



Legal Aspects of EU Foreign Trade Policy



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Introduction

- **Legal Aspects of EU Foreign Trade Policy**
 - Approaching the topic in **four main steps**
 - ❖ The role of trade in the origins of European integration
 - ❖ Normative framework of EU external trade relations
 - ❖ EU foreign trade policy and the promotion and protection of non-economic concerns
 - ❖ Trade liberalization as a regulatory element of EU agreements

Trade Policy and the Origins of European Integration

- **Role of trade policy in the origins of European integration**
 - Our proposition / thesis
 - Trade liberalization was originally not one of the ultimate goals of the processes of European integration
 - However, trade policy became the central policy field / instrument to pursue the overarching goals of European integration
 - Trade policy in the processes of European integration not as an end in itself, but as a means to an end

Trade Policy and the Origins of European Integration

- **Speech by Winston Churchill at the University of Zurich on 19 September 1946**



- “I wish to speak to you about the tragedy of Europe. [...] Yet all the while there is a remedy which, if it were generally and spontaneously adopted by the great majority of peoples in many lands, would as if by miracle transform the whole scene, and would in a few years make all Europe, or the greater part of it, as free and happy as Switzerland is today. What is that sovereign remedy? It is to recreate the European Family, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, in safety and in freedom. [...] We must build a kind of United States of Europe. [...] The first step in the recreation of the European family must be a partnership between France and Germany. [...] At present there is a breathing-space. [...] If we are to form the United States of Europe or whatever name or form it may take, we must begin now.”

Trade Policy and the Origins of European Integration

- **Letter from Dean Acheson to Robert Schuman, 30 October 1949**



❖ “Whether Germany will in the future be a benefit or a curse to the free world will be determined, not only by Germany, but by the occupying powers. No country has a greater stake than France in the answer. Our own stake and responsibility is also great. Now is the time for a French initiative and leadership of the type required to integrate the German Federal Republic promptly and decisively into Western Europe. [...] We here in America, with all the will in the world to help and support, cannot give the lead. That, if we are to succeed in this joint endeavour, must come from France.”

Trade Policy and the Origins of European Integration

- **Schuman Declaration on the creation of a European Coal and Steel Community, 9 May 1950**

➤ “Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. [...] With this aim in view, the French Government proposes that action be taken immediately on one limited but decisive point. It proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe.”

Trade Policy and the Origins of European Integration

- **Schuman Declaration on the creation of a European Coal and Steel Community, 9 May 1950**
 - “By pooling basic production and by instituting a new High Authority, whose decisions will bind France, Germany and other member countries, this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace.”



Trade Policy and the Origins of European Integration

- **Treaty Establishing a European Coal and Steel Community, signed in Paris on 18 April 1951**
 - 23 July 1952: Entering into force
 - 6 member states
 - “Europeanization” of one specific economic field
 - Independent High Authority as the primary law-making body
 - ❖ In addition: Council of Ministers, Common Assembly, Court of Justice
 - Free movement of goods, competition policy
 - Expired on 23 July 2002 (Article 97 ECSC-Treaty)



Trade Policy and the Origins of European Integration

• Role of Jean Monnet in this process

- 1946 until 1952 Head of the French General Planning Commission
 - ❖ 1946 Modernization and Re-equipment Plan (“Monnet Plan”)
- Drafting of the Schuman Declaration 1950
- 1952 until 1955 First President of the Independent High Authority of the ECSC
- 1955 Founder of the Action Committee for the United States of Europe (until 1975)
- 1976 First Honorary Citizen of Europe



Trade Policy and the Origins of European Integration

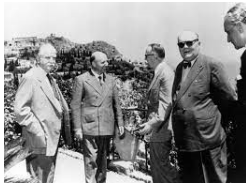
• Subsequent backlashes

- **Project of a European Defense Community**
 - ❖ “Pleven Plan” announced on 24 October 1950
 - French Prime Minister René Pleven
 - ❖ Treaty Establishing a European Defense Community signed in Paris on 27 May 1952
 - ❖ Rejection by the French National Assembly, 1954
- **Project of a European Political Community**
 - ❖ Draft statute



Trade Policy and the Origins of European Integration

- **Consequences of these backlashes**
 - Functional approach: “spill-over”-effects
 - Economic integration aimed at closer political unity
 - June 1955 Conference of Foreign Ministers in Messina



Trade Policy and the Origins of European Integration

- Rome, 25 March 1957
- The **Treaties establishing the European Economic Community** and the **European Atomic Energy Community** are signed by the six ECSC Member States (France, Germany, Italy, Belgium, Luxembourg, and The Netherlands)
- 1 January 1958: Entering into force
- Overall approach
 - Comprehensive economic integration (common market on the basis of a customs union) and special legal regime on the peaceful use of nuclear energy



Normative Framework of EU External Trade Relations

- **Normative Framework of EU External Trade Relations**
 - Our proposition / thesis
 - Trade policy as one of the central EU policy fields where the internal and external dimension of European integration have always been inherently interconnected
 - Trade policy as the main “point of contact” between two of the most important external policies of the EU (the common commercial policy and the European neighbourhood policy)

Normative Framework of EU External Trade Relations

- **Background(s)**
 - **Internal** background of EU external trade relations
 - ❖ Article 28 TFEU: formation of a customs union between the EU member states
 - ❖ Central element of a customs union: common customs tariff in relations with third countries
 - ❖ Article 31 TFEU: Common custom tariff duties are determined by the Council on a proposal of the Commission
 - ❖ Consequence: need to pursue a uniform trade policy vis-à-vis third countries

Normative Framework of EU External Trade Relations

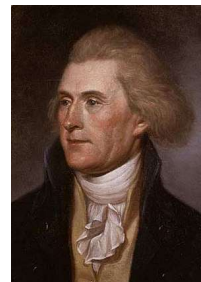
• Background(s)

➤ External/international background of EU external trade relations

❖ “If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be.” (*Thomas Jefferson*)

- One possible reading of the quote:
Stressing interdependence between states in the international system

❖ Creation and existence of the European Union itself as a manifestation of this idea



Normative Framework of EU External Trade Relations

• Background(s)

➤ External/international background of EU external trade relations

❖ Moreover, also the EU is neither alone in the world nor able or willing to isolate itself from international politics

❖ The EU was destined to be become an international actor in its own right

- Development and implementation of external policies

❖ Being first and foremost an economic actor, main focus on trade policy

Normative Framework of EU External Trade Relations

- **Two main EU policies focusing on external economic relations**
 - Common commercial policy (CCP)
 - European neighbourhood policy (ENP)
 - In addition, e.g.,
 - ❖ **Development cooperation**, Articles 208 et seq. TFEU
 - Trade dimension of economic cooperation
 - ❖ **Common foreign and security policy**, Articles 23 et seq. TEU
 - In particular economic sanctions against third countries and non-state actors under Article 215 TFEU

Normative Framework of EU External Trade Relations

- **Common commercial policy (CCP)**
 - Complementing the internal dimension of the customs union
 - Exclusive competence of the EU, Article 3 (1) (e) TFEU
 - Importance of the CCP within the framework of EU external policies
 - ❖ “centerpiece” of EU external relations (*Piet Eeckhout*)
 - ❖ The CCP “was and still is the most important constitutional battleground for European external relations” (*Markus Krajewski*)

Normative Framework of EU External Trade Relations

- **Overarching aims and objectives of the CCP**
 - Central provision: Article 206 TFEU
 - Article 206 TFEU: “By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.”

Normative Framework of EU External Trade Relations

- **Competences of the EU in the CCP**
 - Central provision: Article 207 TFEU
 - ❖ Granting the EU a competence to achieve the objectives stipulated in Article 206 TFEU
 - Material scope of the CCP laid down in Article 207 (1) TFEU
 - “The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the **conclusion of tariff and trade agreements** relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of **uniformity in measures of liberalisation, export policy and measures to protect trade** such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.”

Normative Framework of EU External Trade Relations

- CCP scope of application originally confined to trade in goods
 - Mirroring the customs union under Article 28 TFEU
- Expansion beginning with the Nice Treaty (2001/2003)
- Currently covers also
 - trade in services
 - commercial aspects of intellectual property
 - foreign direct investments (Lisbon Treaty 2007/2009)

Normative Framework of EU External Trade Relations

- **Distinction between two main types of legal instruments in the CCP**
 - **“autonomous” CCP**
 - ❖ Legal acts dealing with foreign economic relations as **unilaterally** adopted by the EU
 - Usually in the form of a regulation (Article 288 (2) TFEU)
 - ❖ Comparable to domestic foreign trade laws of other countries (non-EU members)

Normative Framework of EU External Trade Relations

- **“autonomous” CCP**
 - Examples of unilateral regulatory acts
 - ❖ Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports
 - ❖ Regulation (EU) 2015/479 of the European Parliament and of the Council of 11 March 2015 on common rules for exports
 - ❖ Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items

Normative Framework of EU External Trade Relations

- **“autonomous” CCP**
 - Examples of unilateral regulatory acts
 - ❖ Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods
 - ❖ Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union
 - ❖ Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union

Normative Framework of EU External Trade Relations

- **“autonomous” CCP**
 - Examples of unilateral regulatory acts
 - ❖ Regulation (EU) 2023/1077 of the European Parliament and of the Council of 31 May 2023 on temporary trade-liberalisation measures supplementing trade concessions applicable to Ukrainian products under the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part
 - ❖ Applicable until 5 June 2024 (Article 7)
 - ❖ New regulation currently adopted (EP: 23 April 2024)

Normative Framework of EU External Trade Relations

- **“contractual” CCP**
 - Conclusion of international trade agreements with third countries
 - Examples
 - ❖ **Multilateral** trade agreements
 - E.g., Agreement Establishing the World Trade Organization (1994) (WTO Agreement)

Normative Framework of EU External Trade Relations

- **“contractual” CCP**
 - **Bilateral** trade agreements
 - ❖ E.g. EU-South Korea Free Trade Agreement (2010/2015)
 - ❖ EU-Singapore Free Trade Agreement (2018/2019)
 - ❖ EU-Vietnam Free Trade Agreement (2019/2020)
 - ❖ Comprehensive Economic and Trade Agreement (CETA) with Canada, signed on 30 October 2016, provisionally applied since 21 September 2017
 - ❖ EU-Japan Economic Partnership Agreement (2018/2019)
 - ❖ EU-New Zealand Free Trade Agreement (2023/2024)

European Neighbourhood Policy

- **European Neighbourhood Policy (ENP)**
 - Not strictly speaking an external policy of the EU (based on the legal systemization of the EU treaties)
 - Nevertheless one of the most important EU policies dealing with third countries
 - (Formal) emergence in 2003/2004 at the initiative of the European Commission
 - ❖ See Commission, Wider Europe – Neighbourhood: A New Framework with our Eastern and Southern Neighbours, COM(2003) 104 final
 - ❖ Commission, European Neighbourhood Policy: Strategy Paper, COM(2004) 373 final

European Neighbourhood Policy

- **Formal constitutional basis in Article 8 TEU**
 - Incorporated based on the Lisbon Reform Treaty 2007/2009
 - Article 8 (1) TEU: “The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.”
 - Underlying intention: establishing a “circle of friends” around the EU

European Neighbourhood Policy

- **Formal constitutional basis in Article 8 TEU**
 - Implementation primarily also on the basis of international agreements envisioned
 - Article 8 (2) TEU: “For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.”

European Neighbourhood Policy

- **Formal constitutional basis in Article 8 TEU**
 - Conceived primarily as an *alternative* to EU membership
 - Challenges resulting from this perception
 - ❖ In particular as far as neighbouring countries are concerned that are a “European State” in the sense of Article 49 TEU (accession provision)
 - ❖ Applies in particular to the Eastern dimension of the ENP

European Neighbourhood Policy

- Challenges resulting from this perception
 - But see, e.g., already European Parliament resolution of 17 July 2014 on Ukraine (2014/2717(RSP)), para. 33:
 - ❖ “Reiterates its view that the AAs with Ukraine and the other EaP countries **do not constitute the final goal in their relations with the EU**; points out in this connection that, pursuant to Article 49 of the Treaty on European Union, Georgia, Moldova and Ukraine — like any other European state — have a European perspective and may apply to become members of the Union provided that they adhere to the principles of democracy, respect fundamental freedoms and human and minority rights and ensure the rule of law;”

European Neighbourhood Policy

- Challenges resulting from this perception
 - See more recently, e.g., European Council conclusions of 24 June 2022, EUCO 24/22, paras. 10-11:
 - ❖ “10. The European Council recognises the European perspective of Ukraine, the Republic of Moldova and Georgia. The future of these countries and their citizens lies **within the European Union**.
 - 11. The European Council has decided to grant the **status of candidate country** to Ukraine and to the Republic of Moldova.”

European Neighbourhood Policy

- **Two geographical dimensions of the ENP**
 - **Southern dimension**
 - ❖ Comprising countries like Egypt, Jordan and Israel
 - ❖ Two sub-dimensions
 - Bilateral association agreements with most countries
 - » In principle since the 1970s
 - » Most recent “generation” of agreements from the middle of the 1990s/beginning of the 2000s
 - » Legal basis: Article 217 TFEU
 - Regional dimension: Union for the Mediterranean (2008)

European Neighbourhood Policy

- **Two geographical dimensions of the ENP**
 - **Eastern dimension**
 - ❖ Comprising countries like Georgia, Moldova and Ukraine
 - ❖ Two sub-dimensions
 - Bilateral agreements with most countries
 - » In principle since the 1990s
 - » Most recent “generation” of agreements from 2014
 - » Legal basis: Article 217 TFEU
 - Regional dimension: Eastern Partnership (2009)
 - » Eastern Partnership summits every two years

ENP and CCP: Where Do They Meet?

- **ENP and CCP: Where do they meet?**
 - Main “point of contact” between ENP and CCP are trade agreements
 - ❖ Technically different legal basis: Article 207 TFEU vs. Article 217 TFEU
 - ❖ Substantially quite similar trade-related provisions
 - In particular: “Deep and Comprehensive Free Trade Agreements” as part of the association agreements with Ukraine, Georgia, Moldova (2014)
 - ❖ No comparable agreements yet concluded with participants in the Southern ENP

Regulatory Structure of EU Regional Economic Integration Agreements

- **Regulatory structure of EU regional economic integration agreements concluded with non-member states**
 - **Traditional approach** to trade agreements
 - ❖ Almost exclusive focus on trade in goods
 - ❖ Primary focus on “border measures”
 - Reduction of tariffs and non-tariff barriers at the border (e.g. quantitative restrictions on imports)

Regulatory Structure of EU Regional Economic Integration Agreements

- **Modern approach** to trade agreements
 - Frequently covering a great variety of economic and non-economic issues
 - ❖ E.g., trade in services
 - ❖ Protection of intellectual property rights
 - ❖ Protection of foreign investments
 - ❖ Competition law
 - ❖ Trade remedies
 - ❖ Good regulatory governance for business actors
 - E.g. trade facilitation, transparency
 - ❖ Regulatory cooperation

Regulatory Structure of EU Regional Economic Integration Agreements

- **Modern approach** to trade agreements
 - Frequently covering a great variety of economic and non-economic issues
 - ❖ E.g., political cooperation
 - ❖ Internationally recognized labor and social standards
 - ❖ Democracy, rule of law, human rights
 - ❖ Combatting terrorism and corruption
 - ❖ Environmental protection
 - ❖ Sustainable development
 - ❖ Gender equality

Regulatory Structure of EU Regional Economic Integration Agreements

- **Modern approach** to trade agreements
 - **Consequences** of the modern approach
 - ❖ Trade agreements are often the central agreement regulating bilateral relations between the contracting parties
 - ❖ Increasing complexity of trade agreements
 - ❖ Has the potential to considerably complicate negotiations
 - More than “simple” bargaining involved
 - Contrary to traditional tariff negotiations

Regulatory Structure of EU Regional Economic Integration Agreements

- **Two regulatory issues particularly worth exploring**
 - Protection and promotion of non-economic concerns in EU trade agreements
 - Trade liberalization as a regulatory element of EU agreements

EU Trade Policy and Non-Economic Concerns

- **EU trade policy and the protection and promotion of non-economic concerns**
 - **Background:** Trade policy is not to be seen in isolation from other policies, including the protection and promotion of public (non-economic) interests and concerns
 - **Domestic level:** governmental steering mechanisms aimed at correcting market deficits
 - ❖ E.g., 19th century: consequences of industrialization, child labour etc.
 - ❖ Today: labour and social standards, environmental protection, health issues, consumer protection etc.

EU Trade Policy and Non-Economic Concerns

- **International level: traditionally two main aspects**
 - Securing the implementation of other international legal obligations of states within the framework of trade agreements
 - ❖ E.g., international environmental law, international labour and social standards
 - Securing “policy space” for states within the framework of trade agreements
 - ❖ E.g. accommodating issues of national security

EU Trade Policy and Non-Economic Concerns

- **Traditional regulatory approach**
 - Pursuing the promotion and protection of non-economic concerns on the basis of **exception clauses** in trade agreements
 - See, e.g., Article 36 EU-Ukraine Agreement:
“Nothing in this Agreement shall be construed in such a way as to prevent the adoption or enforcement by any Party of measures in accordance with Articles XX and XXI of GATT 1994 and its interpretative notes, which are hereby incorporated into and made an integral part of this Agreement.”

EU Trade Policy and Non-Economic Concerns

- **Article XX GATT 1994**

➤ “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health; [...]
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; [...].”

EU Trade Policy and Non-Economic Concerns

- **Article XXI GATT 1994**

➤ “Nothing in this Agreement shall be construed [...]

- (b) to prevent any contracting party from taking action which it considers necessary for the protection of its essential security interests
 - (i) relating to fissionable materials [...];
 - (ii) relating to the traffic in arms, [...];
 - (iii) taken in time of war or other emergency in international relations;
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.”

EU Trade Policy and Non-Economic Concerns

- **Modern regulatory approach**
 - In addition to exception clauses today increasingly **more comprehensive normative frameworks** aimed at promoting and protecting non-economic concerns in bilateral / regional trade agreements
 - Important early example (outside the EU context)
 - ❖ Former North American Free Trade Agreement (NAFTA) of 1992/1994
 - E.g., North American Agreement on Environmental Cooperation as a “side agreement” to NAFTA

EU Trade Policy and Non-Economic Concerns

- **Developments in the context of EU trade policy**
 - Increasing **constitutional predetermination** of trade negotiations in this regard
 - Article 207 (1) TFEU: “The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. **The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.**”

EU Trade Policy and Non-Economic Concerns

- Increasing **constitutional predetermination** of trade negotiations in EU trade policy
 - Overarching foreign policy objectives laid down in Article 21 TEU needs to be taken into account
 - ❖ E.g., sustainable development
 - Wide margin of appreciation enjoyed by EU institutions, but nevertheless legally binding objectives
 - potentially subject to judicial review by the European Court of Justice (see in particular Article 218 (11) TFEU)

EU Trade Policy and Non-Economic Concerns

- Increasing **constitutional predetermination** of trade negotiations in EU trade policy
 - **Criticism** voiced in this regard
 - ❖ “wish list for a better world”, “redolent of motherhood and apple pie”
 - References in *Larik*, Foreign Policy Objectives, 2016, p. 168
 - ❖ Downgrading of the specific trade policy objectives laid down in Article 206 TFEU
 - ❖ Increasing “politization” of the EU trade and investment policy

EU Trade Policy and Non-Economic Concerns

- **Manifestations of this regulatory approach in EU treaty practice**
 - EU-South Korea Agreement (2010/2015) as the first of a new generation of EU FTAs
 - ❖ In particular: Inclusion of a **Trade and Sustainable Development Chapter** (Articles 13.1 et seq.)
 - ❖ However: already Chapter 4 “Environment” (Articles 183-190) of the Economic Partnership Agreement EU-CARIFORUM States of 15 October 2008

EU Trade Policy and Non-Economic Concerns

- **Chapter 13 EU-Ukraine Agreement**
 - Trade and sustainable development (Articles 289 to 302)
 - **Three dimensions**
 - ❖ Substantive provisions
 - ❖ Institutional provisions
 - ❖ Provisions on dispute settlement

EU Trade Policy and Non-Economic Concerns

- Selected **substantive** provisions
 - Article 290 (1) EU-Ukraine Agreement: “the Parties shall ensure that their legislation provides for high levels of environmental and labour protection and shall strive to continue to improve their legislation”
 - Article 292 (2) EU-Ukraine Agreement: “The Parties reaffirm their commitment to the effective implementation in their laws and practices of the multilateral environmental agreements to which they are party.”

EU Trade Policy and Non-Economic Concerns

- Selected **substantive** provisions
 - Article 294 EU-Ukraine Agreement: “In order to promote the sustainable management of forest resources, Parties commit to work together to improve forest law enforcement and governance and promote trade in legal and sustainable forest products.”
 - Article 296 (1) EU-Ukraine Agreement: “A Party shall not fail to effectively enforce its environmental and labour laws through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties.”

EU Trade Policy and Non-Economic Concerns

- Selected **institutional** provisions
 - Article 299 (1), (2) EU-Ukraine Agreement: obligation to establish an advisory group on sustainable development comprising of independent representative civil society organizations by each Party
 - Article 299 (3) EU-Ukraine Agreement: establishment of an open civil society forum to meet once a year
 - Article 300 (1) EU-Ukraine Agreement: establishment of the Trade and Sustainable Development Sub-Committee

EU Trade Policy and Non-Economic Concerns

- **Sustainability-Related Dispute Settlement Provisions in EU Trade Agreements**
 - Dispute settlement mechanisms included in regional trade agreements
 - ❖ Frequently modeled after the WTO dispute settlement mechanism (without appellate structure)
 - E.g., Chapter on Dispute Settlement of EU-Vietnam Agreement; Articles 303 et seq. EU-Ukraine Agreement
 - ❖ Frequently including access to trade sanctions
 - E.g., Article 15 (2) Chapter on Dispute Settlement of EU-Vietnam Agreement; Article 315 (2) EU-Ukraine Agreement

EU Trade Policy and Non-Economic Concerns

- **Sustainability-Related Dispute Settlement Provisions in EU Trade Agreements**
 - However: Often **distinction** between disputes over “sustainability-related obligations” and “trade obligations” in regional trade agreements
 - **Three main approaches** in current RTA practice

EU Trade Policy and Non-Economic Concerns

- **Minimalist (procedural) approach**
 - In particular: dispute settlement **exclusively** by way of **consultations**
 - ❖ E.g., Article 12 Agreement on the Environment Canada-Peru of 29 May 2008
 - Background: Canada-Peru Free Trade Agreement (2008)
 - ❖ Article 41 (3) FTA between the EFTA States and Bosnia-Herzegovina (June 2013 / January 2015)

EU Trade Policy and Non-Economic Concerns

- **“Soft” quasi-judicial dispute settlement**
 - E.g., Articles 300-301 EU-Ukraine Agreement
 - ❖ Consultations, Article 300 (4), (5)
 - ❖ Establishment of an independent Group of Experts (three persons), Article 301 (1)
 - ❖ Report to the parties (to be made available to the Advisory Groups), Article 301 (2)
 - ❖ Implementation of the recommendations made by the Group of Experts to be monitored by the Trade and Sustainable Development Sub-Committee, Article 301 (2)

EU Trade Policy and Non-Economic Concerns

- **“Hard” quasi-judicial dispute settlement**
 - E.g. Free Trade Agreement Nicaragua-Taiwan of 16 June 2006 (no longer in force)
 - ❖ Chapter on Environment (Chapter 19)
 - ❖ **Not explicitly excluded** from the general dispute settlement mechanism under Chapter 22
 - Including suspension of benefits in case of non-compliance (Article 22.16)
 - Free Trade Agreement South Korea-US of June 2007/March 2012)
 - ❖ Article 20.9 (4): **explicitly stipulated access** to the general dispute settlement mechanism

EU Trade Policy and Non-Economic Concerns

- **“Hard” quasi-judicial dispute settlement**
 - E.g. EU-New Zealand Free Trade Agreement (July 2023/May 2024)
 - ❖ Quite comprehensive chapter on trade and sustainable development (Chapter 19)
 - Stipulating, e.g., also quite comprehensive provisions on
 - » gender equality (Article 19.4)
 - » climate change (Article 19.6)
 - » responsible business conduct and supply chain management (Article 19.12)

EU Trade Policy and Non-Economic Concerns

- **“Hard” quasi-judicial dispute settlement**
 - E.g. EU-New Zealand Free Trade Agreement (July 2023/May 2024)
 - ❖ Chapter on trade and sustainable development is **not explicitly excluded** from the general dispute settlement mechanism under Chapter 26
 - Contrary to some other chapters like Maori trade and economic cooperation (Chapter 20), regulatory cooperation (Chapter 22)
 - ❖ First EU trade agreement in which the trade and sustainable development chapter is covered by the general dispute settlement mechanism
 - Apparently at the initiative of New Zealand

EU Trade Policy and Non-Economic Concerns

- **“Hard” quasi-judicial dispute settlement**
 - E.g. EU-New Zealand Free Trade Agreement (July 2023/May 2024)
 - ❖ However: Enforcement option of temporarily suspending treaty obligations in case of non-compliance under Article 26.16 (3) is limited to certain situations involving a violation of
 - certain principles concerning the ILO fundamental rights at work, Article 19.3 (3)
 - the obligation to effectively implement the Paris Agreement on Climate Change, Article 19.6 (3)

EU Trade Policy and Non-Economic Concerns

- **“Hard” quasi-judicial dispute settlement**
 - E.g. EU-New Zealand Free Trade Agreement (July 2023/May 2024)
 - ❖ Consequence: (numerous) other obligations stipulated in the trade and sustainable development chapter are not “backed up” by the enforcement option of temporarily suspending treaty obligations in case of non-compliance under Article 26.16 (3)
 - ❖ Obviously a compromise between EU and New Zealand

Trade Liberalization as a Regulatory Element of EU Agreements

- **Trade liberalization as a regulatory element of EU agreements**
 - Applies to treaties in the realm of the CCP as well as the ENP
 - In particular **three** different regulatory approaches
 - ❖ Addressing barriers to trade in the form of border measures to promote open markets
 - ❖ Principle of non-discrimination
 - ❖ Good regulatory governance for companies and other business actors

Trade Liberalization as a Regulatory Element of EU Agreements

- **Addressing barriers to trade in the form of border measures to promote open markets**
 - Two main type of measures
 - ❖ Tariff barriers to trade
 - ❖ Non-tariff barriers to trade at the border
 - **Rules addressing tariff barriers to trade**
 - ❖ **Customs duty**: financial charge on imported or exported goods that is due because of their importation / exportation

Trade Liberalization as a Regulatory Element of EU Agreements

- **Rules addressing tariff barriers to trade**
 - **Purposes** pursued by custom duties
 - ❖ Source of revenue for governments
 - Easier to collect than domestic taxes
 - ❖ Governance instrument to control transboundary economic relations
 - E.g., protection and promotion of domestic industries

Trade Liberalization as a Regulatory Element of EU Agreements

- **Rules addressing tariff barriers to trade**
 - **Reduction and elimination of customs duties on imports**
 - ❖ E.g., Article 29 (1) 1 EU-Ukraine Agreement: “Each party shall reduce or eliminate customs duties on originating goods of the other Party in accordance with the Schedules set out in Annex I-A to this Agreement.”
 - ❖ Article 2.8 (1) EU-Japan Agreement: “Unless otherwise provided for in this Agreement, each Party shall reduce or eliminate customs duties on originating goods of the other Party in accordance with Annex 2-A.”

Trade Liberalization as a Regulatory Element of EU Agreements

- **Rules addressing tariff barriers to trade**
 - **Prohibition of customs duties on exported goods**
 - ❖ Export duties most commonly imposed on raw materials in short supply on the world market
 - ❖ Purpose: ensuring greater availability of respective goods for the domestic industry
 - ❖ E.g., Article 31 (1) EU-Ukraine Agreement: “Parties shall not institute or maintain any customs duties, taxes or other measures having an equivalent effect imposed on, or in connection with, the exportation of goods to the territory of each other.”
 - ❖ Article 2.12 EU-Japan Agreement

Trade Liberalization as a Regulatory Element of EU Agreements

- **Rules addressing non-tariff barriers to trade at the border**
 - Non-tariff barriers to trade: all government sponsored measures that restrict transboundary trade (at the border), other than customs duties
 - In particular: **quantitative restrictions on trade**
 - ❖ E.g., prohibition of importation or exportation of goods, import quotas, export quotas, minimum export price requirements

Trade Liberalization as a Regulatory Element of EU Agreements

- Rules addressing **non-tariff barriers** to trade at the border
 - Common regulatory approach: **general prohibition of quantitative restrictions on trade**
 - ❖ E.g., Article 35 EU-Ukraine Agreement: “No Party shall adopt or maintain any prohibition or restriction or any measure having an equivalent effect on the import of any good of the other Party or on the export or sale for export of any good destined for the territory of the other Party, except as otherwise provided in this Agreement or in accordance with Article XI of GATT 1994 and its interpretative notes. [...]”

Quantitative Restrictions on Trade in Goods

Art. XI:1 GATT

„No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.“

Trade Liberalization as a Regulatory Element of EU Agreements

- **Principle of non-discrimination**
 - Twofold purpose: Guarantee of conditions for a fair competition between ...
 - ❖ ... products from different exporting countries
 - ❖ ... domestic and foreign products
 - See, e.g., WTO, *EC-Seal Products*, Appellate Body (2014), Rn. 5.82
“Finally, we observe that, notwithstanding the textual differences between Articles I:1 and III:4, each provision is concerned, fundamentally, with prohibiting discriminatory measures by requiring, in the context of Article I:1, **equality of competitive opportunities for like imported products from all Members**, and, in the context of Article III:4, equality of competitive opportunities **for imported products and like domestic products.**”

Trade Liberalization as a Regulatory Element of EU Agreements

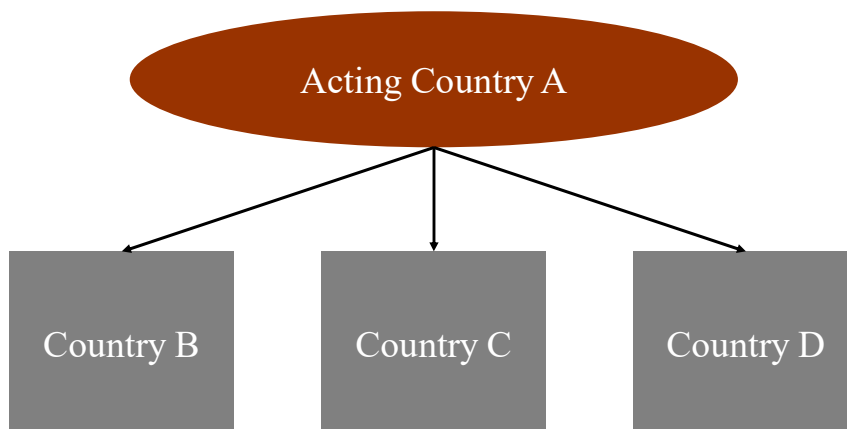
- **Two normative dimensions** of the principle of non-discrimination
 - External dimension: **Most-favoured nation treatment (MFN)**
 - ❖ E.g., country X may not impose a customs duty of 10 per cent on imported smartphones from country Y while imposing a customs duty of 20 per cent on smartphones from country Z.
 - Internal dimension: **national treatment (NT)**
 - ❖ E.g., country X may not impose higher sales taxes on imported smartphones than on domestically produced smartphones.

Trade Liberalization as a Regulatory Element of EU Agreements

- **Principle of non-discrimination**
 - External dimension: **Most-favoured nation treatment**
 - ❖ E.g., Article 8.17 (1) EU-Japan Agreement:
“Each Party shall accord to services and service suppliers of the other Party treatment no less favourable than that it accords to like services and service suppliers of a third country.”

Non-discrimination

External Dimension - Most-Favoured Nation Treatment (MFN)



Trade Liberalization as a Regulatory Element of EU Agreements

• MFN-Treatment

- Scope of application of MFN-obligations
 - ❖ Both border measures and internal measures (e.g. internal taxes on products)
 - ❖ Both **de jure** discriminations ...
 - Measures that make distinctions expressly based on the different origin or destination of products
 - ❖ ... and **de facto** discriminations
 - Measures that are neutrally phrased but have the impact, in practice, of treating a product originating in one country less favourable than products originating in another country

Trade Liberalization as a Regulatory Element of EU Agreements

- **MFN-Treatment: de facto-discriminations**
- Example: Country X imposes a customs duty of 10 per cent on chocolate made with milk from cows that spend at least six months per year at an altitude of more than 1,500 metres above sea level while imposing a customs duty of 20 per cent on chocolate made with other milk.

Trade Liberalization as a Regulatory Element of EU Agreements

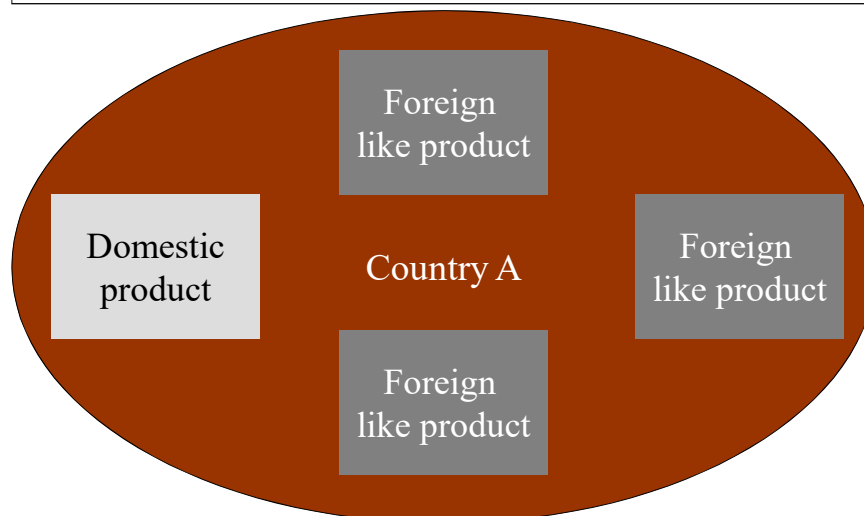
- **Principle of non-discrimination**

- Internal dimension: **national treatment**

- ❖ E.g., Article 8.16 (1) EU-Japan Agreement: “Each Party shall accord to services and service suppliers of the other Party treatment no less favourable than that it accords to its own like services and service suppliers.”
- ❖ Article 34 EU-Ukraine Agreement: “Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of GATT 1994, including its interpretative notes. To this end, Article III of GATT 1994 and its interpretative notes are incorporated into and made an integral part of this Agreement.”

Non-discrimination

Internal Dimension – National Treatment



National Treatment and de facto discriminations

The neighboring countries A und B both have industries that produce cars of a similar kind. The industry in country A is able to sell the cars for \$ 5.000,00, whereas the similar cars from Country B cost \$ 8.000,00. Country B introduces a law requiring a minimum sales price for cars of \$ 8.000,00.

Trade Liberalization as a Regulatory Element of EU Agreements

- Principle of non-discrimination: “likeness”
 - E.g., Article 8.17 (1) EU-Japan Agreement: “Each Party shall accord to services and service suppliers of the other Party treatment no less favourable than that it accords to ***like* services and service suppliers** of a third country.”

Nondiscrimination: “like products”

The EU prohibits the importation and sale of certain materials containing asbestos during production. Material with and without asbestos is identical as far as the end-use of the products is concerned. (see European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body of 12 March 2001, WT/DS135/AB/R) _____

The USA prohibits the sale of Tuna products containing tuna which is caught in a way that kills dolphins. (see US – Restrictions on Imports of Tuna (Tuna II), Panel Report of 16 June 1994 [not adopted], ILM 33 [1994], 839)

Nondiscrimination: “like products”

Country A imposes a higher sales tax on chocolate made with cacao harvested by children than on chocolate made with cacao harvested in accordance with standards prohibiting child labour. (relevance of process and production methods, PPMs?) _____

The USA prohibits the sale of shrimp products containing shrimps that are caught in a way that does not protect sea turtles. (see US – Import Prohibition of Certain Shrimp and Shrimp Products, WTO Appellate Body, 1998)

Non-Discrimination

„like products“

“... an assessment utilizing an unavoidable element of individual discretionary judgement has to be made on a case-by-case basis”.

“... a determination of ‘likeness’ under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products.” (European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body of 12 March 2001, WT/DS135/AB/R, paras. 99 und 101)

Non-Discrimination

„like products“

Determination on the basis of objective criteria

“(i) the properties, nature and quality of the products [physical characteristics]; (ii) the end-uses of the products; (iii) consumers’ tastes and habits ... iv) the tariff classification of the products.”

See, e.g., European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body of 12 March 2001, WT/DS135/AB/R, para. 101.

Trade Liberalization as a Regulatory Element of EU Agreements

- **Good regulatory governance for companies and other business actors**
 - Rules on non-tariff barriers to trade such as, e.g.,
 - ❖ Regulations promoting transparency
 - ❖ Regulations improving responsiveness
 - ❖ Regulations addressing unfair and arbitrary application of trade measures
 - Trade facilitation measures

Trade Liberalization as a Regulatory Element of EU Agreements

- **Good regulatory governance for companies and other business actors**
 - See, e.g., Article 282 (1) EU-Ukraine Agreement:
“Cognisant of the impact which their respective regulatory environment may have on trade between them, the Parties shall establish and maintain an effective and predictable regulatory environment for economic operators doing business in their territory, especially small ones, due account being taken of the requirements of legal certainty and proportionality.”

Trade Liberalization as a Regulatory Element of EU Agreements

- **Good regulatory governance for companies and other business actors**
 - See, e.g., Article 283 (1) EU-Ukraine Agreement
 - ❖ Publication of all measures of general application
 - ❖ Providing an explanation of the objectives of and rationale for such measures
 - ❖ Allowing for sufficient time between publication and entry into force of such measures

Trade Liberalization as a Regulatory Element of EU Agreements

- **Good regulatory governance for companies and other business actors**
 - Article 283 (2) EU-Ukraine Agreement
 - ❖ Publication of any proposal to adopt such measures in advance
 - ❖ Providing opportunities for interested persons to comment on such proposals
 - ❖ Each party endeavours to take into account such comments

Trade Liberalization as a Regulatory Element of EU Agreements

- **Good regulatory governance for companies and other business actors**
 - Article 284 EU-Ukraine Agreement
 - ❖ Establishment of appropriate mechanisms for responding to enquiries from any interested person regarding any trade-related measure and how it is applied in practice
 - Article 285 EU-Ukraine Agreement
 - ❖ Administration of all measures in a consistent, impartial and reasonable manner
 - ❖ Right to be heard in administrative proceedings

Trade Liberalization as a Regulatory Element of EU Agreements

- **Good regulatory governance for companies and other business actors**
 - Article 286 EU-Ukraine Agreement
 - ❖ Maintaining courts or other independent tribunals for the purpose of reviewing and correcting administrative actions
 - **Due process dimension** of the principles of good regulatory governance
 - ❖ Manifestations of the **rule of law** in economic relations



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