

AGORA© Forum

«Steady as She Goes? The European Union Navigating Today's Complex World»

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> The rationale behind the GEM-STONES AGORA© For a is to foster two-way interactions between the GEM-STONES's academic research and policy-making in the fields broached by the GEM-STONES' research agenda. This enables the GEM-STONES PhD Fellows to jointly reflect on their research in an inter-sectoral environment as they will be confronted by representatives from both the academic and non-academic sectors.

> Roundtable 1 of the 2018 AGORA @ Forum on «The EU in Today's Complex World: Steering the Common Commercial Policy» discussed the EU's supranational institutions' ability to successfully shepherd an increasingly complex common commercial policy. Accordingly, it considered to what extent, and by what means, the community-wide actors within the EU have continued to provide for "conscious efforts [seeking] to address and improve institutional interactions" aimed at launching, driving and concluding the latest generation of international trade agreements.

> The following briefs, prepared by three MSCA-funded GEM-STONES Early Stage Researchers served as reference documents for discussions on some of the specific policy challenges associated with the newest generation of trade agreements, specifically the EU's continued efforts within trade negotiations pertaining to:

- Open regulatory dialogues (ESR-1 Laurence Marquis);
- Financial regulation (ESR-4 Kevin Kalomeni):
- The specificities of inter-regional negotiations (ESR-9 Jessica Gomes)





























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ROUND TABLE 1 – Steering the Common Commercial Strategy

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Laurence's research focuses on the impact of the EU investment policy on the complex regime of free trade agreements. Specialized in international arbitration, she was counsel for Canada in NAFTA arbitrations and FTA negotiations. She also practiced at Jones Day and the International Chamber of Commerce in Paris. She lectured in international arbitration and was Editor in chief by interim for the Quebec Journal of International Law. A lawyer called to the Quebec and Paris Bars, she holds a law degree (Université de Montréal) and a master's degree in international commercial law (Université Paris 1-Sorbonne).



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BACKGROUND OF THE STUDIED POLICY FIELD

International trade, negotiations of free trade agreements and the role of the EU:

The frenetic pace at which states and regional blocs are currently concluding new trade agreements can be baffling. Since the indefinite suspension of the Transatlantic Trade and Investment Partnership (TTIP) negotiations with the US in 2016, the EU has redoubled its efforts to get involved in partnerships with major counterparts (Japan, MERCOSUR, Australia, and New Zealand). The EU offers a market of 500 million consumers, and is the largest trading block, followed by the China and the United States, both of which, however, present challenges.

The latter plans the demise of the World Trade Organization (WTO), has launched a global trade war by increasing tariffs with China and the EU, amongst others, and threatens existing trade agreements. China, recognized by the WTO as a market economy in 2001, is also vying for first position amongst potential trade partners. The Belt and Road Initiative (BRI) launched in 2013, seeks to recreate the former silk roads trading route. Valued at 900 billion of investment across 65 countries, with the BRI, China encircles the world. Parallel negotiations for the Regional and Comprehensive Economic Partnership (RCEP) are ongoing between the Association of Southeast Asian Nations (ASEAN) and Australia, China, India, Japan, South Korea and New Zealand.

In this context of the crisis of trade and investment agreements at the international level, the role of the European Union as a supranational organization is more than ever at stake.

BACKGROUND OF EU ACTIONS IN THE STUDIED POLICY FIELD

The EU investment policy since the Lisbon Treaty: an active evolution

In 2009, the Lisbon Treaty consecrated "foreign direct investment" as an EU exclusive competence (art. 207(1) TFEU), as part of its Common commercial policy (CCP). Foreign direct investment however remained a field to be further defined, and the EU investment policy has known many evolutions since. A 2017 ruling in Opinion 2/15 of the CJEU has confirmed that investor-state dispute settlement (ISDS) and portfolio investment are shared competences, thus requiring Member States ratification of EU agreements including these matters. This development emphasized the tension between the internal challenges that the EU must face in the implementation of its investment policy and the interactions between the institutions involved, on the one hand, and the external impacts that this policy has on the regional and multilateral investment agreement networks, on the other.

In line with Opinion 2/15, the Commission successfully integrated a new innovative proposal for a permanent investment court system (ICS) in agreements with Canada (CETA) and Vietnam. In April 2018, the Commission also announced that trade and investment would now be included in different agreements, to ensure there would be no further potential issues with investment, which resulted in separate final agreements for the trade deal with Singapore and Vietnam.

Complex questions of compatibility of the investor state system with EU law, and its interrelations with international investment law, also stand to be resolved. On this specific issue, the Opinion of the Court on this matter (Opinion 1/17) is eagerly awaited. Belgium, in order to ensure that Wallonia would agree to CETA's ratification, submitted a request to the Court, asking whether the new ICS proposed in CETA was compatible with EU law. The opinion of AG Bot was delivered on 29 January 2019, finding the ICS compatible with EU law, including fundamental rights. Nonetheless, this opinion cannot be taken to indicate which way the Court will decide, the latter having notably refused to follow the AG's opinion in a number of recent delicate cases. A decision from the Court that the EU ICS proposal is not compatible with EU law would send the commission back to the drawing board, and signal continuing issues with a coherent EU investment policy.

























Finally, after the Court decided that bilateral investment treaties between EU Member States were incompatible with EU law, in Case C-284/16, Slovak republic v. Achmea BV, delivered on

6 March 2018, the Member States declared in January 2019 that they would terminate these agreements by the end of the year. While this can be seen as a step forward in a uniting process, the full impact of the case, particularly on the Energy Charter Treaty, remains unknown.

And yet, after much evolution of the EU investment policy and the new proposed ICS, the EU has also impacted reform of investor-State dispute settlement (ISDS) on a multilateral level. The EU played a crucial role in the initiation of discussions at UNCITRAL, in 2015, around the need for a reform of ISDS. Standing behind the proposal for a multilateral investment court, the EU has once more taken upon itself to move forward with current issues, in this case the backlash against ISDS, and propose a solution. States have been actively debating the reforms envisaged, and UNCITRAL is expected to put forward a proposal at the end of the process.

In sum, the EU has been proactive, innovative and successful in aligning its investment policy within the CCP, to ensure it could take on its role as a leader in international trade negotiations. While a number of pending questions are still to be resolved, the EU continues to push for unity and coherence, at the bilateral, regional and multilateral levels.

RECOMMENDATIONS

The international trade order is in crisis, and the EU has the opportunity to play a crucial part. It is time for the European Union to act as a leader and fosters alliances, to ensure it succeeds in leading a level playing field of the international order. In this vein, examples abound calling for an alliance around WTO reform and saving multilateralism, to counter the American bilateral protectionist stance.

Never has it been more essential that the European Union present a united front, and the focus of the EU now needs to be on the WTO reform, and the alignment of its EU institutions for a clear trade and investment policy.

Be it through the proposal of an innovative, clear and coherent EU investment policy, or through leading the reform of the WTO, the EU appears poised to establish a coalition against the protectionist policies of the United States, and avoid the unraveling of the global trade system.

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ROUND TABLE 1 – Steering the Common Commercial Strategy

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Kevin Kalomeni

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Kevin Kalomeni is pursuing a PhD in International Political Economy and Political Science. His research focuses on the design of regulatory cooperation provisions contained in EU Preferential Trade Agreements. Using a qualitative framework, he aims at identifying the combination of exogenous factors at the origin of the variation design of these provisions. He graduated with a master degree in International Relations, with finality Peace, security and conflicts from the Université Libre de Bruxelles (Belgium) and Tongji University (China).



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BACKGROUND OF THE STUDIED POLICY FIELD

The proliferation of preferential trade agreements (PTAs) is an evidence of the progressive fragmentation of the multilateral trading system, torned apart by the increasing competition between states. As global demand has stagnated and trade flows have experiences sensible reduction since the financial crisis of 2008, states are incentized to adopt mercantilist and protectionist policies in order to mitigate the inequal distribution of gains revealed by the crisis. Indeed, trade economics research already estalished that the most productive companies are disproportionally able to catch exports markets and exclude their competitors. As long as growth was rising, the disparition of less productive firms was compensanted by creation of new one. Nevertheless, in the immediate aftermath of the financial shocks, growth did not pick up at similar level pre-crisis, despite the expansionary monetary policies adopted by central banks around the world. The persistence of the 0 level interest rates has pushed several economists to fomulate the hypothesis of a secular stagnation situation in western countries. One of the consequences of growth stagnation is the rising divergence between dynamic sectors and stagnating one, accompanied by rising inequalities in term of wages and unemployment level. Part of this phenomenon is due to the role of technology in enabling the most dynamic firms to catch further productivity gains, separating itself from the rest of the competition. This has leaded in the establishment of a reduction of the competition in the market, multipliying situation of oligopolies structure in several sectors with the help of buy-competitors strategies by the biggest firms.

International Trade has accompanied this movement and play a non-negligible role. Global Value chains are proeminent for Multinationales Companies which have disproportionally benefitted from tariff reduction, at the expense sometimes of SMEs. Indeed, as attested by several recent researches, SMEs main barriers to trade are more concentrated on Non-Tariffs Barriers, such as TBT or SPS, rather than tariff level. This makes regulatory cooperation a subject particularly important in order to reequilibrate trade benefits distribution among companies and address indirectly part of the secular stagnation effects. At the same time, simple increazed market access for SMEs is not sufficient. Indeed, value added of products are also of crucial importance as it is often related to the modular integration of technological components into the products, as said a crucial indicator of a company competiveness. An instance of this reality is the intra-industrial structure of automobile, an oligopolistic market "par excellence" an highly influential sector in all trade negotiations. Within this context, regulatory cooperation remains a complex liberalization mean, crucial for offering new opportunities for SMEs not only in terms of exports but also to climb the value ladder of GVCs.

In conclusion, regulatory cooperation in international trade is a policy instrument that has profund impacts not only on the distribution side but also on technology and industry.

BACKGROUND OF EU ACTIONS IN THE STUDIED POLICY FIELD

The origin of the EU approach towards regulatory cooperation finds its origin in the promotion by the EU of the so-called Signapore issues (competition policy, investment, trade facilitation and government procurement) following the conclusion of the Uruguay Round with the aim of competing with Newly Industrializing Countries (Korea, Taiwan), the rising Japan and a more assertive USA. Accompanying this initiative, the "Managed Globalization"'s doctrine of Pascal Lamy was a bold strategy of the commissioner to introduce a more comprehensive agenda to the multilateral sphere by estblishing a de facto moratorium on all new PTAs. The failure of this approach leaded to the progressive formulation of a more pro-active bilateral trade policy, illustrated by the introduction of "Global Europe" in 2006, then its replacement by "Trade, Growth and World Affairs" in 2010, which will introduce the concept of DCFTAs. TGWA was a turning point as it gave the greenlight for the EU to start externalizing its regulation to third countries.

The closure of this "All multilateralism" episode of the EU leaded to the opening a new one, featuring at first so called Mega-Regionals, especially the TTIP. The TTIP was an occasion of intense debates on regulatory cooperation inside the EU as customer's rights were perceived to be undermined by potential regulatory downward harmonization. The EC had to adjust its approacht to deal with this subject, especially in the case of the CETA. Taking the CETA as a benchmark of the current EU approach, regulatory cooperation is integrated into PTAs through a mix of sectoral and horizontal provisions. While a horizontal approach seems generally privileged, certain sectors are particularly emphasized and enjoy specific regulatory mechanisms, such as pharmaceuticals and professional qualifications.

In retrospective, while regulatory issues were orginally linked to specific industrial concerns in the 80s, the EU regulatory



























approach has evolved with time towards a more diffused liberalizing policy focusing on market access, first through multilateralism and then plurilaterals. Customers' rights, notably through the principle of "right to reguleate", are increasingly becoming a new area of domestic conficts for the ratification of trade agreements.

SWOT ANALYSIS OF EU ACTIONS IN THE STUDIED POLICY FIELD

Strengths:

- Active and well developed plurilateral and bilateral trade policy
- Centrality of the EU market in global trade
- Strength of EU regulatory capacities
- Well developped and established sectoral value chains

Weaknesses:

- Increazed domestic tensions, due to customers' rights perception of neglect
- Rising shortcomings of horizontal approach for trade liberalization
- Absence of coordination and linkages between trade policy and industrial policy
- Overreliance on traditional centralized and oligopolistic economic sectors

Opportunities:

- Potentials of Customers' rights to give a new momentum
- Possibility of developping a new joint policy programme between trade and industry
- Extending EU regulatory diffusion
- Pursuing a better distribution of gains and loses of trade through decentralization economic policy

Threats:

- Increased internal political and social tensions
- Loses of credibility towards external partners due to rising domestic blockages
- Increazed veto powers and lobbying for integrating non-trade and non-economic issues
- Dillution of policy relevance of trade agreements, becoming an all encompassing legal instrument with soft legal provisions

RECOMMENDATIONS

In order to address the challenges as presented and enumerated in the previous section, I suggest the forumulation of a joint policy programme between DG trade and DG Industry with two focuses: customers' rights and decentralized industrialization. The horizontal approach of trade liberalization such as multileral overall tariffs cuts, e.g. Swiss formula, is becoming more and more difficult to sustain in a world where growth is trapped in a secular stagnation. Average gains are more and more difficult to attain and are less and less evenly distributed among sectors and among Capital and Labor. Thus, a pro-active attitude needs to be adopted in order to avoid the return of blunt protectionism dommageable to all. A trade and industrial policy against oligopoly is a necessity in order to fight renting situation and offer more space for the emergence of smaller technological and industrial firms. At the same time, it will allow a more freedom to consumers, through rising purchaising power and more liberty in choosing their consumptions. This can only be done by several commitments:

- Transparency in supply chains, implemented by the integration of decentralized public blockchains technologies to record shipping and supply.
- Integration in PTAs of a stand-alone chapter on Consumers' rights, explicitly binding the parties to encourage transparency in their supply chains and regulations. Other elements such as development of common labels, chemical composition and sustainability of products are also to be considered
- Establishment in all EU PTAs of a Consumers' rights working group with the purpose of aligning consumers' rights principle within a single economic zone.
- Commitments of open source in all EU funded technological programs
- Development of a joint policy programme between DG trade and DG industry aiming at developing clusters of small scale industries and technological services companies, relying on decentralization and interoperability of their operating system, oriented towards exports.
- EC supports to all relevant EU organs and outside bodies (CEN-CENELEC) to develop interoperable, transparent quality standards

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ROUND TABLE 1 – Steering the Common Commercial Strategy

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*The comments provided here are not based on my PhD research, but on a chapter that will be part of an edited volume. The chapter focuses on the interregional negotiations for the free trade agreement between MERCOSUR and the EU.



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BACKGROUND OF THE STUDIED POLICY FIELD

The relations between the Common Market of the South (MERCOSUR) and the European Union (EU) were established in the late 1990s, and since then high-level dialogues have been maintained as a way to formalize a free trade agreement (FTA). The FTA is almost twenty years in the making, mostly due to divergences on tariffs in agriculture and automobiles. The volume of bilateral trade is expressive, revolving around 40 billion Euros in 2016. If passed, the FTA would compass the most important regional integration blocs in the Atlantic. The trade exchange among MERCOSUR and the EU is synonymous with the international division of labour. On the South American side, the exports are based on agricultural products, beverage, tobacco, and meat. On the European side, the EU exports include machines and chemicals

Brazil is the only member of MERCOSUR – comprised also of Argentina, Paraguay, Uruguay and Venezuela – to hold a Strategic Partnership with the EU, since 2007. This allowed for the relations between Brazil and the EU to go beyond the traditional exchange of commerce and services. Other areas were contemplated by the Strategic Partnership, such as Sector Dialogues, which endorse projects on human rights, energy, technology, and civil society.Brazil seems to be the natural leader in the continent. It is the largest country in the region, with the highest rates of population, economic growth and natural resources. The privileged position that the country occupies in the relationship with the EU, provided by the Strategic Partnership, make us question how Brazil acts on the negotiations for the FTA between MERCOSUR and the EU.

In 2016, after an extended period of progress and stagnation, the negotiations were back on track, after a four-year-halt. Temer and his Argentinian counterpart, Mauricio Macri, were inclined on sealing the deal. However, some disagreements on parts of the document, and many utterances from agricultural sectors in France and Ireland demonstrated how complicated reaching a consensus would be.

BACKGROUND OF EU ACTIONS IN THE STUDIED POLICY FIELD

MERCOSUR has eleven ongoing trade agreements . Four of them are extra-regional – with India (2004), Israel (2007), Southern African Customs Union (2008), and Egypt (2010) -, and intra-regional, with Latin American countries. The EU has currently thirty-three trade agreements, which are divided among customs unions, associations, and stabilisation agreements, in various parts of the world.

The European Union has a tradition of forming ties with important actors and regions in the world, based on its "external federator" approach. In Latin America, Brazil and Mexico are the ones with a formal SP with the EU. Recently, the trade part of the Global Agreement with Mexico has been updated, and the rest of the document is under revision. As mentioned in the previous subsection, the trade agreement talks with MERCOSUR are still undergoing.















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SWOT ANALYSIS OF EU ACTIONS IN THE STUDIED POLICY FIELD

Strengths: bilateral volume of trade.

Weaknesses: trade agreement based on competition, not on complementarity.

Opportunities: a very large market in South America.

Threats: difficult political and economic conditions in Brazil; opposition of France and Ireland.

RECOMMENDATIONS

Both parts should not miss the window of opportunity: negotiations should be settled as soon as possible, since national elections are held in Brazil in October - and that changes the focus inwardly.

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