to different strategies facing different partner countries (chapter 3).

The EU's trade policy faces impacts like global political and economic shifts. This influenced trade negotiations in the WTO and caused again in

turn subsequent internal changes within the EU.

2.2.1 Political shifts and competitive regionalism

General political changes: After the Second World War global trade policy gradually developed towards increasing liberalization. Several multilateral negotiation rounds (starting with the GATT in 1947) were concluded. In the course of time, more and more countries started to participate in the global trend towards liberalization and more and more issues were ruled for an increasing number of issues.

In the 1980s, the US started with a new, bilateral free trade approach whereas the EU still remained self-committed to multilateralism and instituted a moratorium for bilateral agreements in order to focus explicitly on WTO negotiations. However, since the late 1990s, more and more trade arrangements between more and more countries and regions can be observed worldwide (a confusing “Spaghetti Bowl” of treaties). Traditionally, the EU only concluded bilateral agreements with direct neighbouring or developing countries.⁵

Political theory explains a change in strategy towards bilateral and regional agreements by a historic shift in power relations during the transition from the 20th to the 21st century. After the bloc confrontation between the USA and the USSR during the cold war (bipolar distribution of power), the world experienced a short period of US-hegemony (unipolar distribution of power). Consequently, western beliefs and interests dominated the post-cold war economic order.⁶ This dominance of the US and the EU manifested itself during the Uruguay Round in the foundation of the WTO in 1994. However, western dominance has slowly started to decline in the beginning of the 21st century. Emerging powers like the BRICS (Brazil, Russia, India and China) gained economic and political relevance and are becoming increasingly powerful players in international politics.⁷ This multipolar system, with emerging powers putting into question parts of the western liberal world order, will most likely define international politics in the 21st century.⁸

Competitive regionalism: As the USA and the EU realized that they could no longer globally enforce their economic beliefs and interests through multilateral agreements with all players on board, they developed an alternative strategy: Bilateral and (mega)regional trade and investment agreements. These agreements serve two purposes. Firstly, they are intended to open markets and to generate growth. Secondly, they are a

⁵ Georg Koopmann, Marco Wilhelm, EU Trade Policy in the Age of Bilateralism, in *Intereconomics* (5) 2010, p. 305-312, p. 311.

⁶ Mastanduno, Michael (2014): Order and change in world politics: the financial crisis and the breakdown of the US-China grand bargain, S. 167 ff, in: Ikenberry, G. John, Power, Order and Change in World Politics, Cambridge University Press, Cambridge, 2014

⁷ Young Alasdair (2012) Trade Policy, S. 424, in: Jones, Erik; Menon, Anand; Weatherill, Stephen (eds.), *The Oxford Handbook of the European Union*, Oxford University Press, Oxford 2012, S. 422 – 441

⁸ Nölke, Andreas; May, Christian; Claar, Simone (eds.) (2014): *Die großen Schwellenländer – Ursachen und Folgen ihres Aufstiegs in der Weltwirtschaft*, Springer VS, Wiesbaden

geo-economic instrument to preserve power vis-à-vis the emerging powers and to circumvent the necessity to reach consensus with these new rivals. The two best-known recent projects exemplify this strategy: The US pushed the Trans-Pacific Partnership Agreement (TPP) to contain and exclude its most important pacific rival: China. The EU and the US pushed for the Transatlantic Trade and Investment Partnership (TTIP) to economically and politically consolidate the western alliance. The USA and even more so the EU believe, that only in forming an economic and political block they can defend the liberal world order that served them so well in the past.

2.2.2 Economic shifts and comeback of protectionism

Underlying general economic development: A global trend towards increasing interlinkages between economies resulted in the growth of long cross-country value chains.⁹ Consequently, the EU became more and more integrated in global value chains, too.¹⁰ In the beginning of its own integration history, primary production was dominant and especially agriculture gained political relevance after the Second World War to feed the population. This resulted in a highly protective system to support farming by subsidies and extremely high tariffs. In the course of time, technological progress, overproduction and welfare progress led to decreasing dependence on agricultural protection and industrial manufacturing and services gained in importance. This supported the EU's will to liberalize agricultural markets - even against strongly opposing lobby groups - and led to a respective WTO-Agreement in the late 1990s.

The global economic and financial crisis in 2008 shifted the mentioned long-time liberalization trend towards increased protectionism worldwide. This increase was not as dramatic as during the 1930s crisis¹¹, as the new reaction followed the defined rules of the WTO that limit trade restrictions. However, since 2008 around 2000 new protective measures were established out of which a bulk was established by the G20 including the EU.¹² One type of measure that was used very often were export bans in case of critical food shortages, which is explicitly allowed by the WTO

⁹ Georg Koopmann, Marco Wilhelm, EU Trade Policy in the Age of Bilateralism, in *Intereconomics* (5) 2010, p. 305-312.

¹⁰ Di Mauro, Filippo et.al (2013), Global Value Chains: A Case for Europe to Cheer up, European Central Bank, Compnet Policy brief 03/2013, Frankfurt am Main, available online: https://www.ecb.europa.eu/home/pdf/research/compnet/policy_brief_3_global_value_chains.pdf?fcccc5651bee912e1698e1019c8b3969, p. 3; and De Backer, Koen, Miroudot, Sébastien (2014) Mapping Global Value Chains, European Central Bank, Competitiveness Research network, Frankfurt am Main, available online: <https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1677.pdf>

¹¹ Behrens, Maria; Janusch, Holger (2013) Business as usual – Der ausbleibende Protektionismus in der Wirtschaftskrise, *Zeitschrift für Außen- und Sicherheitspolitik*, 6: 179 – 196, Springer Fachmedien Wiesbaden

¹² Bettina Rudloff, Außenwirtschaftliche Strategien der Europäischen Union in der Krise, in: Ronja Kempin / Marco Overhaus (eds.): *EU-Außenpolitik in Zeiten der Finanz- und Schuldenkrise*, SWP Studie 2013.

without further justification or time-limits. The G20 as new intergovernmental format addressed this issue and attempted a voluntary commitment to abolish these legally permitted protective measures - so far, not very successfully.

While there was initial recourse to protective measures the crisis paradoxically also acts as catalyst for more liberalization, deregulation and harmonization – however, more on investment and more within the EU than towards third countries.¹³ Firstly, on the national level, the “structural adjustment programs” deregulated national markets to render them more competitive and attractive for investors. Secondly, on the European level, the banking union has imposed more regulation for banks, but simultaneously plans are being pursued to increasingly integrate the European single market in services and to create a capital market union.¹⁴ Critics warn that these plans drift away from the lessons learned during the financial crisis.¹⁵ Thirdly, on the international level, the EU has stepped up its efforts to open foreign markets, harmonize regulations and attract investment through increasing bilateral trade and investment agreements.¹⁶

2.2.3 Internal turning points support a more powerful and complex policy

The “Treaty of Maastricht” (1992), including the Economic and Monetary Union (EMU) with plans to introduce a common currency, and the creation of the Single European Market (SEM, 1993) marked a revival of European integration after a prolonged period of economic and political crises.¹⁷ Although most significant changes of the Maastricht treaty took place in other policy areas than trade, the SEM set the stage for two important developments: first, it increased competition among European firms and supported their international orientation.¹⁸ Second, the positive experi-

¹³ Siles-Brügge, G. (2013), ‘The Power of Economic Ideas: A Constructivist Political Economy of EU Trade Policy’, S. 598, in: Journal of Contemporary European Research. 9 (4), S. 597-617.

¹⁴ Schäuble, Wolfgang; Sapin, Michel (2015) Letter to Lord Jonathan Hill, Commissioner for Finance Stability, Financial Services and Capital markets Union, available online: http://www.economie.gouv.fr/files/files/PDF/2015-07-06_letter-about_capital-markets-union_6-july-2015.pdf

¹⁵ Finance Watch et al. (2015) Who will benefit from the Capital Markets Union? Open Letter, available online: <http://www.finance-watch.org/informieren/blog/1151-who-will-benefit-from-cmu-de?lang=de>

¹⁶ See for example the EU-China Bilateral Investment Treaty. Francois Godement, Angela Stanzel (2015) The European Interest in an Investment Treaty with China, European Council on Foreign Relations, London, available online: http://www.ecfr.eu/page/-/ECFR127-The_European_interest_in_an_investment_treaty_with_China_%28both_graphics%29.pdf

¹⁷ Finn Laursen (2012) The Treaty of Maastricht, in: Jones, Erik; Menon, Anand; Weatherill, Stephen (eds.), The Oxford Handbook of the European Union, Oxford University Press, Oxford 2012, S. 121 - 134

¹⁸ Young Alasdair (2012) Trade Policy, S. 425, in: Jones, Erik; Menon, Anand; Weatherill,

ence with internal economic integration and liberalization among European elites was transferred to the EU's external trade strategy. This idea of 'EU trade policy as continuation of internal market policy by other means'¹⁹ rendered the EU's trade policy more liberal and prone to economic integration with external partners.²⁰

The "Market Access Strategy", established in 1996, exemplifies the increasingly proactive external trade policy since the 1990s. In an attempt to forge a political coalition with exporting European companies, European Commissioner for Trade Sir Leon Brittan declared a "D-Day for European Trade Policy" to more aggressively open foreign markets and remove trade barriers.²¹

The enlargement round in 2003 led to an extension of the common market to ten new members. Especially in agriculture, this enlargement pushed reforms: this sector covered the bulk of the EU's budget that time and it was the dominant sector for most of the new members. Applying the high European subsidies to them would have led to exploding costs. A substantial reform of the Common Agricultural Policy led to a reduction of subsidies and thereby changed the EU's position at the WTO – level at that time: Lower subsidies do not require high tariffs anymore to protect farm income against cheap imports. Thereby, the traditional roles between the dominant transatlantic WTO - counterparts at that time shifted: The EU became a more liberal trade actor whereas the US remained comparatively protective. Furthermore, enlargement increased the size of the European Single Market, rendering it more attractive for foreign producers and investors and therefore increasing the EU's leverage in trade negotiations.²²

The trade strategy "Global Europe: Competing in the world" (2006) represents another explicit turning point away from the previous moratorium on further EU bilateral agreements.²³ Since then the EU has initiated more

Stephen (eds.), *The Oxford Handbook of the European Union*, Oxford University Press, Oxford 2012, S. 422 – 441

¹⁹ Ferdi De Ville (2013/14) *EU Trade Policy as the Continuation of Internal Market Policy by Other Means* (S. 93 -103), in: Tamara Takács, Andrea Ott and Angelos Dimopoulos (Eds.), *Linking trade and non-commercial interests: The EU as a global role model?* CLEER Working Papers 2013/14, T.M.C. Asser Institute, Netherlands

²⁰ Ever since the 1980s a trend towards (neo-)liberal ideas in Europe can be observed. See Woolcock, Stephen (2005), *European Union Trade Policy: Domestic Institutions and Systemic Factors*, S. 238, In: Kelly, Dominic; Grant, Wyn, *The Politics of International Trade in the Twenty-First Century. Actors, Issues and Regional Dynamics*, Palgrave Macmillan, New York, S. 234-251

²¹ Shaffer, Gregory (1998) *Mechanisms for the Negotiation of International Trade Claims by Public Authorities on Behalf of Private Enterprises in the European Union: A Public-Private Partnership*, In: *American Society of International Law (eds.), Proceedings of the Annual Meeting*, Vol. 92, S. 212-225

²² Young Alasdair (2012) *Trade Policy*, S. 425, in: Jones, Erik; Menon, Anand; Weatherill, Stephen (eds.), *The Oxford Handbook of the European Union*, Oxford University Press, Oxford 2012, S. 422 – 441

²³ Siles-Brügge, G. (2013), 'The Power of Economic Ideas: A Constructivist Political Economy of EU Trade Policy', S. 598, in: *Journal of Contemporary European Research*. 9 (4), S.

and more bilateral agreements with economically strong partners (see chapter 2.2). Hereby, the EU followed the US approach to focus more on bilateralism than on the stalling WTO negotiations. Furthermore, the strategy “presents a more unambiguously interest-seeking rationalist-‘realist’ policy, prioritizing economic interests in other markets and economic balancing against competitors”²⁴. Followed by the subsequent “*Growth, Jobs and World Affairs*” strategy (2010), both strategies relinquished some normative aspects associated with its trade strategy in the past, putting a higher emphasis on competitiveness, growth, market opening and handling of emerging rivals. Normative aims like development, human rights and the environment remained present in EU trade policy.²⁵

The Treaty of Lisbon (2009) had three central effects on the EU’s external trade policy:²⁶

- (1) It extended the EU’s trade competences to foreign direct investment and intellectual property. This dispenses with almost all of the mixed elements in trade agreements that have created confusion both within the EU and among the EU’s trading partners. Since then, negotiations for EU-wide bilateral investment treaties (BITs, e.g. with China) and EU-wide comprehensive trade and investment agreements (e.g. TTIP with the US or CETA with Canada) have become possible. Until then it was in the national, i.e. a member state’s responsibility to negotiate individually national investment agreements. This extension of exclusive competences may reduce the number of cases where national parliaments have to approve trade agreements as being mixed ones (see chapter 4.2 for further details on the importance and controversies concerning investment policies), even though this can be a relevant political momentum?
- (2) The role of the European Parliament (EP) has been strengthened in three ways:²⁷ first, the EP’s competences in co-decision have been extended, e.g. regarding legal acts on topics such as anti-dumping and safeguards. Additionally, the European Commission (EC) is

597-617.

²⁴ García, M. (2013). ‘From Idealism to Realism? EU Preferential Trade Agreement Policy’, S. 535, in: *Journal of Contemporary European Research*. 9 (4), S. 521-541

²⁵ Evita Schmieg (2015) Trade and Investment Agreements for Sustainable Development? Lessons from the EU’s Economic Partnership Agreement with the Caribbean, available online: https://www.swp-berlin.org/fileadmin/contents/products/research_papers/2015_RP06_scm.pdf

²⁶ Stephen Woolcock (2010) The Treaty of Lisbon and the European Union as an actor in international trade, ECIPE Working Paper No. 01/2010, available online: <http://www.ecipe.org/app/uploads/2014/12/the-treaty-of-lisbon-and-the-european-union-as-an-actor-in-international-trade.pdf>

²⁷ Stephen Woolcock (2010) The Treaty of Lisbon and the European Union as an actor in international trade, S. 11 f., ECIPE Working Paper No. 01/2010, available online: <http://www.ecipe.org/app/uploads/2014/12/the-treaty-of-lisbon-and-the-european-union-as-an-actor-in-international-trade.pdf>

now legally obliged to inform regularly the EP during the process of trade negotiations. The power to influence the course of negotiations remains however very limited and the power to grant authority to the Commission to start negotiations remains exclusively in the hands of the Council. Only at the final stage, the EP has to approve any trade agreement now by simple majority. This makes the EP a new real veto player in trade negotiations.

- (3) Trade policy is now part of Article 205 (Part five External Action) as element of EU external policy. This raises the question as to whether there will be any increased tendency for the EU to use trade policy as an instrument of other policy objectives pursued by the EU under external action, such as foreign policy, environmental or development policy”²⁸.

The latest trade strategy of 2015, “Trade for all”, continues the EU’s objective to generate growth and jobs by way of market opening, deregulation, liberalization and increased competitiveness. Free Trade Agreements (FTAs) and the WTO are considered as instruments to achieve these ends, especially in the time of economic crisis and budgetary restraints. However, as a reaction to the growing criticism towards free trade policy, the EU also put a greater emphasis on values like transparency, sustainable development and human rights.

Box 1: Major changes in EU trade and investment policy over time

(1) Partner countries

- Shift towards competitive bilateralism
- Push for agreements with economically strong and distanced countries

(2) Priorities

- Increasingly complex issues addressed
- Increasing market access offered
- Setting global standards and norms
- Forging political partnerships by trade arrangements

(3) Decision process and competencies

- Unified external commercial policy defining FDI as EU competence
- Increased power of the European Parliament

²⁸ Stephen Woolcock (2010) The Treaty of Lisbon and the European Union as an actor in international trade, S. 13., ECIPE Working Paper No. 01/2010, available online: <http://www.ecipe.org/app/uploads/2014/12/the-treaty-of-lisbon-and-the-european-union-as-an-actor-in-international-trade.pdf>

3. The EU as trading and investing actor: facts and figures

3.1 Market power

While the EU still represents a large global market, some patterns differ among goods, services and investments:

(1) *On goods* in 2014 only 15 % of global trade was covered by the EU, (compared to 18% in 2003), whereas for instance China has increased its share from 5% (2000) to 15% (2014). The EU is the second largest importer of goods after the US (in 2014: €1,680 bn) and the second largest exporter after China (in 2014: €1,702 bn). Major export partners are the US, China, Switzerland, Russia and Turkey (2014) for the dominant product categories machinery, cars and chemistry products. Major import partners are China, US, Russia, Switzerland and Norway (2014) for the most important products fuels, lubricants and machinery.²⁹

(2) Regarding *services*, the EU takes a share in global exports of around 45% and of imports of 40%.³⁰ Exports go mainly to the US - attracting one third of EU's exports- , Switzerland and China, which are at the same time major origins for EU's services' imports. Major areas are for both, exports and imports services for companies, transport and travel services.

(3) *On investments*, the global European dominance is less ambiguous: the EU is the major attractor for foreign direct investments with €523 bn in 2013 (US: €142 bn). Accumulated until today the EU holds a share of all investments undertaken globally of 20%. Out of all investments flowing into the world, the EU holds 25%.³¹ Major investment sectors for inflows within the EU are services and the EU undertakes FDI mostly in the production sector, especially machinery (2013).³² Outflows mainly go to the US, Switzerland and Brazil, whereas inflows are coming from the US, Switzerland and Bermuda (2013).

This large market size as such founds a principal large power of the EU in shaping international norms in trade. Partners are interested in entering into the EU market and therefore they may be willing to follow the EU's approach. This idea of setting a "global standard" is for instance targeted by the Agreements with Canada (CETA) and the USA (TTIP) in order to set the scene against China.

3.2 Performance of the EU in terms of openness and legitimacy

The performance of the EU as trade actor will be first identified by *openness*,

²⁹ EU Commission, The European Union Trade Policy 2015, available at: http://trade.ec.europa.eu/doclib/docs/2011/august/tradoc_148181.pdf.

³⁰ UNCTAD Statistics, <http://unctadstat.unctad.org/wds/TableViewer/tableView.aspx>

³¹ EU Commission, The European Union Trade Policy 2015, available at: http://trade.ec.europa.eu/doclib/docs/2011/august/tradoc_148181.pdf.

³² Eurostat, <http://ec.europa.eu/eurostat/web/balance-of-payments/data/database>.

i.e. what type or degree of liberal trade (or border protection) the EU does apply. Additionally, the partners addressed by agreements indicate the type and degree of market opening, too.

As second dimension it will be analysed how European trade and investment policy is characterised by legitimacy and participation: This can be implemented by involving the European and national parliaments and stakeholders. In addition, the participation of developing countries will be looked at, as they often are weak partners without sufficient resources to take part in relevant negotiation procedures and bodies. Supporting their capacities thereby contributes to global fairness.

3.2.1 Openness of EU trade policy

(1) Effectiveness in terms of degree of liberalisation

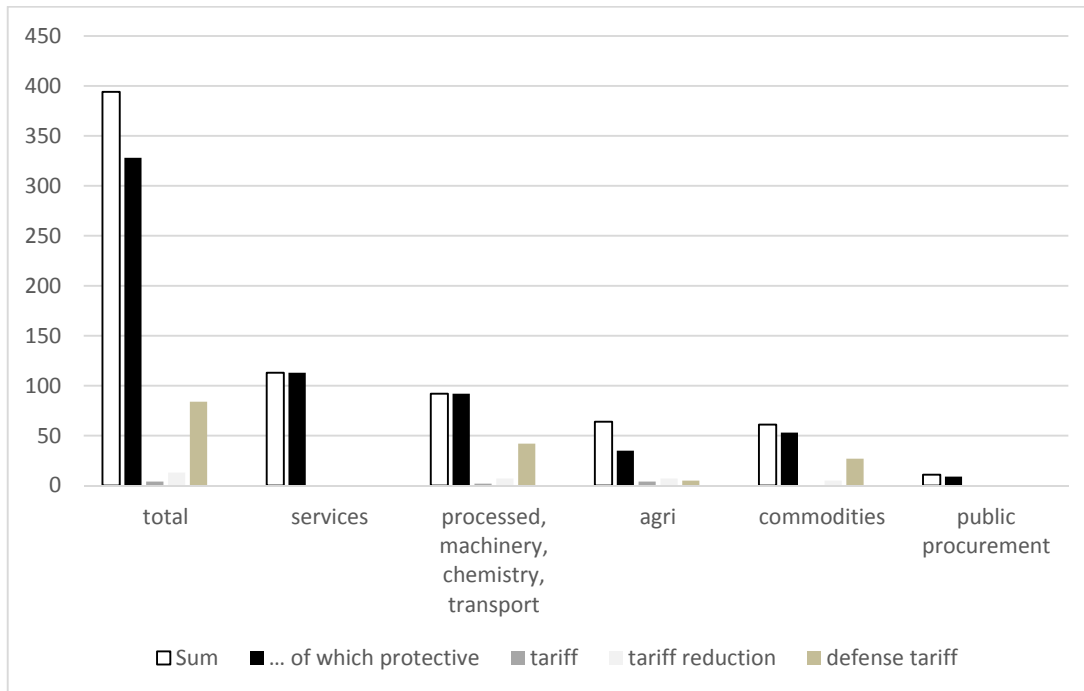
On trade, the EU changed protectionism over time: during the Uruguay round, it was seen as a closed actor with the highest tariffs (similar to Japan, Norway and Switzerland).³³ Nevertheless, since the beginning of the Doha Round the EU became a more market-open actor. However, since the financial and economic crises in 2008 a flashback towards protectionism can be observed worldwide as well as for the EU: Within the G20, the most dominant group in establishing new trade barriers, the EU is responsible for 10% of new protective measures since 2005 (330 in total). The focus lies on the service and machinery sector (graph 1), whereas agriculture and raw materials hardly were protected. Mainly those measures were used which are explicitly allowed by the WTO. These are trade defence measures (permitted if forbidden subsidies or dumping are applied by trade partners) or measures which fall under national competency in the EU, like certain state aid in crises.

Especially measures beyond tariffs, the NTMs, gained relevance even though they are difficult to calculate: it is assessed for the EU that the average tariff lies at 4% (US: 3%) whereas for NTMs a spectrum is assessed of 20-57% (US: 17-70%).³⁴

³³ Luzius Wasescha, Challenges for the multilateral trading system, Staatssekretariat für Wirtschaft, Bern, 2003.

³⁴ Bettina Rudloff, Food Standards in Trade Agreements, Differing regulatory traditions between the EU and the US and tips for TTIP, SWP comments 2014.

Figure 1: EU protection in different sectors (number of new measures in 2005-14)



Source: Global trade alert, data available at <http://www.globaltradealert.org/>

On investments, the EU seems to be more open and some Members proactively increased market access to other trade partners since the beginning of the economic and financial crisis: Germany for example adopts some partnership agreements on raw materials (Mongolia, Kazakhstan, Peru and Chile) in order to improve access to strategic raw materials for the sector of telecommunication.

(2) Partner and type of flexible liberalisation in different trade agreements

The EU established a large set of free trade agreements (FTA) which covers 30 out of more than 600 FTAs globally notified to the WTO (table 1).

The regional coverage of these FTAs became wider and increasingly addressed economically strong countries. One can observe a certain pattern of the different agreements:

- Trade rules with *candidate countries* are a traditional step in the accession process of the EU. This starts with a process to adopt all EU regulations (“*acquis communautaire*”) to build a common market. Hereby NTMs are harmonised in terms of using EU standards before accession. After acceding the EU, the common external tariff (CET) is used, thereby a customs union is established.
- Another traditional way of trade policy towards similar and neighbouring countries takes place within the *European Economic Area*. It addresses countries with comparable economic status but without (current) intention to join the EU (Norway, Iceland, and Liechten-

stein). Respective trade rules define bilateral free trade, however with exceptions – often on agricultural and fish products. The individual national tariffs remain – therefore only a free trade area instead of a customs union is established.

- *Other direct neighbours in the South and East* are engaged through the European Neighbourhood Policy; thereby trade is part of an overall setting of political approaches aiming at political stability.

(1) Trade with *Mediterranean countries* was already addressed in the 60s by Association Agreements. At that time, liberal trade often was offered only in a limited manner from both sides, the EU and the partner, by means of tariff rate quotas (TRQs): these offer only a limited quantity of reduced tariffs. Another limitation to complete free trade exists by excluding some sectors like, again, agriculture and fisheries. These agreements developed increasingly liberal over time in terms of extending TRQs and gradually including the so far excluded sectors. Especially the Mediterranean partners protected their borders for a long time, but a real reciprocal market opening was targeted: Due to the political instability in the Mediterranean countries, so far respective negotiations could be started only with very few countries (Morocco and Tunisia). Following the new idea of Deep and Comprehensive Free Trade Area (DCFTA), other measures than tariffs should be envisaged, too. An additional objective is to build a large free trade region among the EU and the partners. This assumes free trade among the partner countries what until today only hardly is achieved by the Mediterranean countries. Other problems remain on harmonizing NTMs between partners and the EU and on accepting each other's procedures to define and control standards. Only one Agreement on Conformity Assessment and Acceptance of industrial products (ACAA) could be adopted with Israel so far.

(2) For the *eastern partners* such complex agreements had been started from the scratch, as no precursor comparable to the Association Agreements with the Mediterranean region had existed with the former USSR. After the USSR's collapse respective negotiations were concluded with the new states Armenia, Georgia, Moldova and the Ukraine, but not ratified and thus have not entered into force yet or only provisionally (table 1). In force are agreements with Macedonia, Albania, Montenegro, and Bosnia and Herzegovina. The one with the Ukraine led to large political tensions between the EU and Russia, the latter accusing Russia for undermining the strength of the region and intra-regional agreements. It also became a symbol of growing rejection of the EU by right-wing parties and some parts of the citizens, as expressed by the negative Dutch referendum in spring 2016.

- *Trade Agreements with Developing countries* face a particular tradition for the EU. Due to the colonial history of many EU member states, several trade arrangements have existed for a long time – often with the aim of the European countries to benefit from imported raw material originating in the colonial state. From the very be-

ginning of the EU, such regimes existed for African, Caribbean and Pacific Group of States (ACP), offering an asymmetric free entry to the EU markets while protecting the own European market (“Yaoundé- and Lomé-Agreements”). A respective WTO exception allowed such asymmetric openings only for the EU but expired in 2007. Since then, reciprocal – i.e. the partners have to open their markets, too - European Partnership Agreements (EPAs) were negotiated to replace the former unilateral agreements. In addition to these agreements with individual countries, a general as well as unilateral scheme for developing countries exists with the General System of Preferences (GSP). This is based on the WTO’s “enabling clause” allowing for such unilateral approaches for developing countries only: a list of countries benefits from tariff reductions, least developed countries (LDCs) even from duty free within the “Everything but Arms” (EBA) initiative. An additional scheme (GSP+) offers duty free as well to other countries under the condition that certain governance requirements are fulfilled, like supporting human rights.

- *Wealthy and distanced countries* are proactively addressed since the EU communication on trade in 2006. The Commission started for instance negotiations with Japan in 2007, with Canada in 2009 and with the US in 2013. These newer agreements all follow the idea of complex DCFTAs addressing very different issues like investment, competition and public procurement. What can be noticed is that so far not many agreements with Asian countries could be finally concluded (Korea, Singapore, and Vietnam, table 1).

In sum, still nearly 40 % of EU’s trade in goods takes place outside any trade agreement. Out of the remaining 60%, only half of the related agreements are already concluded. This means, currently only 30% of EU’s trade volume for goods is regulated by trade agreements. The bulk of respective agreements were closed with neighbouring countries. With some dominant trade partners, agreements could not be concluded yet (Russia, China, and USA) (table 1).

Table 1: Share of trade in goods and state of FTA-negotiations

Country/Region	% EU Trade in Goods	Details on negotiations
USA	15,2	FTA under negotiation
China	13,8	No FTA negotiations (launched in 2007, stalled since 2011) But BIC under negotiation.
EFTA	11,2	Part of European Economic Area or FTA (Switzerland)
Russia	8,4	No FTA negotiations (negotiations until march 2014, then suspended)
MENA (excl. Turkey)	5,5	Association Agreements in force with most countries, deepening planned
ASEAN	5,3	Paused regional FTA negotiations. Bilateral negotiations with individual States ongoing or concluded
Gulf Cooperation Council (GCC)	4,4	FTA negotiations started, but stalled in 2008
ACP (excl. South Africa)	4	Several bilateral and regional FTAs/EPAs under negotiation/concluded/ratified
Turkey	3,8	Customs Union since 1995. Plans to update customs union to become part of TTIP
Japan	3,2	FTA under negotiation
MERCOSUR (5)	2,8	FTA under negotiation
South Korea	2,4	In force (2011)
India	2,1	Paused FTA negotiations since 2013, considering to resume
Canada	1,7	Concluded, not yet ratified
Mexico	1,4	In force (2001)
Hong Kong	1,3	No FTA negotiations
South Africa	1,2	In force (1999)
Taiwan	1,2	No FTA negotiations (but demanded by Taiwan)
Australia	1,1	No FTA negotiations (negotiations planned in 2017)
Ukraine	0,9	Concluded, not yet ratified
Andean Community (4)	0,8	FTA with Colombia, Peru concluded. Accession of Ecuador and Bolivia planned
Central America (6)	0,3	Concluded, not yet ratified
Other Countries	7,7	
Sum countries with FTA	61,8	
.. of which concluded	33,2	
.. of which not concluded	28,6	
Sum countries without FTA	37,9	

Source: EU, Overview on FTA and other Trade Negotiations update May 2016, available online: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf and several pages for individual countries under www.trade.ec.europa.eu.

Color-coding: Grey: Free Trade Agreement (FTA) at least under negotiation (light grey), or further progressed in terms of concluded or into force (dark grey); white: No FTA negotiations.

(3) Agreements' complexity

The different set of partner countries means at the same time to differentiate issues and rules covered. In general, there is a trend towards increased complexity:

- For *candidate countries*, the major idea always was a narrowing of regulations to build a common market. Therefore, NTMs and regulatory institutional cooperation always have been an accession condition serving at the same time as a means to enforce certain standards via the incentive of membership. To a lesser extent, this cooperation was valid as well with close neighbours. Today, these issues are increasingly addressed by agreements with strong and distanced partners like Canada and the US.
- All the *DCFTAs* include so-called Singapore issues, which were aimed to be integrated into the multilateral WTO system at the Ministerial in Singapore 1996 (investments, public procurement or competition rules). Due to the rejection of developing countries, this aim failed and these issues now are covered by bilateral agreements of industrialised countries.

Box 2: Key messages on openness

- Different trends in trade and investments
 - *Trade:* Following the global pattern the EU shifted its border measures from normal tariffs to “defensive” tariffs, which are allowed by WTO in case of prohibited measures applied by others
 - *Investments:* the EU remains more open compared to trade – especially during the economic crisis in 2008 even more opening measures had been introduced to attract capital
- New priorities: The EU increasingly seeks strong partners. Only few agreements were able to be adopted with Asian countries so far.
- New measures: According to the new DCFTAs approach, issues beyond tariffs and even beyond existing WTO rules are addressed like standards and competition rules.

3.2.2 Legitimacy

The Treaty of Lisbon changed the trade and investment policy in terms of the Parliament's power.³⁵ Additionally, stakeholder involvement and the treatment of developing countries have evolved.

(1) *In terms of parliamentary involvement at the EU-level*, the decision procedures now strengthen the European Parliament (EP). Still, the Commission runs the negotiations mandated by the Council of the European Union. The EP however has to ratify each agreement and can thus block an agreement in total, but only after the negotiations have been finished. This was not the case prior to Lisbon when assent was only required in exceptional cases. However, the EP cannot substantially change or amend an agreement. It can only approve or reject the complete text. The new power of the EP therefore lies in the continuous threat of rejecting the whole agreement if it is too far away from the EP's position. Furthermore, the Commission as negotiating actor is now legally required to inform the EP during negotiations. However, how far this duty has to reach is part of ongoing disputes as the current debate and criticism by parliamentarians on the TTIP negotiations reveal. Especially members of national parliaments claim a lack of transparency and of venues to influence the process: they only get insight into negotiation texts without the possibility for notes. In May 2016, the NGO Greenpeace published the confidential negotiation texts ("TTIP leaks") as part of their campaign against TTIP.

(2) *National parliaments* need to ratify so called "mixed agreements" which touch on areas falling in national competence, like social and cultural cooperation and certain types of investments not falling in the category of „direct“ investments (that are "portfolio investments"). The final character of an agreement – whether it is mixed or not - can only be seen at the very end, knowing all issues covered. The EU-Korea-Agreement and the ones with Peru and Columbia are mixed agreements for example. CETA has been defined as mixed agreement although Commission's legal experts precluded that. This step was a political concession towards member states within the very critical atmosphere. National ratification by all EU members can last several years and therefore agreements can be provisionally implemented before the final ratification. This may become a problem if one member state does not ratify at a later stage. A case in point is the Dutch referendum against the EU-Ukraine Association Agreement. This mixed agreement has been ratified by all EU member states except for the Netherlands so far. If the Dutch government were to follow the popular vote (32% of the Dutch participated in the vote, 61% of which rejected the agreement) "an unprecedented situation would emerge in which an EU international agreement cannot enter into force because a member state is not in a position to ratify it".³⁶ At the end of 2016, a

³⁵ EU Centre in Singapore, Implications of the Lisbon Treaty on EU External Trade Policy, Background Brief No 2, March 2010, p. 2

³⁶ Van der Loo, Guillaume (2016) The Dutch Referendum on the EU-Ukraine Association Agreement: Legal options for navigating a tricky and awkward situation, Center for

potential compromise could be reached by some amendments in the agreements guaranteeing to exclude Ukraine's Membership. This may make an adoption by Dutch parliament possible.

(3) *Stakeholder participation* is guaranteed by the EU through several venues. First, the Commission holds several kinds of regular meetings with civil society organizations³⁷ on bilateral and multilateral trade negotiation or on her Sustainability Impact Assessments. Second, every individual trade negotiation is accompanied by stakeholder briefings and consultations during and between the negotiation rounds. These first two venues are part of the so-called "Civil Society Dialogue" (CSD, founded in 1998). Third, if deemed politically and technically necessary, the Commission forms case specific formats to include interest groups, like the TTIP Advisory Group or the Transatlantic Business Dialogue (TABD), the latter of which helped prepare the negotiations for TTIP. Fourth, the EC is considering the idea to include interest group participation in the agreement's text itself e.g. by involving them in stakeholder committees (see chapter 4.1).

NGO's critics and scientists have voiced concerns that these venues do not live up to the self-proclaimed ambition of transparency and balanced interest group participation. This can be illustrated with two examples. First, an evaluation of the CSD commissioned by the EU itself finds that "current aspirations/goals do not match reality. The CSD is an information relay. Discussion is limited and there is no real debate. The CSD does not currently generate clear outputs to inform policy; consequently, there is a mixed picture of satisfaction among civil society organizations. Currently, the CSD provides a forum to allow the Commission to hear different views, it is less able to address concerns and improve policy and there are question marks over transparency. By answering questions on what the Commission really wants, it should be possible to define aspirations that better meet the Commission's goals for the CSD."³⁸

Second, the EU offers disproportionate access and influence for business interests in informal groupings compared to other stakeholders. To prepare for the TTIP negotiations, the EC formed a close political alliance with the TABD, a club of CEOs of the biggest European and US-American transnational firms.³⁹ The CEOs were granted highest-level access to

European Policy Studies, available online <https://www.ces.eu/publications/dutch-referendum-eu-ukraine-association-agreement-legal-options-navigating-tricky-and> About 80% of the agreements provisions fall under exclusive EU competences and can therefore be provisionally applied (including the Deep and Comprehensive Free Trade Area DCFTA, which is part of the Association Agreement). Source: Van der Loo (2016).

³⁷ The European Commission includes enterprises in its definition of civil society.

³⁸ Coffey International Development (2014) Evaluation of DG Trade's Civil Society Dialogue, final report, p. 8. Available online: http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152927.pdf

³⁹ Coen, David; Grant, Wyn (2005), Business and Government in International Policymaking: The Transatlantic Business Dialogue as An Emerging Business Style?, In: Kelly, Dominic; Grant, Wyn (eds.), *The Politics of International Trade in the Twenty-First Century. Actors, Issues and Regional Dynamics*, Palgrave Macmillan, New York, S. 47 – 70

decision makers, while representatives from trade unions, consumer groups or NGOs were only given second hand offers or were excluded.⁴⁰

This lack of viable venues for participation and the imbalance of different interest groups damage the legitimacy of EU trade policies and spurs civil society protests – like those against CETA and TTIP.

(4) *Transparency* has increasingly become an issue during the TTIP (and less the CETA) negotiations as protests against the treaty gained in strength. Even though the EU has reacted by offering information on the negotiation positions – something unique worldwide – its counterpart, the US, does not support any further opening and allows even only limited access for parliamentarians. The TTIP leak in May 2016 by Greenpeace pushed the public interest for more information, a public demand that should be addressed in the future.

(5) *Developing countries* and their specific needs are addressed as objectives of the EU in the context of trade policy and the overall external action (Art. 205 TFEU): the texts express the intention to reduce poverty, to support democracy and to integrate all countries in the world economy. Several agreements have been exclusively negotiated with developing countries and have introduced the possibility for either less ambitious commitments (EPAs, GSP) or longer transition phases or more safeguards compared to developed countries. However, the EU does not address the indirect (and potentially negative) impact of large regional agreements like TTIP on developing countries.

Cowles, Maria Green (2001a), The Transatlantic Business Dialogue and Domestic Business-Government Relations, In: Cowles, Maria Green; Caporaso, James; Risse, Thomas (eds), *Transforming Europe*, Cornell University Press, New York, S. 159 - 179

⁴⁰ Bignami, Francesca; Charnovitz, Steve (2001), Transatlantic Civil Society Dialogues, In: Pollack A. Mark, Shaffer C. Gregory (eds), *Transatlantic Governance in the Global Economy*, Rowman & Littlefield Publishers, Inc., Maryland, S. 255 – 268

Knauss, Jody; Trubek, David (2001), The Transatlantic Labor Dialogue: Minimal Action in a Weak Structure, In: Pollack A. Mark, Shaffer C. Gregory (eds), *Transatlantic Governance in the Global Economy*, Rowman & Littlefield Publishers Inc., Maryland, S. 235 - 254

Box 3: Key messages on legitimacy of EU's trade policy

- The *European Parliament* has to vote on every FTA and thus became a veto player in trade policy. Still, there is need for clarification how far the information requirements of the Commission towards the EP will reach in reality.
- The *national parliaments* lost power in the area of direct investments, as they fall now into sole EU competence. However, they still have to ratify mixed agreements.
- *Stakeholders* can influence trade politics through formal (Civil Society Dialogue) and informal (groups like the TABD) venues. Critics point to the disproportionate influence of business groups compared to other groups.
- *Transparency* has only recently been addressed by the Commission, as protests started to threaten the whole negotiations.
- The interests of *developing countries* are only partially addressed by the EU.

4. Special cases: regulations and investments in EU Agreements

Regulatory cooperation and investments are two new issues in the increasingly complex EU trade agreements. These issues can be used to demonstrate typical EU positions that are sometimes in conflict with other countries' approaches or WTO rules. Both are issues of high public sensitivity as the political controversies over CETA and TTIP show. They touch on the tension between liberal trade and the national sovereignty to establish national policies on sensible areas like food safety, public health and the environment.

4.1 Regulatory Cooperation

The OECD identifies a wide array of existing International Regulatory Cooperation (IRC) mechanisms ranging from supranational institutions (very deep cooperation e.g. through the EU institutions) to informal dialogues (soft, non-binding cooperation through exchanges of information).⁴¹ Despite the fact that regulatory cooperation has been growing steadily in the past decades⁴² there is no generally recognized definition, given the wide variety of practices.

The EU aims to narrow regulation with its trading partners in order to

⁴¹ OECD (2013) International Regulatory Co-operation – Addressing Global Challenges, p. 23 ff., available online: <http://www.oecd.org/gov/regulatory-policy/irc.htm>

⁴² OECD (2013) International Regulatory Co-operation – Addressing Global Challenges, p. 20, available online: <http://www.oecd.org/gov/regulatory-policy/irc.htm>

reduce regulatory burden and thereby costs for business, to promote an effective, pro-competitive regulatory environment and to learn from and develop common regulatory practices.⁴³ “Regulation” in regulatory cooperation refers thereby to all important legislative acts on the EU-level, which touch on the trade of certain goods, services and investments.⁴⁴

Older agreements – i.e. before CETA and TTIP - only limited their regulatory scope to specific issues like sanitary issues and technical barriers and the provisions differ between agreements (EU-Chile, EU-South Korea, EPAs). The outcome of such cooperation can take different forms:

- *Harmonization* at EU level is the objective of accession by implementing the *acquis*. It ends in identical product or process standards applied by candidate countries at EU level or at any level to be defined in other trade agreements.
- *Equivalence* is already suggested by the WTO in the area of food standards (SPS Agreement Art. 4) to accept foreign standards if the same safety level can be assumed. This has to be justified by the exporter. This approach is implemented by existing EU Veterinary Agreements with several countries (Canada, US) for selected lists of animal products. They define for what products (positive list) complete or only conditioned equivalence is agreed on. For the latter, the country has to first fulfil defined requirements prior to acceptance. Very often only a limited number of products is addressed, of which again only very few are seen as equivalent.
- *Mutual Agreements of Recognition* is the general acceptance of each other’s regulatory system. As a result, they define acceptance not only within positive lists for single products or standards but also for a whole sector or a whole country. For example, the ACAA between the EU and Israel defines it for industrial products. Another example is the Mutual recognition Agreement with the US on several different products like medical products, labour security and marine equipment.

The new regulatory chapters in CETA and TTIP go deeper than the former chapters limited to certain sectors, as they are, firstly, applicable to any sector. Secondly, they include the future perspective: whereas the three mentioned possible outcomes address existing standards defined in legal acts, the modern regulatory approach is linked to an *ex-ante* exchange prior to defining standards.

The already consolidated text of CETA gives concrete insights into the functioning of regulatory cooperation in CETA. Chapter 21 “Regulatory

⁴³ See Article X.1: EU: General Objectives and Principles in the TTIP position of EU leaked by Greenpeace, April 2016. Available online: <https://www.ttip-leaks.org/hektor/doc9.pdf>

⁴⁴ “Regulations and directives” and “delegated and implementing acts” within the meaning of Articles 288, 290 and 291 of the Treaty of Lisbon. Source: Article X.2: Definitions and Article X.3: Scope, in the TTIP position of EU leaked by Greenpeace, April 2016. Available online: <https://www.ttip-leaks.org/hektor/doc9.pdf>

Cooperation”⁴⁵ creates a “Regulatory Cooperation Forum” (Article 21.6), which is composed of government officials and “interested parties” upon invitation, to institutionalize regulatory cooperation. The “regulatory cooperation activities” (Article 21.4) include “ongoing bilateral discussions on regulatory governance”, exchanges of information on regulatory processes which “should begin as early as possible in that process”, allows “interested parties to provide comments in writing”, the conduct of “joint risk assessment and a regulatory impact assessment” and more.

Here, critical voices claim that regulatory cooperation opens an additional venue for trade partners and interest groups to influence regulation even before it reaches the European Parliament, therefore stalling regulation in the European general interest (“regulatory chill”). The planned regulatory cooperation bodies composed of administrative experts and interest groups are particularly criticized. Formally, they do not have legal competence themselves. However, for example in the case of CETA, the agreement-wide joint trade committee may extend annexes, which include as well equivalence lists for food. However, it only can do so in combination with the normal procedures of the contracting partner. In the EU this would be – as it always was the case as well for previous agreements - a council decision, i.e. without the European Parliament.

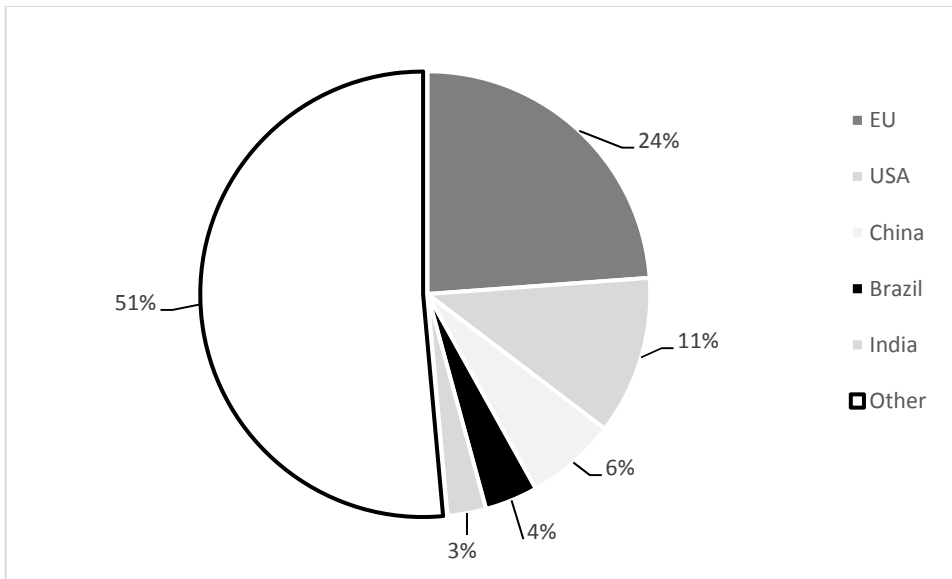
A European speciality of rules relevant to regulation is the **precautionary principle**, addressed by the Treaty of Lisbon (Article 191, paragraph 2, TFEU). It states that authorities must intervene as long as harmfulness of a certain approach or production has been proven - something hardly possible for any new technology. The European approach often clashes with other countries’ attitudes and even with WTO ruling: the US is focussing on a science-based or “after caring” approach, although this had not been always the case.⁴⁶ It initiates public action only if a damage can be proven. The current US approach is closer to the WTO ruling: the WTO refers in some areas of potential risks to existing standards (Codex Alimentarius for food standards) for which an international scientific consensus is assumed. A deviation towards stricter standards has to be supported by a scientific risk assessment. The WTO only addresses a limited precautionary principle for food safety: provisional measures can be applied but a risk assessment has to be carried out at a later stage (Art. 5.7 SPS Agreement). This specific European understanding has led to a situation where the EU is the actor most often accused in WTO disputes or formally requested to explain its ruling under the complaints’ notifications (graph 3).

⁴⁵ See Comprehensive Economic and Trade Agreement (CETA), consolidated text, p. 173 ff., available online:

http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

⁴⁶ David Vogel, The politics of precaution, 2012.

Graph 3: Requests on new legal food notifications (WTO complaints 1995-2014, % against country)



Source: WTO database on specific trade concerns, available at <http://spsims.wto.org/web/pages/search/stc/Search.aspx>.

Box 3: Key messages on EU's regulatory cooperation

Different forms of regulatory cooperation have existed for a long time. In its new generation trade agreements, the EU wants to include chapters for deeper regulatory cooperation in order to reduce unnecessary regulatory burden for businesses, promote an effective, pro-competitive regulatory environment and to learn from and develop common regulatory practices. Critics see this deeper regulatory cooperation as additional venue for business interests and as danger for regulation in the general interest.

4.2 Investments

Until today, investment issues have always been treated in bilateral agreements since no far-reaching agreement on rules for investment could be reached at multilateral level. The WTO- Agreement on Trade-Related Investment Measures (TRIMs) only refers to market access of investors ("pre-establishment") to foreign markets and some specific access rules can be found in the General Agreement on Trade in Services (GATS). The protection of investors after entering the foreign market ("post-establishment") has always been addressed in bilateral investment agreements (BITs). The EU and its member states implemented half of the global 3000 BITs. Before the Treaty of Lisbon, single member states concluded national BITs. The bulk of these national BITs has been concluded-

ed by the UK, Germany and the Netherlands, with Germany being the first country to sign a BIT with Pakistan in the 1960s. The new ones will be only EU-wide or part of EU-Trade Agreement, as it is in the case of CETA and TTIP.

Out of the 1500 EU BITs 200 are intra-EU-Agreements, originating in the time before the involved countries joined the EU – like the BITs between Poland and Germany and Poland and France.⁴⁷ Very recently, the European Commission requested to terminate such BITs.⁴⁸ Some experts argue that the EU is in the process of creating a new EU-wide model for BITs, going beyond the old EU member state BITs [which] contain some of the last vestiges of international economic law's *laissez-faire* liberalism. They are for the most short instruments, one-sided focused on investment protection in favour of the company, and do not incorporate exceptions relating to essential security, human rights, the environment or other public interests” to the benefit of the target countries’ society,⁴⁹

Based on earlier improvements in investment law originating in the USA and Canada and given the new competences and obligations of the Treaty of Lisbon, the EU could create a new, European model for BITs taking into account the space for national policies (“right to regulate”).⁵⁰

Through new EU-wide agreements like TTIP and CETA, the EC wants to end with the “spaghetti bowl” of many different national BITs and create a new European standard for investment chapters. In general, EU BITs address typical elements like fair and equitable treatment, prohibiting expropriation without compensation and they include Investor-State Dispute Settlement (ISDS), a procedure of a private mechanism outside the normal legal jurisdiction.

The changes in the European approach to investment law can be illustrated through the new *European Commission’s proposal*: After strong protests especially regarding TTIP negotiations, the European Commission suspended further negotiations on this topic and started a consultation. After the consultation procedure, the European Commission and the German government came forward with reform proposals:⁵¹ an appeal option, an

⁴⁷ Cecilia Olvet: Intra-EU BITs, A test for European solidarity, February 2013.

⁴⁸ Italy, the Czech Republic and Ireland already ended respective Agreements. Romania, Poland, Denmark announced to do soon and Austria, Finland, France, Germany, and the Netherlands issued a proposal how to end all of these für the whole EU. European Commission, Press release, Commission asks Member States to terminate their intra-EU-BITs, Brussels, 18 June 2015. Hogan Lovells, Romania to terminate its intra-EU Bilateral Investment Treaties, in: Lexology, September 29 2016, at <http://www.lexology.com/library/detail.aspx?g=00ca7288-468a-4344-8f53-0e03181f14e6>

⁴⁹ Titi, Catharine (2015) International Investment Law and the European Union: Towards a New Generation of International Investment Agreements, in: The European Journal of International Law Vol. 26 no. 3, p. 657.

⁵⁰ Titi, Catharine (2015) International Investment Law and the European Union: Towards a New Generation of International Investment Agreements, in: The European Journal of International Law Vol. 26 no. 3, p. 639 – 661.

⁵¹ European Commission (16 September 2015): Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations, available online: http://europa.eu/rapid/press-release_IP-15-5651_en.htm and Michael Kjrjewski, Model-

independent international court/tribunal and predetermined judges should be introduced.⁵² The *German paper* additionally suggested a certain sequence of using ISDS and national courts to avoid parallel cases.

Finally, the *investment chapter within CETA* was changed even after the formally concluded negotiations. The new chapter integrates all reform ideas: it strengthens the right to regulate, i.e. to define exceptions for future legal changes not to be accused as indirect expropriation. It aims at reducing ambiguities, increasing transparency and it institutionalizes a permanent dispute settlement tribunal, establishes an appeal system and requires following jointly multilateral mechanisms, which support a real international court system.⁵³

It will replace all existing BITs of seven member states (Poland, Hungary, Croatia, Latvia, Romania, Slovakia, and Czech Republic).

Concerning TTIP it is still unclear to what extent the US government will be open to the EU's proposed changes. According to the TTIP leaks in spring, in 2016 there are still significant differences in the negotiations.

In more than half of the 600 documented cases, the companies claiming originate in the EU. German investors claimed in 50 cases.⁵⁴ This indicates the relevance of these procedures especially for European companies. Between Canada and European Member states four cases occurred, all complaints from Canadian companies (Romania, Czech Republic, Slovakia, and Croatia). Therefore, the EU and especially Germany could play a relevant and active role in further improving existing rules.

The recently concluded EU-Vietnam Agreement already completely copied the Canadian investment chapter. The soon starting negotiations with New Zealand and Australia could follow. The more this model will be implemented the stronger could be the position to use it for example facing China within the started EU-BIT negotiations.

Box 4: Key messages on EU's Investment Agreements

Since the Treaty of Lisbon, (foreign direct) investments have become a sole competency of the EU, transferring the mandate to negotiate the issue to the European Commission. Regarding the rules, the EU is reforming its approach to investment treaties, going beyond the old model BITs of its member states and responding to criticism against one-sided privileges of investors but target countries' society.

Investitionsschutzvertrag mit Investor-Staat-Schiedsverfahren für Industriestaaten unter Berücksichtigung der USA, Gutachten für das BMWi, 2015.

⁵² Stephan Schill LL.M. (NYU) for the Federal Ministry of Economics and Energy regarding the "Impact of the provisions on investment protection and on investor-state dispute settlement in the draft Free Trade agreement between the EU and Canada (CETA) on the scope for the legislature to act, 2014.

⁵³ European Commission, In focus: Comprehensive Economic and Trade Agreement (CETA), available online: <http://ec.europa.eu/trade/policy/in-focus/ceta/>

⁵⁴ ICSID and iisd databases.

5. Challenges and policy implications for a future EU trade and investment policy

Challenge 1: Increased complexity of agreements

The stalling WTO negotiation not only led to more bilateral FTAs but also to increasingly complex ones even beyond the WTO's scope. Especially EU agreements go beyond the WTO frame compared to US agreements that are closer to WTO rules and therefore easier to be enforced by the WTO dispute system.⁵⁵ This complexity means, on the one hand, that tailor-made agreements can be concluded without waiting for final WTO solutions. On the other hand, it increases the risk of WTO disputes and undermines efforts to reach multilateral consensus in the WTO.

Weaker countries are particularly at risk: For instance, EPA partner countries or Mediterranean countries often cannot fulfil standard requirements as part of modern agreements and therefore cannot benefit from the offered tariff reductions. They need more support to implement these new trade requirements. Furthermore, as third countries outside of bilateral agreements they face new external standards to be fulfilled without taking part in the decision process. The same is already relevant at the multilateral level as weak countries often cannot participate in underlying decision processes, e.g. for food standards in the respective organisation of the Codex Alimentarius Commission. As the EU has a uniquely long tradition both on trade agreements with developing countries and on regulatory cooperation, it should become a proactive actor for supporting development by trade rules.

Challenge 2: Bilateralism hype and new protectionism

Multilateralism and bilateralism must not necessarily be opposites – bilateral arrangements can be proactively used to push for progress on the multilateral level. Especially on issues beyond the WTO, club solutions may help regulatory cooperation among like-minded countries that may extend their cooperation to others in a second step.⁵⁶

In bilateral agreements, a gradual integration of third countries into these agreements should be envisaged. The EU followed such a regional approach from the very start of negotiations with its southern and eastern partners and with the EPAs. An extension of originally bilateral CETA and TTIP to third countries could also be an option as it is at least mentioned in the new EU trade strategy. In following this strategy, the EU would follow an approach that is already being used in other agreements like the Trans-Pacific Partnership (TPP). Very exceptionally, CETA addresses the multilateral level by requiring that both parties have to support multilateral rules for the investment disputes and by following multilateral principles for agricultural subsidies. One important element would be to integrate simplified rules of origins and harmonized preferences between

⁵⁵ Horn, H., Mavroidis, P. C. and Sapir, A. (2010), "Beyond the WTO? an anatomy of EU and US preferential trade agreements", *The World Economy* 33(11).

⁵⁶ Petros Mavroidis, *Opposites attract? Bringing the trade and regulatory communities together*, April 2015, blog E15 Initiative.

partners in bilateral agreements – for example, the GSP of the EU differs from the one of the US. In addition to such an opening of EU agreements, a position on how to interconnect existing megaregionals would also be important: so far, there is no explicit EU position on how to coordinate among different agreements.⁵⁷

Another new future challenge is the risk of a phase of new global protectionism. After the US election, the future American government published its envisaged trade agenda encompassing a whole set of protective measures: The TPP is planned to be stopped, NAFTA may be renegotiated or cancelled and anti-dumping tariffs against China are foreseen to support American competitiveness. Even though not explicitly mentioned, TTIP negotiations probably will be postponed. If affected trading partners like China will react by own protective measures a type of “trade war” may arise. The EU already declared “to put TTIP in the freezer”. However, the EU should proactively use this offered break to conceptually rethink its own trade policy. New concepts and narratives are relevant in the face of increasing fear towards globalization.

Challenge 3: Transparency and participation in a new generation of trade agreements

The protests against TTIP, the Dutch referendum on the EU-Ukraine Association Agreement and the Brexit vote reveal the deeply rooted scepticism against EU trade policy and even the EU as a whole. This popular mistrust must be seriously addressed with concrete measures:

Transparency. A minimal requirement for a credible democratic process is the strengthening of the EP and national parliament’s rights to access documents to make informed decisions. Some improvements are in place already, like the publication of some position texts. However, still only a limited number of interim steps are made public. In addition, even national parliamentarians only gained the possibility for limited insight in closed and protected rooms at a late stage – despite the possibility that the agreement may be a mixed one to be ratified nationally what requires a sound information basis. The new strategy explicitly mentions increased transparency by extending the new TTIP approach to all negotiations. It remains to be seen whether this will entail a serious move towards transparency.

Participation. For the new generation of trade agreements to be legitimate and to be accepted by the people, all stakeholders need to be able to participate in a fair and balanced manner. The European Commission’s own study⁵⁸ on the problems of the Civil Society Dialogue provides a critical analysis and reasonable recommendations to tackle this problem: fundamentally reform the CSD to create an output-oriented institution

⁵⁷ San Bilal, Clara Brandi, Max Mendez-Parra, The new EU trade and investment strategy: The proof of the pudding is in the eating, The current column, 16 October, DIE.

⁵⁸ Coffey International Development (2014) Evaluation of DG TRADE’s Vicil Society Dialogue. Available online: http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152927.pdf

that is taken seriously during negotiations. Only in integrating trade unions and civil society groups in trade policy through venues like the CSD can the EU as a whole defend itself against the reproach that it mostly listens to big business.

Challenge 4: Rising Powers

The conclusion of the megaregional TPP between the US and several Pacific countries (excluding China) has put pressure on the EU's trade policy in the past: this new trade block covers a market share of 40% of global trade and therefore may weaken the EU's position on global markets. Moreover, it pushed the EU into a weaker position during the TTIP negotiations as the US can rely on the market power of this megaregional. However, after the potential TPP's end due to the future American trade strategy the EU could now take a step towards China and other emerging powers. Thereby the EU could regain a stronger position against the US. Such an agreement could build upon the BIT negotiations with China since 2013 and should be open for other Asian third countries. However, here it will be sensible how to balance economic interests and other values like labour rights and environmental protection. CETA (and possibly TTIP depending on its future) could be used as a standard for a serious reform of existing trade and investment treaties that could then be used as a model for treaties with emerging countries or China. Something already happened within the EU-Vietnam agreement as far as investments are concerned: this Agreement completely copied the respective chapter, as it is part of CETA, indicating a potential model character of CETA.

Challenge 5: Preventing disintegration and new protectionism

There is a serious threat of European disintegration. The ongoing economic crisis in the European south, the refugee crisis, the increasing strength of nationalist and populist parties, the deep-rooted mistrust against European elites, the protests against EU trade policy and the rise of EU-sceptic referenda culminating in the Brexit vote – this multitude of crises is confronting the EU with its biggest political and economic challenges since decades.

A political reform of trade policy is indispensable to respond to these crises. Only in enhancing transparency and participation, the EU can gain the political legitimacy to be able to negotiate economic agreements that are needed for economic growth and jobs.

Challenge 6: Balancing trade policy with other European values

FTAs offer potential to spur economic activities, generate growth and jobs. However, the effect of these economic objectives on other European values has to be carefully evaluated. On the one hand, trade and growth are essential to sustain the means to provide public services like climate protection, the people's material wellbeing and thus their support for democracy. On the other hand, extensive investment protection and efficient but opaque policies can undermine democratic decisions, the balance of power between interest groups and other values like environmental protection. To find the right balance between European economic

interests and European values will be one of the major challenges for European trade policy.

6. Conclusion

EU trade policy is faced with an amplitude of changes and challenges. The distribution of global power is shifting towards emerging powers and the competition for market share and standards has replaced multilateral agreements with bilateral and regional agreements. In this new environment, the Treaty of Lisbon has equipped the EU with new exclusive competences to negotiate comprehensive EU-wide trade and investment agreements, including new issues like regulatory cooperation and non-tariff measures. At the same time, in the context of multiple European crises, EU trade policy have become more controversial than ever, spurring the necessity of serious reforms.

Europe should use its economic power to develop and promote new standards in trade policy that respect European values like global welfare, democracy, environmental protection and labour rights. A first step can be seen in CETA, which addresses several of the sensible issues, and the Agreement with Vietnam copied the reformed investment chapter.

Abbreviations

ACAA – Agreement on **Conformity Assessment** and Acceptance of industrial products

ACP – African, Caribbean and Pacific Group of States

BIT – Bilateral investment treaty

BRICS – Brazil, Russia, India, China and South Africa.

CEO Chief Executive Officer

CET – Common external tariff

CETA – Comprehensive Economic and Trade Agreement

CSD – Civil Society Dialogue

DCFTA – Deep and Comprehensive Free Trade Area

EBA – Everything but Arms

EC – European Commission

EMU – Economic and Monetary Union

EP – European Parliament

EPA – European Partnership Agreement

FDI – Foreign Direct Investment

FTA – Free Trade Agreement

GATT – General Agreement on Tariffs and Trade

GSP – General System of Preferences

IRC – International Regulatory Cooperation

ISDS – Investor-State Dispute Settlement

LDC – Least developed countries

NAFTA – North American Free Trade Agreement

NTM – Non-tariff measure

SEM – Single European Market

TABD – Transatlantic Business Dialogue

TFEU – Treaty on the Functioning of the European Union

TPP – Trans-Pacific Partnership

TRIM – Trade-Related Investment Measure

TRQ – Tariff rate quotas

TTIP – Transatlantic Trade and Investment Partnership

WTO – World Trade Organization