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EDITORIAL COMMENTS

Playing by the rules – Free and fair trade

In autumn 2017, the Commission published a series of proposals, recommendations and policy documents which herald the start of a new stage in EU trade policy-making. They take stock of Commissioner Malmström's 2015 "Trade for all" strategy, respond to the crucial ruling of the Court of Justice in Opinion 2/15, on the FTA with Singapore, and current debates about the scope and direction of new trade agreements, and calibrate the balance between the values and interests which the Union is to uphold and promote in its "relations with the wider world". Against a background of increased contention over trade policy, these initiatives invite us to think about the principles – if any – on which that policy rests. Let us start with the mission statement for the EU's external policy set out in Article 3(5) TEU, which contains a striking reference to trade: alongside commitments to peace, security, sustainable development and "the strict observance and the development of international law" the EU is to contribute to "free and fair trade". The phrase carries both ambiguity and a potential which recent initiatives and developments in EU trade policy are starting to reveal. It appeared with little explanation during the drafting of Part I of the Constitutional Treaty in the first half of 2003. There was no reference at all to trade in the February 2003 Praesidium draft of Article 3, which sets out the Union's overall objectives.[1] "Free and fair trade" then appeared in a revised text in May that year,[2] and was retained in subsequent drafts, finally finding its way into the Lisbon Treaty and Article 3(5) TEU. The May 2003 redraft of the provision responded to a large number of suggested amendments, and in particular to calls for language signalling greater "openness to the world", including several suggestions for including a reference to free trade, but the inclusion of "fair trade" was not explained.[3]

1. Praesidium, Draft of Articles 1 to 16 of the Constitutional Treaty, 6 Feb. 2003, CONV 528/03, Art. 3. According to the explanatory note in the same document, the "philosophy of this Article is to set out the general objectives justifying the very existence of the Union and its action for its citizens".

2. Praesidium, Draft Constitution, Revised Text of Part One, 26 May 2003, CONV 724/03, Art. 3.

3. CONV 724/03, Annex 2 p. 54; for a summary of the suggested amendments, see CONV 574/1/03 REV 1, p. 40.

Article 3 as a whole was intended to reflect, without simply repeating, objectives appearing elsewhere in the Treaty in connection with specific policies, and its paragraph 5 clearly echoes the general external objectives found in Article 21 TEU, which resulted from the report of the Working Group on external action.[4] However, neither Article 21 TEU, nor Article 206 TFEU which sets out the objectives of the Common Commercial Policy, mention free or fair trade in so many words. Article 21(2)(e) TEU refers to "the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade"; and Article 206 TFEU requires the Union to "contribute, in the common interest, to the harmonious development of world trade." These references suggest a trade policy which is committed to participating in multilateral efforts towards liberalization, a commitment which dates from the foundation of the EEC.[5] Although free trade means different things in different contexts, and no free trade agreement will remove all trade restrictions, the aim of contributing to free(r) trade can certainly be drawn from these Treaty provisions; and in an external policy context free trade carries the connotation of WTO-compatible liberalization of trade.[6] But what does free *and fair* trade (*commerce libre et équitable*) mean? Does it somehow reflect the obligation to take account of the needs of "all countries" and "common interests"?

There are, in fact, two distinct understandings of fair trade. In the first, fair trade means playing by the rules – in particular, the rules represented by the trade disciplines of the WTO. Unfair trade includes illegal subsidies, or dumping, or a failure to respect intellectual property rights, but also absence of reciprocity. In the second, although rules are also significant, fair trade carries an ethical dimension and suggests that trade policy should contribute to upholding the EU's values as well as promoting its interests.[7] Both these understandings can be found, often intertwined, in documents on trade strategy, but as we shall see they also help to shape the instruments of trade policy and even the conception of its scope.

4. Final Report of Working Group VII on External Action, 16 Dec. 2002, CONV 459/02.

5. Art. 110 EEC.

6. C.f. Joined cases 21-24/72, *International Fruit Company NV and others* v. *Produktschap voor Groenten en Fruit*, EU:C:1972:115, paras. 10–13.

7. Fair trade is of course commonly associated with the Fair Trade Foundation standards which relate to the price paid to producers, fair wages and employment conditions and social provision: "The objective of *fair trade* is to ensure that producers receive a price which reflects an adequate return on their input of skill, labour and resources, and a share of the total profit commensurate with their input." Commission Communication on Fair Trade of 29 Nov. 1999, COM(1999)619, p. 4. Union initiatives generally place Fair Trade in this sense in the context of the private sector, Corporate Social Responsibility and, to some extent, public procurement practice; see e.g. Commission Report on the implementation of the EU trade strategy "Trade for all", COM(2017)491, 13 Sept. 2017, p. 11.

Fair trade as playing by the rules

In an article written a month before the signing of the Lisbon Treaty in 2007, trade commissioner Peter Mandelson and the Portuguese trade minister Manuel Pinho (then holding the rotating Presidency) clearly expressed the idea of fair trade as fair play: "Europe should defend its businesses and workers against unfair trade by upholding trade rules and strengthening the multilateral system that polices them…. Political support for free trade hangs on a robust defence of fair trade."[8] As this quotation demonstrates, free trade requires rules, and fairness in this sense is a necessary condition for free trade to work. Often expressed in terms of ensuring a level playing field, this approach is still at the forefront of EU trade policy. In the Communication on future trade policy published in September 2017, the Commission claims "Our trade policy strives to make open trade fair: ensuring that European business, workers and farmers compete on a level playing field with those of our trading partners around the world."[9] On the same day, a report on the first two years of the "Trade for all" Strategy called for a trade policy which secures "a level playing field for EU companies – be it by securing reciprocal market opening, tackling unfair practices or enforcing the EU's rights and upholding high standards".[10] Two elements of this current iteration are striking. The title of the Communication on trade policy, "A modern trade policy to harness globalization", is a deliberate reference to the Commission's own reflection paper on Harnessing Globalization, of May 2017, in which the words fair and unfair appear 25 times.[11] The message is that globalization needs to be tamed or harnessed, that fair globalization is important not only for the developing world,[12] but also to protect European "business, workers and farmers". And this more defensive vision of fair trade, as well as being concerned with playing by the rules, also includes greater stress on the need to defend the EU's

8. Mandelson and Pinho, "Defending Europe's Interests", *International Herald Tribune*, 22 Nov. 2007. The authors conclude that "Europe's basic foreign economic policy should be 10 words long. Resist protectionism at home. Open markets abroad. Defend fair trade."

9. Commission Communication "A modern trade policy to harness globalization" COM(2017)492, 13 Sept. 2017, p. 5.

10. Commission Report on the implementation of the EU trade strategy "Trade for all" COM(2017)491, 13 Sept. 2017, p. 3.

11. European Commission reflection paper on Harnessing Globalization, COM(2017)240, 10 May 2017.

12. The UN Millennium Declaration called for globalization to be made "fully inclusive and equitable." The September 2005 World Summit which reviewed the Millennium Goals called for "fair globalization" in terms of the goals of "full and productive employment and decent work for all": UNGA Resolution, 2005 World Summit Outcome, A/Res/60/1, para 47. On the ILO's work on fair globalization, see <www.ilo.org/integration/themes/sdg/lang—en/index.htm>.

own standards, that free trade should not entail lowering environmental, health or consumer standards or constrain the "right to regulate" of the EU and (importantly) of its Member States.[13] An articulation of the level playing field in terms of ensuring that the regulatory choices which underpin the internal market are not undermined, has also emerged as a central concern of the EU in the UK withdrawal process, both in establishing the parameters for a transitional period,[14] and in planning future trade relations. The level playing field here goes beyond upholding trade rules; a future agreement, the EU says, must also address the risk of unfair competitive advantage.[15] "Playing by the rules" can thus refer to social, tax and regulatory rules as well as to the international trade rules of the WTO.

Screening foreign direct investment

A number of examples could be given of the materialization of this view of fair trade among the Commission's trade policy priorities for 2018,[16] including the long negotiations over the reform of the EU's trade defence instruments which are finally drawing to a close.[17] Let us take a different

13. See also European Council Conclusions 22–23 June 2017, EUCO 8/17, paras. 16–17: "[The EU] will actively promote an ambitious free trade agenda on the global scene. To this end, it will seek to foster a truly level playing field, while remaining vigilant concerning the respect and promotion of key standards, including social, environmental, health and consumer standards that are central to the European way of life. … trade and investment can only be free if it is also fair and mutually beneficial."

14. European Council Guidelines, 15 Dec. 2017, EUCO XT 20011/17, para 4: "[Under the transitional arrangements] In order to ensure a level playing field based on the same rules applying throughout the Single Market, changes to the acquis adopted by EU institutions, bodies, offices and agencies will have to apply both in the United Kingdom and the EU."

15. European Council Guidelines, 29 April 2017, EUCO XT 20004/17, para 20: "Any free trade agreement … must ensure a level playing field, notably in terms of competition and State aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices." See in more detail the Commission's presentation to the EU27 on the level playing field as part of the internal preparatory discussions on the future relationship, 31 Jan. 2018, TF50 (2018) 27: <ec.europa.eu/commission/sites/beta-political/files/level_playing_field.pdf>; so-called "LPF provisions" of a future trade agreement discussed include competition and State aid, taxation, environmental and social regulation.

16. Commission Work Programme for 2018, 24 Oct. 2017, COM(2017)650 final/2; priorities include the FDI screening proposal discussed *infra*, finalizing the revised trade defence instruments, a new instrument on international public procurement and pursuing the objective of a multilateral investment court.

17. For the original proposal see COM(2013)192; political agreement was reached on 5 Dec. 2017, IP/17/5136; the regulations are expected to be adopted in May 2018; for the agreed text see INTA_LA(2018)616821, 26 Jan. 2018.

example: the Commission's proposal – published on the same date as the report and communication just mentioned – on screening foreign direct investment (FDI).[18] The proposal is presented as part of a policy to ensure that in trade and investment "everyone plays by the same rules" and to protect the legitimate interests of the Union and its Member States.[19] It is interesting as illustrative of the Union's evolving policy on FDI, and in its attempt at a delicate balance between openness and control (liberalization and regulation, free and fair trade) in this relatively new policy field for the EU. And although the proposed legal basis is the Common Commercial Policy (an exclusive EU competence which offers wide discretion to EU policy-makers to act in the Union interest), the proposal itself is designed to ensure that Member States can assess and protect their own security and public order needs. While declaring that the EU will remain open to foreign investment, the Commission makes the case for establishing what it calls an "enabling framework" for pre-investment screening by Member States on grounds of security and public order so as to protect essential Member State and EU interests where there is a risk of strategic assets being taken over by a foreign-owned (or especially foreign-state-owned) investor. The proposal is based on the Common Commercial Policy (Art. 207 TFEU[20]) on the ground that it concerns FDI, and it uses the definition of FDI adopted by the Court in Opinion 2/15 in establishing the scope of Article 207 TFEU.[21] However the position is complicated by the fact that direct investment in this sense also falls within the scope of the Treaty provisions on capital movements,[22] and (unlike the other

18. Commission Communication "Welcoming foreign direct investment while protecting essential interests", COM(2017)494, 13 Sept. 2017, and its accompanying proposal for a Regulation, COM(2017)487.

19. COM(2017)487, p. 2.

20. Art. 207 TFEU is the basis for EU autonomous action and international agreements in the field of the common commercial policy (CCP); it provides that the CCP shall be based on uniform principles as regards *inter alia* trade in goods and services, the commercial aspects of intellectual property, and foreign direct investment.

21. COM(2017)487, Art. 2(1): "investments of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity." Cf. Opinion 2/15, EU:C:2017:376, para 80.

22. See e.g. C-326/07, *Commission* v. *Italy*, EU:C:2009:193, para 35. There is also an overlap between capital movements and establishment, but the definition of FDI in the proposal falls within the scope of capital movements rather than establishment, as differentiated by the Court of Justice: Case C-35/11, *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paras. 98–102.

Treaty freedoms) Article 63 TFEU establishes the principle of freedom of capital movements also in relation to third countries.[23]

The kind of screening proposed would amount to a restriction on the movement of capital, requiring a justification based in the Treaties.[24] Indeed, Article 65 TFEU refers to the possibility of the Member States taking measures justified on grounds of public policy or public security, and the Commission duly refers to this in presenting the proposal (though not in the text of the draft Regulation itself).[25] However this derogation from free movement is not attached to Article 207 TFEU but to the movement of capital, a matter of shared, not exclusive, competence,[26] and it refers to action by the Member States, not by the EU. Competence under Article 207 TFEU is exclusive *a priori* by virtue of Article 3(1) TFEU and its use here suggests that the proposed Regulation will *authorize* the Member States to (continue to) do something which would otherwise be outside their competence.[27] However, at the same time the proposal appears to authorize something that the Treaty already, in Article 65 TFEU, authorizes the Member States to do. And if the intention is to establish legislative parameters for the exercise of the Treaty-based derogation (as has been done in the case of other free movement derogations[28]) then its legal basis would need to be found in the capital movement provisions.[29] To put the question crudely: is the proposal essentially concerned with making FDI screening more effective, or is it necessary to ensure that Member State screening can continue? If this proposal is not enacted, will those Member States with screening programmes be acting illegally in terms of EU law? The ambiguity in the proposal cannot simply be laid at the door of the Commission; it derives from the ambiguous and overlapping relation in the Treaties between the CCP and the free movement of capital, which was not completely resolved by Opinion 2/15.[30]

Indeed, the choice of Article 207 as the legal basis for the proposal derives support from the broad view taken by the Court of Justice in Opinion 2/15 of

23. See e.g. Case C-464/14, *SECIL — Companhia Geral de Cal e Cimento SA,* EU:C:2016:896, and the comment by O'Brien in 55 CML Rev. (2018), 243.

24. See e.g. Case C-54/99 *Association Église de Scientologie de Paris, Scientology International Reserves Trust*, EU:C:2000:124, paras. 14 and 17.

25. Art. 65(1)(b) TFEU; COM (2017) 487, p. 4.

26. Opinion 2/15, *FTA EU-Singapore*, EU:C:2017:376, paras. 241–242.

27. C.f. the authorization given to the Member States, under certain conditions, to maintain and conclude BITs with third countries, until a BIT between the EU and that third country enters into force: Regulation 1219/2012/EU establishing transitional arrangements for bilateral investment agreements between Member States and third countries, O.J. 2012, L 351/40.

28. E.g. in relation to the free movement of persons, Directive 2004/38, Arts. 27–33.

29. Art. 64(2) TFEU.

30. In Opinion 2/15 the Court merely determined that non-direct investment falls outside Art. 207 TFEU, and within the scope of Art. 63 TFEU.

the application of Article 207 to the investment protection provisions of the free trade agreement with Singapore. Provisions in the agreement authorizing derogations from the investment protection provisions on grounds of public order or public security could, it was held, be subsumed within EU trade powers and did not encroach on Member State competence, on the ground that they were limited to establishing the way in which that competence should be exercised, including requirements of necessity and non-discrimination.[31] The FDI screening proposal is in line with this reasoning in that it does not require the Member States to screen certain types of FDI, nor harmonize the factors on which the Member States will take decisions on FDI; it does not even require that each Member State should adopt a screening mechanism.[32] Instead, it authorizes FDI screening on grounds of security and public policy, includes a non-exhaustive list of factors which may be taken into account (such as whether the foreign investor is controlled by the government of a third country[33]), imposes a requirement of non-discrimination,[34] and establishes procedural conditions such as transparency and the possibility of judicial redress, information-sharing obligations and a degree of cooperation between Member States.[35]

The reasons for this approach are no doubt several; as already mentioned the Commission is following the steer given by the Court in Opinion 2/15 where security and public policy discretion is concerned; very likely the proposal is also designed to minimize contestation (although given the very different attitudes of the Member States towards attracting FDI, this hope may be in vain). The explicit reason given by the Commission itself is instructive, when we consider the ambiguity of the Treaty basis. The problem with the current position, the Commission says, is that it is difficult to monitor FDI flows; there is no way of taking the interests of other Member States into account during the screening process (where there is one); and third country investors are faced with a variety of different and sometimes opaque regimes. But, the Commission goes on to argue that there is no need for all screening to take place at EU level, nor for a completely harmonized system of screening, nor even for uniformity as to whether screening is introduced or not. A system for FDI screening at EU level, according to the Commission, would be difficult to operate given the diversity of Member States' views, as well as the security concerns, which are essentially national.[36] An EU mechanism could

31. Opinion 2/15, paras. 97–103.
32. Currently, according to the Commission, 12 Member States have some kind of FDI screening mechanism.
33. COM(2017)487, Art. 4.
34. COM(2017)487, Art. 6.
35. Ibid.
36. Art. 4(2) TEU.

result in "long deadlines for taking decisions and uncertainty" and additional administrative burdens both for Member States and for foreign investors in situations where decisions often need to be taken quickly.[37] The Commission justifies the adoption of a Union measure in terms of combatting unfair practices: "making sure that everyone plays by the rules and ensuring that essential EU interests are being protected".[38] Insofar as it is proposed to impose constraints on the Member States, these also reflect a rule-based approach: a procedural framework based on transparency and non-discrimination with the possibility of judicial redress, and a clear attempt to ensure compliance with WTO rules and other international obligations, such as those in bilateral trade and investment agreements.[39] Arguably the proposal does not go far enough in this direction: while limiting screening to purposes of security and public policy, it does not explicitly rule out – in line with the case law – restrictions which "serve purely economic ends".[40]

The light touch of the current proposal and the reasons given for it are a good illustration of the ambiguity of its Treaty basis. The choice between the Common Commercial Policy and the free movement of capital is not just a legal quibble: the two sets of provisions have very different logics. Within the CCP, the Treaties do not predetermine the level of liberalization and it is for the Union institutions (within the framework of the EU's international obligations) to determine the appropriate level of free trade and the rules designed to ensure that it is fair. The emphasis is on uniformity of rules, and such derogations that exist are dependent on legislative authorization. The *a priori* exclusivity of trade policy powers, unlike pre-emption, is concerned less with protecting already-defined legislative choices and more with preserving the EU's freedom as regards future policy choice and ensuring the unity necessary to defend the Union interest towards third countries.[41] Articles 63–66 TFEU, on the other hand, establish a rule of freedom of movement, together with derogations based on Member State interests, operating within EU-set parameters; as a field of shared competence it is subject to subsidiarity. The Commission's screening proposal uses the CCP as a legal basis, but the predominant logic of the draft is that of free movement; the "uniform principles" are kept to a minimum; and although the Commission rightly points out that subsidiarity is not applicable in the case of exclusive competence, we have already seen that its reasoning in justifying the proposal is essentially subsidiarity-based. Acting within the Regulation's

37. Commission Staff Working Document SWD (2017) 297 of 13 Sept. 2017, p. 9.
38. Commission Communication, COM(2017)492, cited *supra* note 9, p. 5.
39. See COM(2017)487, preamble para 3.
40. Case C-54/99, *Église de Scientologie,* para 17.
41. Opinion 1/75, EU:C:1975:145.

procedural rules the Member States will continue to assess their own public interest. One aspect of the proposal, indeed, is more firmly placed within the logical frame of the CCP: a new power of the Commission to screen FDI "likely to affect projects or programmes of Union interest", such as projects involving a substantial amount of EU funding, or which are covered by Union legislation regarding critical infrastructure.[42] Yet even here, the Commission's conclusions would be in the form of an opinion and while the Member States are enjoined to take "the utmost account" of the Commission's expression of the Union interest, as they are of the interests of other Member States, the ultimate decision will lie with the Member State concerned, acting, quite properly, in its national interest.[43]

This is not the only current instance of a certain reticence on the part of the Commission and sensitivity towards the Member State perspective, even within trade policy, that bastion of exclusive competence. It is perhaps somewhat ironic that despite the willingness of the Court to interpret exclusive EU trade policy powers as including (foreign direct) investment protection, the Commission is currently holding back from including investment protection in its recommendations for negotiating directives for new free trade agreements. The difficulty arises, of course, as a result of the finding that aspects of the standard investment protection package – non-direct investment and investor-state dispute settlement – fall within shared competence. In line with its new practice (the recommendation for the Art. 50 TEU negotiating directives set a precedent here) the Commission has published its recommendations to the Council to open negotiations with Australia[44] and New Zealand.[45] The market access dimension of FDI is included, but for the rest the Commission has decided to wait until there is a political agreement with the Council and European Parliament over how investment protection and investor-state dispute settlement will be fitted into the EU's trade agreement architecture.[46]

These recent initiatives in EU trade policy indicate that the current understanding of fair trade as "playing by the rules", while defending a

42. COM(2017)487, Arts. 3(2) and 9.

43. Under the current proposal a Commission opinion may also be addressed to a Member State which does not have an established screening mechanism (COM(2017)487, Art. 9(1)); this poses questions as to applicability of the procedural safeguards the regulation is designed to ensure.

44. Recommendation for a Council Decision authorizing the opening of negotiations for a Free Trade Agreement with Australia, COM(2017)472 final.

45. Recommendation for a Council Decision authorizing the opening of negotiations for a Free Trade Agreement with New Zealand, COM(2017)469 final.

46. Commission Communication, COM(2017)492, cited *supra* note 9, p. 6.

multilateral rules-based system as being in the Union interest, places emphasis on protecting the standards, and regulatory and public policy choices of the Member States, as well as those of the Union.

Fair trade as ethical trade

But this is not the only possible understanding of fair trade. We can also see fair trade as equitable or ethical trade, a trade policy which takes account of the interests of developing country trade partners, which is based on respect for fundamental rights whether derived from the EU's own Charter or from international law, and which is designed to further other social and environmental objectives, including sustainable development. These goals may be in tension: the EU's values and interests, which it is mandated to uphold and promote, do not necessarily always coincide with the interests of developing country partners. One of the challenges for the EU is the need to ensure that sustainable development, while reflecting (and protecting) the EU's own regulatory preferences, embeds trade liberalization into a broader development agenda. When the Lisbon Treaty came into force, a reading of "free and fair trade" in Article 3(5) TEU which would encompass the ethical and social dimension of trade liberalization seemed far-fetched, but several recent developments suggest that this picture is likely to change. At a strategic level, trade policy is increasingly integrated into other policy concerns, including sustainable development; the current Trade Strategy expressly encompasses non-trade values,[47] and the September 2017 report argues that "[b]asing trade policy on EU and universal values allows the EU to shape globalization to promote sustainable development both at home and abroad."[48] Other strategic documents such as the new Consensus on Development[49] and the implementation of the 2030 Agenda for Sustainable Development[50] envisage trade policy as integral to their objectives. At the level of specific instruments, two legal developments in particular can be said

47. "One of the aims of the EU is to ensure that economic growth goes hand in hand with social justice, respect for human rights, high labour and environmental standards, and health and safety protection. This applies to external as well as internal policies, and so also includes trade and investment policy." Commission Communication of 14 Oct. 2015, "Trade for all: towards a more responsible trade and investment policy", COM(2015)497, p. 22.

48. Commission Report, COM(2017)491, cited *supra* note 10, p. 9.

49. The New Consensus for Development, "Our World, Our Dignity, Our Future" was adopted as a Joint Statement on 7 June 2017 by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission.

50. Commission Communication "Next steps for a sustainable European future: European Union action for sustainability", COM(2016)739, 22 Nov 2016.

to support this perspective on fair trade: the *Front Polisario* case,[51] and the Court's approach to trade and sustainable development in Opinion 2/15.

Fair trade, human rights and international law

In *Front Polisario*, the General Court, supported by Advocate General Wathelet, had held that although there is limited room for judicial review of the exercise of trade policy discretion by the Commission or co-legislators, there are nonetheless procedural obligations on the Union's institutions to base their decision-making on all the relevant facts, these facts including the envisaged impact of a trade agreement on the human rights situation within its trading partners and the compliance of the agreement with peremptory norms of international law (*jus cogens*) and *erga omnes* obligations.[52] While the Court of Justice did not directly address this procedural argument, reversing the judgment of the General Court on other grounds, its approach was suggestive. The ECJ was clear in preferring an interpretation of an EU trade agreement and subsequent institutional practice that is consistent with the Union's obligations under international law, in particular the customary principle of self-determination and the principle that treaty obligations must be performed in good faith.[53] The case thus links trade policy to the Union's commitment, expressed in Article 3(5) TEU, to the "strict observance" of international law, and in doing so draws together the rules-based and ethical dimensions of free and fair trade.[54] It also invites us to look beyond the EU's

51. Case T-512/12, *Front populaire pour la liberation de la saguia-elhamra et du rio de oro (Front Polisario)* v. *Council*, EU:T:2015:953; Case C-104/16 P, *Council* v. *Front Polisario*, EU:C:2016:973. See annotation by Cannizzaro in this *Review*.

52. Case C-104/16 P, *Council* v. *Front Polisario*, Opinion of A.G. Wathelet, EU:C:2016:677, paras. 256–262.

53. Case C-104/16 P, *Council* v. *Front Polisario*, paras. 123–124.

54. In his later Opinion in the *Western Sahara* case, A.G. Wathelet builds upon these arguments, addressing the extent to which, in concluding a Fisheries Agreement with Morocco, the EU has fulfilled its constitutional obligation to comply with international law. His conclusion is that "in that they apply to the territory of Western Sahara and the waters adjacent thereto, the Fisheries Agreement and the 2013 Protocol are incompatible with Article 3(5) TEU, the first subparagraph of Article 21(1) TEU, Article 21(2)(b) and (c) TEU and Articles 23 TEU and 205 TFEU, which impose on the European Union a requirement that its external action strictly observe international law." Opinion of A.G. Wathelet in Case C-266/16, *Western Sahara Campaign UK, The Queen* v. *Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, EU:C:2018:1, para 286. The ECJ chose a slightly different solution, by finding that the Agreement and Protocol are simply not applicable to the waters adjacent to the territory of Western Sahara, while also stating that if the territory of Western Sahara were included in the scope of application, this "would be contrary to certain rules of general international law", EU:C:2018:118, esp. para 63.

policy preference for including human rights provisions in trade agreements, and to think of the procedural as well as substantive implications of the requirements to pursue a trade policy which takes full account of human rights impacts, and is international law compliant.[55]

Fair trade, sustainable development and playing by the rules

The trade and sustainable development (TSD) chapters in recent EU trade agreements represent an effort to integrate social and environmental objectives into trade policy. These chapters have developed a distinct character. They contain three types of substantive provision: commitments to implement key ILO conventions and multilateral environmental agreements; a commitment not to lower labour and environmental standards so as to improve trade or attract investment (the non-regression clause, preserving the "level playing field"); and provisions on the sustainable management of natural resources, combatting illegal trade (e.g. in endangered species) and cooperation in the promotion of corporate social responsibility and fair and ethical trade initiatives.[56] In Opinion 2/15, the ECJ considered these chapters from the perspective of competence distribution and legal basis, and its approach sheds light on the substantive orientation of EU trade policy. The Court could have (as the Advocate General had done) determined whether the TSD provisions were simply ancillary and incidental to the predominant trade objectives of the agreement or – alternatively – represented obligations sufficiently independent to require a separate legal basis. Instead, it chose to redefine the proper objectives and scope of EU trade policy in the light of the general objectives which govern all external action and the explicit injunction in Article 207(1) TFEU that trade policy must be conducted "in the context of" these principles and objectives.[57] Given that Article 21 TEU includes sustainable development among the EU's external objectives, and Articles 9 and 11 TFEU require the integration of social protection and environmental protection requirements into all EU policies and activities "with a view to promoting sustainable development", and adding a specific reference to the obligation to contribute to "free and fair trade" expressed in Article 3(5) TEU,

55. See e.g. the EU Action Plan on Human Rights and Democracy (2015–2019), adopted by the Council on 20 July 2015, point 25.

56. Commission non-paper "Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)", 11 July 2017, tradoc_155686, p. 2; Commission Report on implementation of Free Trade Agreements in 2016, COM(2017)654, Chapt. 6.

57. See further Asteriti, "Article 21 TEU and the EU's Common Commercial Policy: A test of coherence" in Bungenberg et al. (Eds) 8 *European Yearbook of International Economic Law* (2017), 111.

the ECJ concluded that "the objective of sustainable development henceforth forms an integral part of the Common Commercial Policy".[58] The TSD chapter is thus not independent of trade policy, creating new and separate obligations, but part of it, ensuring that "trade between [the parties] takes place in compliance with the obligations that stem from the international agreements concerning social protection of workers and environmental protection to which they are party."[59] The ECJ links fair trade to sustainable development, and sustainable development – in this trade policy context – is defined in terms of specific multilateral conventions on core labour rights and environmental protection. These chapters do not try to create a parallel system of sustainable development standards, but rather to further the take-up and implementation of existing regimes.[60] Likewise, the TSD chapters complement rather than replace the compliance mechanisms established by these international regimes. Partly for this reason the TSD chapters are excluded from the general dispute settlement provisions of EU trade agreements (normally arbitration) and instead focus on capacity-building, incentive measures, monitoring and dialogue. Although sanctions-based enforcement has been raised as a possible way of strengthening the TSD chapters, the Commission has clear reservations. It argues that the sanctions-based enforcement favoured in different forms by the USA and Canada is based on protecting domestic producers from unfair competition ("social dumping") rather than the EU's preferred approach of combining the level playing field with support for multilateral standards – combining, in effect, the two understandings of fair trade.[61]

The reference to free and fair trade in Article 3(5) TEU has become part of an elaborate chain of reasoning which results in a potentially significant broadening of trade policy objectives; but it does more than that. When we put Opinion 2/15 alongside *Front Polisario*, we see the potential for "free and fair trade" to become more than a rhetorical statement. The different conceptions of fair trade we have touched on here are not necessarily opposed to each other. Fair trade may mean playing by the rules, but those rules are no longer limited to the disciplines of the WTO; they include regulations designed to ensure a level playing field, and criteria that are derived directly or indirectly

58. Opinion 2/15, para 147.
59. Opinion 2/15, para 152.
60. Commission non-paper cited *supra* note 56, p. 4.
61. Ibid., p. 8. Interestingly, the Court in Opinion 2/15 suggests that the possibility of sanction already exists, since a breach of the TSD chapter obligations may in any event entitle a party to terminate or suspend the trade liberalization envisaged elsewhere in the agreement: Opinion 2/15, para 161. For a critical comparison and assessment of recent EU and US practice, see Melo Araujo, "Labour Provisions in EU and US Mega-Regional Trade Agreements", 67 ICLQ (2018), 233.

from general international law and multilateral conventions on labour rights or the environment. Inevitably, the balance between different dimensions of free and fair trade will adjust according to perceptions of the EU's own interests and the wide divergence between EU trade partners in terms of economic development and political preferences. It is still too early to assess the impact of this on the EU institutions and its effect on the dynamic relation between institutions and Member States, though the developments we have touched on here offer some indications. It will be interesting to see how these legal and institutional factors shape the content as well as the process of future EU trade policy-making.