

# Sustainable development as a legally binding objective: what implications for EU trade and investment policies?

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# Overview

1. Objectives before the Treaty of Lisbon
2. Sustainable development in the Treaty of Lisbon
3. The substantive implications of sustainable development for EU trade and investment policymaking

# 1. Objectives before the Treaty of Lisbon (1/3)

- No clear overview of objectives
- BUT Common Commercial Policy (CCP)
  - Original areas of EU competence for external action
  - *Aiming* for liberalisation
- Other policy considerations?

## *ARTICLE 110*

En établissant une union douanière entre eux, les États membres entendent contribuer conformément à l'intérêt commun au développement harmonieux du commerce mondial, à la suppression progressive des restrictions aux échanges internationaux et à la réduction des barrières douanières.

La politique commerciale commune tient compte de l'incidence favorable que la suppression des droits entre les États membres peut exercer sur l'accroissement de la force concurrentielle des entreprises de ces États.

## *Article 110*

By establishing a customs union between themselves Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers.

The common commercial policy shall take into account the favourable effect which the abolition of customs duties between Member States may have on the increase in the competitive strength of undertakings in those States.

# 1. Objectives before the Treaty of Lisbon (2/3)

- Developmental aspect of trade ► using the CCP for non-economic objectives
  - Opinion 1/78 (*Natural Rubber*)
  - *Commission v Council (Generalised Tariff Preferences)* (C-45/86)
- Expanding Union ► use of CCP for other non-economic objectives
  - Foreign policy and security objectives
    - See *Werner* (C-70/94), *Leifer* (C-83/94), *Centro-Com* (C-124/95) case law
  - Environmental objectives
    - See Opinion 2/00 (*Cartagena Protocol*), *Commission v Council (Energy Star Agreement)* (C-281/01), *Commission v Council (Rotterdam Convention)* (C-94/03) and *Commission v Parliament and Council (Rotterdam Convention)* (C-178/03)

# 1. Objectives before the Treaty of Lisbon (3/3)

- Effect on EU trade policymaking?
  - Possible, but predominantly related to trade
  - Questions
    - How do trade & non-economic objectives interact?
    - What is the legal value of objectives?
    - Which objective needs to be prioritised?
- Policy choice
  - Wide margin of political discretion in economic policies
  - See *Bulk Oil* (C-174/84) and *Odigitria* (T-572/93)



## 2. Sustainable development in the Treaty of Lisbon (1/4)

- Goals of Treaty of Lisbon
  - Simplification EU structure
  - Increasing democratic legitimacy
  - Consistency and coherence
- Policy coherence ► sustainable development concerns
  - Millennium Development Goals
  - Commission communications
  - See also *Commission v Council (Philippines Agreement)* (C-377/12)

# 2. Sustainable development in the Treaty of Lisbon (2)

- CCP measures
  - Mandatory nature of liberalisation objective
  - BUT it never stands alone
- Article 205 TFEU

## *Article 205*

The Union's action on the international scene, pursuant to this Part, 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.

## *Article 206*

(ex Article 131 TEC)

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.

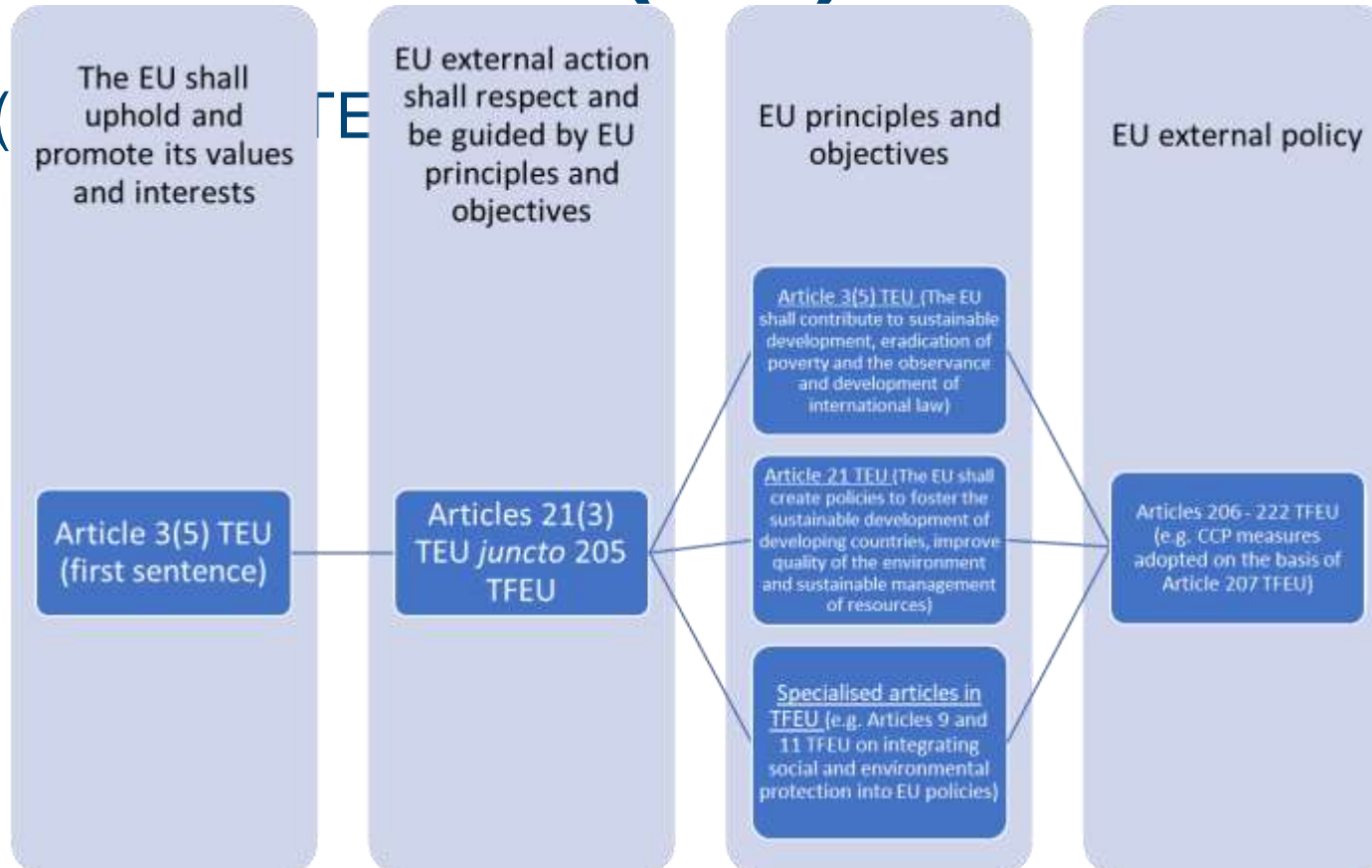
## *Article 207*

(ex Article 133 TEC)

1. 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.

# 2. Sustainable development in the Treaty of Lisbon (3/4)

➤ Articles 3(5) TEU





# 2. Sustainable development in the Treaty of Lisbon

- CJEU case law ► legal principles
  - Opinion 2/15 (EU – Singapore)
  - *Air Transport Association of America v. Secretary of State for Foreign and Commonwealth Affairs*
  - *Front Polisario* cases (T-279/19 and T-290/19)
  - Opinion 1/17 (CETA)

142. One of the features of that development is the rule laid down in the second sentence of Article 207(1) TFEU that 'the common commercial policy shall be conducted in the context of the principles and objectives of sustainable development'.  
163. It would, moreover, not be coherent to hold that the provisions liberalising trade between the European Union and a third State fall within the common commercial policy and that those which are designed to liberalise trade are designed to liberalise trade in the context of sustainable development. In conjunction with the objective of sustainable development, the liberalisation of trade is part of that policy.  
101. Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union (see, to this effect, Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraphs 9 and 10, and Case C-104/08 *Intertek* [2009] ECR I-1171, paragraph 20).  
200. In providing for the creation of such a mechanism, standing outside the judicial systems of the Parties, the aim of Section F of Chapter Eight of the CETA is, as observed by the Council and the Commission, to ensure that the confidence of foreign investors extends to the body that has jurisdiction to declare infringements, by the host State with respect to their investments, of Sections C and D of that Chapter. It is apparent, therefore, that the independence of the envisaged tribunals from the host State and the access to those tribunals for foreign investors are inextricably linked to the objective of free and fair trade that is stated in Article 3(5) TEU and that is pursued by the CETA.

➤ What are the substantive implications thereof?

### 3. The substantive implications of sustainable development for EU trade and investment policymaking (1/6)

- What does this mean for a reform process like the Energy Charter Treaty?
  - Bringing it in line with current investment practices and sustainable development goals
  - Paris Agreement, as confirmed by European Green Deal
    - The strict observance of international law (Article 3(5) TEU)
    - Sustainable development objectives
      - Articles 3(5) and 21 TEU
      - Article 11 TFEU
      - Article 37 Charter of Fundamental Rights of the European Union
      - European Climate Law
  - How to implement?



## 3. The substantive implications of sustainable development for EU trade and investment policymaking (2/6)

- The Treaties leave a lot of questions unanswered
  - What does it mean to
    - Conduct EU external trade and investment policies in the context of EU objectives?
    - Contribute to sustainable development and the strict observance and development of international law?
  - What is the hierarchical relationship between these values, principles and objectives?

### 3. The substantive implications of sustainable development for EU trade and investment policymaking (3/6)

- The CJEU has not elaborated on this matter
  - Opinion 2/15 (*EU – Singapore FTA*)
  - *Commission v Council (Philippines Agreement)* (C-377/12)
- EU institutions ► wide margin of political discretion in external economic relations (*Bulk Oil* (C-174/84) and *Odigitria* (T-572/93))
  - Including for the obligation to integrate sustainable development!



### 3. The substantive implications of sustainable development for EU trade and investment policymaking (4/6)

- Norms flowing from values ► application of complex and/or imprecise rules that do not have the same degree of precision as a provision of an international agreement
  - Manifest error of assessment
    - See *Air Transport Association of America* (C-366/10)
    - See *Front Polisario* cases (T-279/19 and Joined cases T-344/19 and T-356/19)
      - EU institutions ► exercise discretion, aspects decisions examined, adequate reasons
      - Clear legal concept/rule ► specific action entailing foreseeable and objective criteria
    - CJEU has not (yet) confirmed
- *A contrario* Opinion 1/17 (CETA)



### 3. The substantive implications of sustainable development for EU trade and investment policymaking (5/6)

- Commission ► procedural implications of obligation to integrate EU objectives into trade instruments
  - See Communications ► impact assessments
  - European Ombudsman and Court: vital obligation
    - EU – Vietnam FTA
    - EU – Mercosur trade negotiations
  - Conclusions impact assessments ► EU trade and investment policies?
    - European Ombudsman: need for modification/mitigating measures in case of negative human rights impacts
    - >< Commission
- Political negotiations



# 3. The substantive implications of objectives for EU (trade) policymaking (6/6)

- What does this mean for a reform process like the Energy Charter Treaty?
  - Reforms include
    - So-called flexibility mechanism
    - Inclusion of a chapter on sustainable development with a conciliation procedure
    - Exclusion of intra-EU applicability of ECT
  - Widespread malcontent
  - How to achieve further reform/departure agreement?
    - Treaty objectives
    - Paris Agreement, European Green Deal, European Climate Law
    - EU Member States exit from the mixed agreement



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Questions?

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