The Reform of the Common Commercial Policy

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I. Introduction

The Treaty of Lisbon introduced a number of significant institutional and substantial changes in the law governing the external relations of the European Union.¹ Many of these were already foreseen in the Treaty establishing a Constitution for Europe.² In particular, the Lisbon Treaty preserved the provisions of the Constitution Treaty regarding the common commercial policy, which is why the respective analyses of these provisions remain by and large valid.³

The Lisbon Treaty's changes of the law of the common commercial policy deserve special attention for at least two reasons: first, external trade policy is still the most important field of EU external relations in practical terms.⁴ The EU is one of the key players of the multilateral trading system and increasingly pursues bilateral and regional trade agreements with strategic partners throughout the world.⁵ Second, the debates about the scope, nature and


instruments of the common commercial policy as well as the changes introduced through the treaty reforms of Amsterdam and Nice suggest that this policy field is characterised by a set of fundamental constitutional disputes. They concern the distribution of competences between the Union and its Member States, the powers and functions of the EU's institutions and the values and policy goals underlying the formation of the common commercial policy. The present contribution will therefore analyse the changes of external trade policy focussing on principles and objectives, competences and institutions. It begins by situating the common commercial policy in the framework of the treaties and then moves to a discussion of the substantive and procedural reforms of the common commercial policy introduced by the Treaty of Lisbon.

II. Location and context of the EU’s external trade law

The provisions on the common commercial policy in the Treaty on the Functioning of the European Union (TFEU) can be found in Articles 206 and 207 TFEU which amend and modify former Articles 131(1) and 133 of the Treaty Establishing the European Community (TEC). Article 131(2) TEC which contained a reference to the favourable effect of the 

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abolition of customs duties between Member States on the competitive strength of undertakings has been abolished because the provision had no specific legal meaning and was redundant. Furthermore, the Lisbon Treaty eliminated the former Article 132 TEC on the harmonization of state aid for exports to third countries, because this provision was never used.\(^8\) It should be noted that export aids are in any event a subject matter covered by the scope of Article 133 TEC (now Article 207 TFEU).\(^9\) Finally, Article 134 TEC on requisite measures in case of trade diversion or economic difficulties due to the execution of the common commercial policy was also not included in the reformed provisions on trade policy, because it was deemed incompatible with the internal market and has not been applied since 1993.\(^10\)

Articles 206 and 207 TFEU form Title II of Part V of the Treaty on the Functioning of the European Union, which is entitled “External Action by the Union”. Unlike the Constitutional Treaty which also included the provisions on the common foreign and security policy (CFSP) in this part of the treaty,\(^11\) the Lisbon Treaty kept the CFSP in the Treaty on European Union (TEU).\(^12\) The separation of the CFSP from the other external policies resembles the former pillar structure of the European Union which included the CFSP in the second pillar while the common commercial policy – as the “façade” of the common market\(^13\) – constituted an element of first pillar, the European Community. Furthermore, both the

\(^8\) European Convention, Draft Articles on external action in the Constitution (April 2003 Draft of the Constitution), 23 April 2003, CONV 685/03, p. 55.


\(^10\) April 2003 Draft of the Constitution (n 8 above) 55.

\(^11\) On the common framework of the EU’s external actions in the Constitution Treaty see Cremona (n 2 above) 1352-1353.

\(^12\) Articles 23 to 41 TEU.

Constitution and the Lisbon Treaty maintain institutional and legal differences between the CFSP and the traditional external policies of the European Community.

Unlike the CFSP, the other external policies, such as development cooperation (Articles 208-211 TFEU), economic, financial and technical cooperation (Articles 212-213 TFEU), humanitarian aid (Article 214 TFEU) and restrictive measures (Article 215 TFEU) are included in the TFEU's Part V. Part V also contains a general provision (Article 205 TFEU) which stipulates that the EU's external policies shall be guided by the principles and objectives laid down in the general provisions on the Union's external action in the Treaty on European Union. Furthermore, the rules applying to the conclusion of international agreements (Articles 216-219 TFEU) and the relations with third countries and international organisations (Articles 220 and 221 TFEU) as well as the solidarity clause (Article 222 TFEU) are also included in Part V of the TFEU. All provisions of this part of the TFEU constitute the context of the common commercial policy.

III. Principles and objectives

The common commercial policy is subject to two layers of principles and objectives: Article 206 TFEU, which is based on former Article 131(1) TEC contains the specific trade policy objectives and can be considered the inner layer of objectives. The general objectives and principles of Union's external policy as laid down in Article 21 TEU also apply to the common commercial policy by reference of Article 205 TFEU. They form an outer layer of principles and objectives for the common commercial policy. There is, however, no hierarchy between the two layers and all objectives are of equal relevance for the common commercial policy.

1. Specific policy objective: Gradual trade liberalization
The specific policy objectives of the common commercial policy according to Article 206 TFEU continue to be the harmonious development of world trade, the progressive abolition of restrictions on international trade and lowering of customs and other barriers. In addition, Article 206 TFEU introduces the abolition of restrictions on foreign direct investment as a further objective which was not part of Article 131(1) TEC. This reflects the extension of the scope of the common commercial policy to foreign direct investment according to Article 207(1) TFEU.\(^{14}\) The objectives of Article 206 TFEU refer to trade liberalization, but they do not indicate a free trade policy. Instead, the wording indicates that the process of trade liberalization shall be a gradual one.\(^{15}\) In this respect, the objectives of Article 206 TFEU resemble the objectives of the world trading system.\(^{16}\)

The Treaty of Lisbon did not change the contents of the specific policy objectives of the common commercial policy much (with the exception of the inclusion of investment liberalization), but it modified their addressees and legal nature. While the TEC referred to the Member States as actors, Article 206 TFEU uses the Union as grammatical subject and underlines the predominant role of the Union as an actor in external trade policy. More importantly, Article 206 TFEU turns the gradual trade liberalization into a binding objective.\(^{17}\) Article 131(1) TEC only contained an aspiration (‘Member States aim to contribute to …’). Contrary to this, Article 207(1) TFEU uses the word ‘shall’, which denotes an obligatory character of the liberalisation objective.

\(^{14}\) See below IV.2.c).

\(^{15}\) Dimopoulos (n 4 above) 155-157.

\(^{16}\) See the preambles of the Marrakesh Agreement Establishing the World Trade Organization and of the General Agreement on Tariffs and Trade 1947 (‘...substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce...’).  

\(^{17}\) Dimopoulos (n 4 above) 160.
The binding nature of this trade policy objective introduced through the Lisbon Treaty has been interpreted as a prohibition of the removal of liberalisation commitments such as tariff concessions or market access commitments in services because such a “step back” would contradict the objective of gradual trade liberalisation.\textsuperscript{18} This reading of Article 206 TFEU seems too strict. It overlooks that the Union is only obliged to contribute to trade liberalisation, but not to pursue it under any circumstances. Furthermore, Article 206 TFEU states the objectives of the external trade policy, but not its means. The removal of tariff concessions or of services market access commitments is a particular trade policy instrument, which may also contribute to the gradual liberalisation of trade in the long run. For example, the modification and partial removal of GATS concessions of the EU as a result of the Union’s enlargement in 2004\textsuperscript{19} lead to the harmonisation of services concessions within the EU and contributed to an overall lowering of trade restrictions as stipulated in Article V:4 GATS. Whether or not a tariff or market access commitment can be withdrawn or modified is not a question to be answered on the basis of Article 206 TFEU, but by the respective rules of the World Trade Organisation in particular Article XXVIII GATT and Article XXI GATS. In any case, all trade measures, be they liberalising or not, must be scrutinised on the basis of the general external policy objectives and principles.

2. General external policy objectives and principles

The Treaty of Lisbon significantly increased the objectives and principles of the common commercial policy by submitting it to the general external policy objectives and principles.

\footnote{\textsuperscript{18} Dimopoulos (n 4 above) 161.}

\footnote{\textsuperscript{19} See Council for Trade in Services, Communication from the European Communities and its Member States, Certification, Draft Consolidated GATS Schedule, 9 October 2006, S/C/W/273. On the distribution of competences to implement these modifications see ECJ, Opinion 1/08 Modification of GATS Schedules [2009] ECR I-0000.}
Article 205 TFEU stipulates that all external policies ‘shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union. In addition, Article 207(1) TFEU states specifically that the common commercial policy shall be conducted ‘in the context of the principles and objectives of the Union’s external actions.’ While the wording of Article 207(1) TFEU only requires the pursuit of the common commercial policy in the context of the general principles and objectives, Article 205 TFEU clarifies the obligatory nature of the framework established by the general objectives and principles: the common commercial policy has to be conducted in accordance with those objectives and principles.

These principles and objectives can be found in Article 21 TEU. They include, ‘democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, equality and solidarity, and respect for the United Nations Charter and international law.’ Furthermore, according to Article 21(2) TEU the Union shall define and pursue common policies *inter alia* in order to,

‘foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty, encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade and help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.’

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20 Cremona (n 2 above) 1363 also highlights the significance of this addition to the provisions on the common commercial policy.

21 Dimopoulos (n 4 above) 165 (‘mandatory nature’).
These goals reflect and reinforce the general objectives of the Union’s relations with the “wider world” according to Article 3(5) TEU.\(^{22}\)

It should be noted that both Articles 3(5) and 21 TEU contain references to classical trade policy objectives: Article 3(5) TFEU refers to “free and fair” trade and Article 21 TFEU calls for an encouragement of the integration of all countries into the world economy which shall be achieved \textit{inter alia} ‘through the progressive abolition of restrictions on international trade’. It is therefore clear that the general obligations and principles of the external policy do not abandon or supersede gradual trade liberalisation as an objective. However, it is equally clear that the common commercial policy should not only aim at gradual liberalisation of trade, but also non-economic policy objectives, such as human rights, equality and solidarity, sustainable development and the preservation and improvement of the quality of the environment.\(^{23}\) Articles 205 and 207(1) TFEU explicitly require the common commercial policy to contribute to these objectives rather than to simply focus on the reduction of barriers to trade. By placing the common commercial policy into the larger framework of such policy goals, the Lisbon Treaty deviates substantially from previous reforms of trade policy through the Amsterdam and Nice treaties.\(^{24}\)

Submitting the common commercial policy to the general external policy objectives and principles may have practical implications: As the pursuance of the goals mentioned in Article 21 TEU through the common commercial policy is a binding obligation, the Union's organs will have to consider them in the formulation and implementation of the EU’s external policy.

\(^{22}\) This provision states, ‘In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.’

\(^{23}\) Dimopoulos (n 4 above) 169.

\(^{24}\) Dimopoulos (n 4 above) 162.
trade policy. Consequently, Council and Commission need to explain and justify a particular trade policy measure with reference to the objectives and goals mentioned in Article 21 TEU. This could be supported by the requirement of environmental, social and development impact assessments of all trade agreements and unilateral measures. It could also be argued that trade relationships with countries which openly reject the principles mentioned in para. 1 of Article 21 TEU (democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, principles of the United Nations Charter and international law) would require specific justifications and an explanation why these relations would not further harm the pursuance of those principles on a global level.

Binding the common commercial policy to the general goals and objectives of the Union's external policies has been criticised in the literature because it would lead to a ‘politicisation’ of trade policy. These fears are unfounded and based on a misconception of trade policy. Trade liberalisation has never been an end on its own. Neither the European treaties nor the treaties of the multilateral trading system indicate such an understanding of trade liberalisation. Already the GATT 1947 stipulated that trade liberalisation should contribute to such goals as raising standards of living and ensuring full employment. The WTO agreement preamble broadened these objectives to include sustainable development, protecting and preserving the environment and the concerns of developing countries. Furthermore, trade policy measures have been used and continue to be used to support political developments, both positive and negative. In this respect, trade policy has always been political. The novelty of the Treaty of Lisbon is that it recognises that trade policy may pursue non-economic objectives and that it stipulates which non-economic objectives the EU should pursue through its trade policy. This also indicates which objectives may not guide trade policy. For example, using trade sanctions as a reaction to the election of a particular

\[25\] Bungenberg (n 5 above) 128.
government could not be justified on the basis of the Treaty of Lisbon, because it would contradict the democratic principles mentioned in Article 21(1) TEU as long as the election was free and fair.

This raises the question how potential conflicts between trade liberalization and the other objectives mentioned in Article 21 TEU could be addressed. At the outset, it should be remembered that all objectives are of equal value and should therefore be pursued on a mutually reinforcing basis. In fact, Article 21 TEU seems to be based on the assumption that there is only little potential for conflict between those objectives in the first place. The goals of article 21 TEA are also sufficiently general to suggest a wide scope of political discretion for the institutions of the EU to assess whether there is (a potential) conflict between those objectives and how to avoid it. If the political organs of the Union deem trade liberalisation as a valuable instrument to foster human rights, the treaties would not seem to hinder such an approach. However, in the case of an unavoidable conflict the different objectives would have to be balanced based on the principle of proportionality. For example, if the liberalisation of basic public services would clearly lead to unacceptable social exclusion from the supply of these services in a particular country, the protection of the right to water and health may trump the objectives of trade liberalisation. If such a clear causal relationship could be shown it would be the task of the European Court of Justice to assess whether a particular trade policy violates the principles of Article 21 TEU.

IV. Competences

The nature and scope of the Community's (now Union's) competence with regard to the common commercial policy has been a ‘constitutional construction site’ of growing
complexity since the early days of the European Economic Community. The Treaty of Lisbon clarifies some of the pertinent and disputed issues, but also raises new questions.

1. Exclusive nature

Article 3(1)(e) TFEU explicitly holds that the Union shall have exclusive competence in the area of the common commercial policy. This codifies the ECJ's case law which has consistently held that the Member States do not have the power to enter into international agreements or legislate on matters of the common commercial policy. According to Article 2(1) TFEU, exclusive competence means that only the Union may legislate and adopt legally binding acts. Member States can only do so if they have been empowered by the Union or when they implement Union Acts. According to Article 3(2) TFEU the exclusive competence also includes the conclusion of an international agreement ‘when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.’ Similarly, Article 216(1) TFEU holds that the Union may conclude international agreements ‘where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope’. Both provisions are based on the ECJ's doctrine on implied external powers. According to this


doctrine, the Union not only enjoys external powers if and insofar as the treaties explicitly confer such powers, but also implicit powers, which follow from internal competences. The three alternatives of Articles 3(2) and 216(1) TFEU are based on different aspects of the implied powers doctrine. The first alternative, ie the conclusion of an agreement which is provided for in a legislative Act of the Union seems to be taken from Opinion 1/94, the second alternative, ie the conclusion is necessary to enable the Union to exercise its internal competence, can be traced to Opinion 1/76 and the third alternative, ie the conclusion of an agreement may affect common rules or alter their scope, is taken from the AETR judgement.

2. Scope

The first sentence of Article 207(1) TFEU holds that the scope of the common commercial policy includes trade agreements relating to trade in goods and services and the commercial aspects of intellectual property as well as foreign direct investment.

a) Policy instruments

The common commercial policy traditionally comprises an autonomous and an international policy dimension. The former employs internal EU legislation regulating trade while the later

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30 For a comprehensive overview see Eeckhout (n 26 above) chapter 3.
31 Wouters, Coppens and De Meester (n 1 above) 174-180.
33 Opinion 1/76 Laying-up fund for inland waterway vessels [1977] ECR 741, 756, para. 5.
34 Case 22/70 Commission/Council (AETR) [1971] ECR 263, 275, para. 22.
covers the negotiation and conclusion of international agreements. Article 207 TFEU clarifies that the Union's exclusive competence in the field of the common commercial policy according to the Lisbon Treaty would include the negotiation and conclusion of agreements (external competence) as well as the implementation of these agreements (internal competence). Article 207(3) TFEU mentions the negotiation and conclusion of international agreements and Article 207(2) TFEU refers to the implementation of the common commercial policy. This not only covers measures of the autonomous trade policy, but also the implementation of trade agreements.

b) Trade in services

The scope of the common commercial policy concerning trade in services has been subject to a 15 year long ‘saga’ of treaty changes and disputes between the Member States and the EU’s institutions. The controversy was finally resolved by the Lisbon Treaty.

According to Article 207 TFEU the common commercial policy covers all aspects of trade in services. The Union is therefore exclusively competent to agree and implement trade agreements with provisions on services. The Lisbon Treaty abandons the ‘shared competence’ concerning agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services which was contained in Article 133(6) subparagraph 2 TEC. The only remains of this sectoral carve-out is the third subparagraph of Article 207(4) TFEU, which requires unanimity in the Council for the conclusion of trade agreements concerning these services in particular circumstances.


37 See below V.1.
Union’s competence of the common commercial policy strengthens the negotiating power of the Commission in international trade negotiations. However, it should be noted that the sectoral carve-out of Article 133(6) subparagraph 2 TEC concerned a set of politically and socially sensitive services, including services of general interest. The abolishment of the shared competence in this area substantially limits the Member States' influence on trade policy affecting these services and may have significant implications for Member State's policies in these areas. It also affects the democratic legitimacy of the common commercial policy, because national parliaments are no longer responsible for the ratification of trade agreements which would (also) cover these services.

c) Commercial aspects of intellectual property

The scope of the common commercial policy concerning intellectual property rights remains restricted to the ‘commercial aspects’ of these rights. Article 207 TFEU keeps the term ‘commercial aspects of intellectual property’, which has no direct equivalent in international trade law: The relevant WTO’s agreement refers to trade-related aspects of these rights. While there is a general agreement that the linguistic difference between commercial aspects and trade-related aspects is not of great significance and that the term commercial aspects of intellectual property rights refers to the WTO's TRIPS agreement, the nature of this reference has been disputed. Some commentators have argued that the reference is a dynamic one which would also include changes in the TRIPS agreement. Others have held that the reference is

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40 Krenzler and Pitschas (n 6 above) 302.
static, linking the common commercial policy to the TRIPS at the time of its conclusion while any changes would require the exercise of a special competence in Article 133(7) TEC.\textsuperscript{41} According to this provision, the Council was empowered to extend the application of the common commercial policy to international agreements on intellectual property in so far as they were not covered by the common commercial policy yet. The Lisbon Treaty abandoned this possibility. This has two implications: first, the Council can no longer enlarge the scope of the common commercial policy to non-commercial aspects of intellectual property. Second, if one assumes that the reference to commercial aspects of intellectual property is a static one, the abolishment of Article 133(7) TEC would deprive the Union of the possibility to negotiate and conclude changes in the TRIPS agreement. This would lead to a reduction of the scope of the common commercial policy which was not intended by the drafters of Lisbon (and Constitution) Treaty.\textsuperscript{42} It is therefore more appropriate to assume that Article 207 TFEU contains a dynamic reference to the TRIPS agreement. In conclusion, the Treaty of Lisbon extends the exclusive competence of the European Union to all three “pillars” of the WTO (trade in goods, trade in services and trade-related aspects of intellectual property rights).\textsuperscript{43}

d) Foreign direct investment

While the increase and clarification of the scope of the common commercial policy regarding trade issues has not been subject to much political or academic controversy, the extension of the common commercial policy to foreign direct investment attracted considerable scholarly

\textsuperscript{41} Cremona (n 39 above) 72; Hermann (n 6 above) 18-19.

\textsuperscript{42} Krajewski (n 7 above) 111.

\textsuperscript{43} Eeckhout (n 26 above) 55; Leal-Arcas (n 3 above) 29; Bungenberg (n 5 above) 132.
interest\textsuperscript{44} and already triggered legislative and policy proposals from the Commission.\textsuperscript{45} Foreign direct investment usually refers to long-term investment in a foreign country and can be distinguished from short-term portfolio investment.\textsuperscript{46} Portfolio investments are therefore not covered by Article 207 TFEU.\textsuperscript{47} It has been argued that the Union would have an implied external competence relating to portfolio investments based on the provisions of the free movement of capital (Articles 63-66 TFEU).\textsuperscript{48} This argument ignores the express intention of the drafters of the Lisbon Treaty to limit the EU's competence to foreign direct investment. Furthermore, the argument cannot explain why the inclusion of foreign direct investment in Article 207 TFEU was necessary in the first place, because an implied external competence based on the free movement of capital would also cover foreign direct investment.

As a consequence of the limitation of the Union's competence to foreign direct investment, agreements covering foreign direct investment and portfolio investment like most investment protection treaties do not fall within the exclusive external competence of the

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\textsuperscript{47} Ceyssens (n 44 above) 275.

\textsuperscript{48} European Commission, ‘Towards a comprehensive investment policy’ (n 45 above) 8.
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Union.\textsuperscript{49} This leads to a split of the competence to negotiate and conclude investment agreements. The Union is exclusively competent concerning those aspects of the agreement which relate to foreign direct investment, the Member States remain competent concerning portfolio investments. The practical consequence is that all investment agreements which cover both aspects of investment need to be concluded as mixed agreements.\textsuperscript{50}

Another even more controversial issue concerns the substantive scope of the competence regarding foreign direct investment.\textsuperscript{51} At the outset it should be underlined that the wording of Article 207 TFEU does not refer to investment protection and therefore leaves the question about the contents of the Union's competence regarding foreign direct investment open. The majority view in the literature holds that Article 207 TFEU covers not only issues of investment liberalisation but also of investment protection. Some authors argue that this coverage should extend to all typical forms of investment protection including measures regarding expropriation.\textsuperscript{52} This is also the view of the European Commission.\textsuperscript{53} Others want to restrict the Union's investment competence to so-called performance standards, ie non-discrimination, fair and equitable treatment and full protection and security,\textsuperscript{54} because the principle of neutrality vis-a-vis the Member States' systems of property ownership (Article 345 TFEU, ex Article 295 TEC) excludes an EU competence regarding expropriation.\textsuperscript{55} Both

\begin{thebibliography}{99}
\item Bungenberg (n 5 above) 135; Tietje (n 3 above) 16.
\item On this debate see also Wouters, Coppens and De Meester (n 1 above) 171-173.
\item Bungenberg (n 5 above) 144; Herrmann (n 44 above) 211.
\item European Commission, ‘Towards a comprehensive investment policy’ (n 45 above) 5.
\item On these standards see also R Dolzer and C Schreuer, \textit{Principles of International Investment Law} (2008) 119-194.
\item Tietje (n 3 above) 14. On this argument see also Dimopoulos (n 44 above) 127 et seq.
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views lead to the consequence that the Member States would lose the exclusive competence to negotiate, conclude and implement investment protection agreements and that the Union would acquire the competence to negotiate new and re-negotiate old investment protection agreements. This would revolutionise the investment protection policy in Europe: until now, EU bilateral agreements did not contain provisions on investment protection. Bilateral investment protection treaties remained within the competence of the Member States. Some Member States, such as Germany and the UK, are currently parties to more than 100 bilateral treaties with different countries. The Member States would lose the competence to determine the scope, contents and partners of these agreements if the common commercial policy is understood to include investment protection.

It is submitted that the extension of the common commercial policy to foreign direct investment could and should be read more narrowly only referring to those aspects of foreign direct investment which concern investment liberalisation and those which have a close link to trade. This reading of Article 207 TFEU is supported by context, object and purpose of the provision and by its negotiating history. According to Article 206 TFEU the Union aims to contribute to ‘the progressive abolition of restrictions on international trade and on foreign direct investment’ (emphasis added). The abolition of restrictions on foreign direct investment refers to so-called pre-establishment restrictions on market access, but not to post-establishment standards of investment protection. While it is true that the absence of international standards of investment protection may deter foreign investors, the notion of

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56 Dimopoulos (n 44 above) 371.

57 A similar view is proposed by Ceyssens (n 44 above) 279-281, who wants to exclude expropriation and standards of protection on the basis of the limitation of competences now laid down in Article 207(6) TFEU, but maintains that the scope of the common commercial policy is not limited to market access issues, ibid, at 286. On Article 207(6) see below 3.

58 Krajewski (n 7 above) 114; Leczykiewicz (n 27 above) 1678.
‘restrictions’ relates to restrictive measures and not to an investment-unfriendly environment.

It should also be noted that the term ‘foreign direct investment’ is not a term of international investment protection law. It is typically not used in bilateral investment treaties. If the drafters of the Lisbon Treaty wanted to confer the competence to conclude typical investment protection agreements to the Union why did they use the limited concept of foreign direct investment which would not give the Union the competence to conclude a single bilateral investment treaty on its own?

The negotiating history of the inclusion of foreign direct investment in the common commercial policy also supports a more narrow reading. As the inclusion was already part of the Draft Constitution Treaty adopted by the European Convention in 2003, the Convention deliberations are a point of reference. During the early phase of the Convention's work, the Working Group on External Action did not discuss an extension of the common commercial policy to investment at all and made no proposal in this regard. When the Convention Praesidium proposed the extension of the common commercial policy to foreign investment it argued that this was necessary because ‘financial flows supplement trade in goods and represent a significant share of commercial exchanges’. This indicates the assumption of a close link between investment and trade, but made no reference to investment protection. It is therefore not clear whether the Praesidium wanted to include investment protection in the first place or intended a more narrow scope of the notion of investment. The proposal was not discussed in detail. However, some Convention Members rejected it and called for the deletion of foreign direct investment mostly without any differentiated reasoning. The only

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59 This is argued by Ceyssens (n 44 above) 177 and Hermann (n 44 above) 206-207.

60 Draft Articles on external action (April Draft) (n 8 above) 43.

exception was the representative of the British government and then Minister for Europe Peter Hain, who suggested that the reference to foreign direct investment should be explicitly limited to investment negotiations in the WTO. He explained this with the perceived intention of the Commission to negotiate a multilateral investment agreement in the WTO. In addition, he clearly indicated that the reference to foreign direct investment would not ‘remove Member State competence to conduct bilateral investment activity’. There are no other documented references to investment protection or bilateral investment treaties in the Convention deliberations.

Had the Convention intended to include investment protection treaties in the common commercial policy, these issues would have been debated in the Convention. It is hardly imaginable that representatives from 15 Member States governments and parliaments would have abandoned the legal basis for hundreds of Member States international agreements without discussion.

It should also be remembered that the deliberations of the Convention took place at the same time as the EC and its Member States were engaged in the debates and discussions about investment policies in the WTO. This also supports the view that the proponents of the inclusion of foreign direct investment in the common commercial policy were predominantly concerned with the EC's negotiating mandate in the WTO and were not necessarily thinking about bilateral investment treaties concluded by the EU.

3. Limitations of the exercise of competences

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62 Proposal by Mr Hain contained in the compilation of amendments (n 61 above).

63 Similar doubts are expressed by Cremona (n 29 above) 31.

Article 207(6) TFEU contains a limitation of the exercise of the competences of the common commercial policy according to which the exercise of these competences ‘shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.’ Article 207(6) TFEU contains two elements which are closely connected: the first part of the provision stating that the delimitation of competences between the Union and the Member States shall not be affected by the exercise of the competences in the field of the common commercial policy reiterates the general principle of limited and specific conferral of competences (Articles 4(1) and 5(1) and (2) TEU). In the context of external policies this excludes a so-called ‘inverse AETR effect’ by which an implicit internal competence could be derived from an explicit external competence.\(^{65}\) The second element of Article 207(6) TFEU holds that the exercise of the trade competence may not lead to harmonisation where the treaty expressly prohibits this. This applies in particular to those areas in which the Union is only competent for ‘supporting, coordinating and complementary action’, such as education and health (Article 6(a) TFEU). As the Lisbon Treaty conferred the Union with the exclusive competence to conclude trade agreements covering services, the Union may conclude agreements covering education and health as well. However, the Union may not implement such an agreement if these agreements would require harmonisation measures, because the Union lacks the competence to harmonise in these areas. Consequently, the Union’s external competence (‘treaty-making’) may extend beyond the scope of its internal competence (‘treaty-implementing’).

Such an incongruence between internal and external competences would not be a deviation from the AETR doctrine and its codification in Article 3(2) TFEU because this doctrine only provides for parallel competences if an internal competence exists. It does not affect the

\(^{65}\) Wouters, Coppens and De Meester (n 1 above) 174; Cremona (n 29 above) 32.
possibility that an external competence can exist without a parallel internal competence. In fact, the ECJ mentioned the possibility of an incongruence between external and internal competences in Opinion 1/75 (‘Local costs’) when it held that it was without prejudice to the treaty-making powers of the EC if the implementation of the agreement were to be the responsibility of the Member States.\footnote{Local Costs [1975] ECR 1355, (n 9 above) 1364.}

An incongruence of external and internal competences is not uncommon in federal systems. Often the federation has an all-inclusive competence to conclude international agreements, but cannot implement them as long as the relevant legislative power rests with the states.\footnote{See Krajewski (n 7 above) 117-118.} As a consequence, the federation has to consult the states before it concludes an agreement which requires implementation by them. A similar requirement of the Union to consult the Member States before the conclusion of an agreement which requires implementation by the Member States could be based on the principle of sincere cooperation between Union and Member States which is expressively laid down in Article 4(3) TEU.\footnote{On the principle of cooperation concerning international agreements see also ECJ, Opinion 2/00 [2001] ECR I- 9756, para 8 with further references to the case law.} This particular consequence of Article 207(6) TFEU can be seen as a step towards further ‘federalization’ of the Union’s external relations. Instead of only ‘centralizing’ additional external powers at the Union level, the Lisbon Treaty requires policy co-ordination and co-operation at different government levels. Such policy co-ordination and co-operation is a typical elements of federal systems in which the central level is competent to act externally, but does not have the internal competence to legislate in all matters and therefore depends on the sub-central units of the system (provinces, cantons, Ländere etc.) to implement international agreements.
V. Institutions

The central reforms of the common commercial policy regarding institutional matters concern the decision-making in the Council (qualified majority voting/ unanimity) and the role and powers of the European Parliament. The Lisbon Treaty introduced smaller amendments regarding the former and major changes regarding the latter.

1. Decision-making in the Council

Article 207(4) TFEU holds that the Council should decide by qualified majority voting regarding the negotiation and conclusion of international agreements. This rule already existed before the Lisbon Treaty. Subparagraphs 2 and 3 of Article 207(4) TFEU contain exceptions from this principle.

Article 207(4) subparagraph 2 TFEU requires unanimity for the negotiation and conclusion of agreements regarding trade in services, commercial aspects of intellectual property and foreign direct investment ‘where such agreements include provisions for which unanimity is required for the adoption of internal rules.’ This provision applies the principle of parallelism to the decision-making in the Council: the negotiation and conclusion of international agreements shall be governed by the same majority requirements as internal legislation with the same content. This reflects the sensitivity of services and foreign direct investment for national regulatory autonomy and shows that the Member States were reluctant to lose the control over international agreements in this field. However, unanimity in the Council with regard to services and investment agreements is only required if respective internal legislation also needs to be adopted by a unanimous Council. If the Council can adopt legislation by qualified majority, it can also conclude international agreements in the same way.
Subparagraph 3 of Article 207(4) TFEU requires unanimity in the Council for the conclusion of agreements in the field of trade in cultural and audiovisual services, where these risk prejudicing the Union's cultural and linguistic diversity and in the field of trade in social, education and health services, where these risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them. This provision raises a number of questions. At the outset it should be noted that it only covers the conclusion of agreements, and not the negotiation, which distinguishes it from subparagraphs 1 and 2. Hence, the negotiating process will not be influenced by the unanimity rule of subparagraph 3. Another aspect of the scope of subparagraph 3 concerns its sectoral coverage, which could be determined on the basis of the standard classification of services (CPC) used by the WTO.69

The interpretation of the term ‘cultural and linguistic diversity’, which is new in the context of the common commercial policy, poses a greater challenge. The term used to only exist in Article 149(1) TEC. The Lisbon Treaty also uses it in Article 3(3) TEU which states that the Union ‘shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.’ However, the term is not defined. Apart from the ambiguity of this term, the operation of Article 207(4) subparagraph 3(a) TFEU also requires an assessment of the risk posed by a trade agreement to the Union’s

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69 WTO, Services Sectoral Classification List, 10 July 1991, MTN.GNS/W/120, reproduced as part of the Guidelines for the Scheduling of Specific Commitments under the GATS of 23 March 2001, WTO-Document S/L/92. Audiovisual services include motion picture and video tape production and distribution services and television and radio production and transmission services. Cultural services include a variety of services broadly associated with literature, art, music and history, such as museums, archives and theatre services. Education services include primary, secondary, higher and adult education. Health services include hospital services, and possibly also medical services of doctors, nurses, midwives and physiotherapists, which are actually considered professional services. Social services are not further specified in the WTO classification, but could include social work, care and community services.
linguistic and cultural diversity. Assessing such a risk raises difficult legal and factual questions. It is not clear how this risk assessment could be implemented in practice.

Subparagraph 3(a), unlike 3(b) does not aim to protect a particular value of the Union, but the organizational and institutional necessities for the provision of services in the three sectors at the national level. It therefore seeks to protect the national autonomy in this context. The provision can therefore be seen as the last pocket of resistance of the Member States against the complete incorporation of services into the common commercial policy.

Both subparagraphs 3(a) and 3(b) require an assessment of the risk posed by an international agreement to the organizational context of the provision of a service. The exception from qualified majority voting in subparagraphs 3(a) and (b) requires a Member State calling for a unanimous vote to specifically invoke one of these subparagraphs and explain why and how the agreement concerned would pose a risk to the Union’s cultural and linguistic diversity or to the provision of health, social and education services. If the other Council members do not share this view and the decision is taken by qualified majority voting, only a judgment by the ECJ would provide ultimate clarity.

Arguably, these interpretative uncertainties could render subparagraph 3 non-operational. As a consequence the Council could either decide to conclude all agreements involving audiovisual, cultural, health and education services by unanimous vote in order to avoid risking a violation of the voting requirements or Member States could refrain from invoking subparagraph 3 in the first place. The actual practice will most likely depend more on the political context of the issues concerned and less on legal niceties.

In any event, a trade agreement which includes issues requiring unanimity and issues requiring only a qualified majority will be concluded in its entirety by unanimous vote in the

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70 Leal-Arcas (n 3 above) 31-32; Krenzler and Pitschas (n 64 above) 808.
71 Krenzler and Pitschas (n 64 above) 808.
Council according to the ‘Pastis’ principle. This could in particular be the case for agreements concluding future rounds of multilateral trade negotiations, which typically include a large variety of subjects.

2. Role and function of the European Parliament

The Lisbon Treaty significantly enhanced the role and the function of the European Parliament in the field of the common commercial policy. One commentator even argued that the increased importance of the parliament is the most important change of the common commercial policy. The role of the parliament has been modified regarding the negotiations, conclusion and implementation of international trade agreements and regarding autonomous trade policy measures.

Article 207(2) TFEU clearly stipulates the European Parliament's function as a co-legislator with regard to the implementation of agreements and the adoption of internal autonomous trade policy measures. The provision refers to the ordinary legislative procedure (Article 294 TFEU) which is the former co-decision making procedure (Article 251 TEC) in all but its name. Consequently, the European Parliament has the right to make amendments and also has a final veto power with regard to internal measures.

The European Parliament also gained a special right to be informed with regards to negotiations of international agreements. According to Article 207(3) subparagraph 2 TFEU

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74 Cremona (n 29 above) 31.
the Commission shall inform the special committee of the Council (the former ‘Committee 133’, now the Trade Policy Committee) and the European Parliament on the progress of such negotiations. Even though the Commission already informed the Parliament on trade issues prior to the entry into force of the Lisbon Treaty on the basis of an inter-institutional agreement, the additional reference to the Parliament in Article 207(3) TFEU enhances the role of the Parliament because it is legally binding\(^{75}\) and because it requires the Commission to inform the European Parliament in the same way as the Council's Trade Policy Committee on trade negotiations. Given the fact that the Commission consults with this committee on a weekly basis, the inclusion of the Parliament in Article 207(3) TFEU goes beyond the current practice and sends a clear signal to the other EU organs, in particular the European Commission, that the European Parliament is supposed to play an active role in external trade policy.

Regarding the conclusion of trade agreements, Article 207(3) TFEU refers to the general rules on the conclusion of international agreements in Article 218 TFEU.\(^{76}\) This provision contains two means of parliamentary participation concerning the conclusion of international agreements. In general, the European Parliament needs to be consulted before the Council concludes an agreement (Article 218(6) subparagraph 2(b) TFEU). The only exception to this rule concerns agreements relating exclusively to the common foreign and security policy. However, no exception exists for trade agreements. This distinguishes the TFEU from the TEC, which excluded trade agreements from parliamentary consultation.

The Treaty of Lisbon requires parliamentary consent in five specific categories of cases according to Article 218(6) subparagraph 2(a) TFEU. Among others, parliamentary consent is necessary for ‘agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the Parliament is

\(^{75}\) Woolcock (n 73 above) 5.

\(^{76}\) On this see Wouters, Coppens and De Meester (n 1 above) 181 et seq.
required’. Hence, whenever an international agreement covers an area, to which the ordinary legislative procedure applies, its conclusion requires the consent of the European Parliament. As mentioned, Article 207(2) TFEU requires the establishment of the framework for implementing the common commercial policy in accordance with the ordinary legislative procedure. The European Parliament is hence not only a co-legislator for the implementation of international agreements, but also needs to give its consent to the conclusion of the agreement.

It is therefore safe to assume that the European Parliament’s consent is required for the conclusion all international agreements which need to be implemented in accordance with the provision of Article 207(2) TFEU. However, this does not answer the question whether the Parliament’s consent is required for agreements which do not need to be implemented because they do not contain any requirements which need to be transformed into domestic law. For example, changes in the WTO’s Dispute Settlement Understanding (DSU) would not need to be implemented domestically because the DSU is only applicable at the international level. It could therefore be argued that Article 207(2) TFEU does not apply to changes of the provisions of the DSU. As a consequence, parliamentary consent for the conclusion of an international agreement changing provisions of the DSU would not be necessary. Therefore, if such an agreement would be concluded independently of the results of the other current WTO negotiations, it is possible that the European Parliament's consent would not be necessary. However, since Article 218 TFEU would abandon the exception for trade agreements from the general consultation requirement, the European Parliament would need to be consulted.

The new requirement of parliamentary consent to the conclusion of international agreements is an improvement from the perspective of democratic legitimacy and ought to be welcomed. The limitation of this right to agreements which need implementation in internal

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77 Grave (n 29 above) 108; Wouters, Coppens and De Meester (n 1 above) 185; Cremona (n 29 above) 15.
law is disappointing, but may not be too significant in practice. In any case, the requirement of parliamentary consent will strengthen the European Parliament’s influence in the negotiation process of international agreements, which is arguably just as important as the right to accept or reject an agreement.

When assessing the overall level of democratic legitimacy of external trade policy according to the Lisbon Treaty, it must be remembered that all areas of trade policy fall into the exclusive competence of the Union. Hence, Member States’ parliaments are no longer required to ratify trade agreements. This in turn reduces their influence on those agreements and the level of legitimacy they confer upon the common commercial policy. In particular because of the reduced influence of national parliaments on the common commercial policy, the Lisbon Treaty does not substantially decrease the deficit of democratic legitimacy of this policy area even if the increased role of the European Parliament would fill the gap in parliamentary scrutiny due to the exclusion of the Member States’ parliaments.

VI. Conclusion

The Lisbon Treaty changed the constitutional law of the common commercial policy in a number of important aspects. Overall, it can be concluded that these changes make the Union’s external trade policy more federal, but not necessarily more democratic. The Union gained a comprehensive external competence which covers all fields of the current multilateral trading system. The extent of the Union’s competences regarding foreign investment remains disputed: Against an apparent academic and political consensus that the

78 Wouters, Coppens and De Meester (n 1 above) 186.

79 See also Woolcock (n 73 above) 5, who points out that the parliamentary scrutiny of the Member States parliament has not been very effective in practice.
Union is competent to conclude investment protection agreements, this chapter claimed that contextual, teleological and historic arguments support a more narrow view. 

It has also been shown that Article 207 TFEU does not provide the Union with full internal competence to adopt legislation to implement respective agreements. Hence, the Union needs to co-ordinate with the Member States before such an agreement can be concluded. This is a situation which can be found in many federal systems and is therefore neither unusual nor impractical. The co-ordination between Union and Member States is facilitated by the fact that a number of issues still require unanimity in the Council. Many of those issues which require unanimity in the Council for the conclusion of an international agreement are also the issues for which the Union does not have internal competence. Therefore, the voting rules require co-ordination and a common accord of the Member States in matters where the internal competence of the Union is limited.

The necessity to implement an international agreement of the Union will nevertheless put political pressure on the Member States to adopt the relevant legislation. The formal competence of the Member States to implement an international agreement may in fact not leave the Member States a large margin of discretion.

The Lisbon Treaty increased the rights of the European Parliament regarding the conclusion of trade agreements. However, this improvement is partly outweighed by the fact that the national parliaments lost the right to ratify trade agreements which minimized their influence on external trade policy. The Lisbon Treaty therefore repaired some democratic defects of the previous constitutional law of the common commercial policy, but also introduced new problems.