Law and Diplomacy in the Management of EU–Asia Trade and Investment Relations

This volume fills a gap in the literature regarding questions around the interactive dynamics between law and diplomacy on international trade and investment. It brings together lawyers and political scientists from Europe and Asia in an interdisciplinary effort at tracing the respective roles of law and diplomacy in the relations of the European Union (EU) with its trade and investment partners in Asia. Focusing on trade and investment relations with Asia, the EU presents a particularly interesting case, as it has been a strong proponent of a rules-based international economic order for years and a frequent user of the formal procedures established in international treaties in case of disputes. At the same time, it has kept diplomatically active to adjust dispute management and international agreements to the needs and demands of the partners involved. Furthermore, not only is this region of crucial importance due to the presence of both vigorous emerging economies, like China, India and Vietnam, and more established partners, like Japan, EU–Asia relations also present a broad set of economic disputes and recent negotiation efforts analyzed in the contributions to this volume.

This book will be of key interest to scholars and students of international trade/economic law, EU politics, EU external relations (law), international relations, diplomacy and more broadly to international relations and Asian studies.

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Contents

Figures viii
Tables ix
Contributors x
Acknowledgements xv

Introduction 1
CHIEN-HUEI WU AND FRANK GAENSSMANTEL

PART I
Conceptual discussion and historical evolution 15

1 Managing international economic relations through
diplomacy and law: Towards a framework for understanding
the external policies of the European Union 17
FRANK GAENSSMANTEL AND CHIEN-HUEI WU

2 Judicial diplomacy? The role of the CJEU in EU–Asia
trade disputes 43
ANDRÉS DELGADO CASTELEIRO

3 Law and diplomacy in EU–China trade relations:
A historical overview 58
JAPPE ECKHARDT

4 EU–Asia investor–state disputes: Assertive legalism
for economic and political autonomy 75
LEÏLA CHOUKROUNE
PART II
Law and diplomacy in the management of disputes and disagreements

5 Embedding diplomacy in formal procedures:
How the European commission navigated the solar panel dispute with China 95
FRANK GAENSSMANTEL

6 The China–EU solar panel trade dispute:
Explaining different responses of the member states 111
SHAOFENG CHEN

7 Disciplining export restrictions through negotiation and litigation 135
CHIEN-HUEI WU

8 The limits of a legal approach in resolving EU–China trade disputes on non-market economy status 154
CHING-WEN HSUEH

PART III
Diplomacy and the creation of law 175

9 Preventing divergences from becoming disputes:
The elusive EU–China investment negotiations 177
JULIEN CHAISSE, QIAN XU AND XUELIANG JI

10 A legal approach for trade issues and a diplomatic approach for non-trade and sustainability issues? From the EUSFTA via the Singapore opinion of the court of justice of the EU to the JEFTA 194
HERMAN H. VOOGSGEERD

11 More than words? Labour standards in the future EU–India FTA 212
GERDA VAN ROOZENDAAL
12 New trade rule-making regarding sustainable development in EU FTAs with Asian countries 229
YUMIKO NAKANISHI

Conclusion 246
CHIEN-HUEI WU AND FRANK GAENSSMANTEL

Index 251
# Figures

<table>
<thead>
<tr>
<th>Figure</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.1</td>
<td>EU-related disputes in the WTO (from 1995 to 2018)</td>
<td>3</td>
</tr>
<tr>
<td>I.2</td>
<td>Asia, total imports and exports (1995–2017)</td>
<td>4</td>
</tr>
<tr>
<td>I.3</td>
<td>EU–Asia disputes in the WTO (from 1995 to 2018)</td>
<td>6</td>
</tr>
<tr>
<td>1.1</td>
<td>The different influences on policy-maker decisions</td>
<td>23</td>
</tr>
<tr>
<td>3.1</td>
<td>EU anti-dumping cases (all investigations, 1987–2015)</td>
<td>60</td>
</tr>
<tr>
<td>3.2</td>
<td>China’s AD cases (1997–2015)</td>
<td>63</td>
</tr>
<tr>
<td>6.1</td>
<td>Combining the variables</td>
<td>117</td>
</tr>
<tr>
<td>6.2</td>
<td>Export volumes from Germany, Italy and Poland to China</td>
<td>123</td>
</tr>
<tr>
<td></td>
<td>(in millions of Euro)</td>
<td></td>
</tr>
<tr>
<td>7.1</td>
<td>Commodity price indices – Nominal (1960–2018)</td>
<td>140</td>
</tr>
<tr>
<td>7.2</td>
<td>Commodity price indices – Real (1960–2018)</td>
<td>140</td>
</tr>
</tbody>
</table>
## Tables

1.1 Legalized dispute settlement mechanisms and their forms  
1.2 A typology of dispute settlement mechanisms and their characteristics  
1.3 Factors facilitating/promoting diplomatic and legal approaches in resolving EU–Asia disputes  
3.2 EU–China WTO dispute settlement cases (2002–2018)  
4.1 Dispute settlement: Asia a new and fast-changing actor  
4.2 EU–Asia-related ISDS  
4.3 Intra-Asian ISDS  
6.1 Chinese FDI flows into Germany, Italy and Poland (in millions of Euros)
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**Qian Xu**’s doctoral project examines the international governance and regulation of global sanitation and water services. Her PhD research verges on both international investment law and human rights law, with a focus on the interplay between these bodies of law in the context of international arbitration. Xu’s PhD thesis seeks to provide the first exhaustive analysis of international disputes in the increasingly globalized challenges of water resource allocation. The stakes in arriving at a rational and effective normative regime for international water governance are considerable given the potential for high profits, the development of new technologies and the basic need of all human populations for water access. Her objective is to suggest legal developments that might enable states to better
manage the privatization of water services. Xu’s academic publications include “Is It Finally Time for India’s Free Trade Agreements? The ASEAN ‘Present’ and the RCEP ‘Future’” *Asian Journal of International Law* (2019); “Challenges of Water Governance (and Privatization) in China” 47 *Georgia Journal of International and Comparative Law* (2018); “Trans-Pacific Partnership: A World Trade Revolution?” *APEC Currents* (2016). She is also a contributor to the Asia Law Portal, which is the leading source of information and insights on the practice of law in the vast Asia-Pacific region. Xu is currently working on a new article that critically examines the application of the proportionality principle across two decades of investment disputes. Qian Xu holds a BA from Heilongjiang University (2012), an LLM from CUHK Law (2014) and a post-graduate diploma from the Academy of International Trade and Investment Law (2015). She is a member of the Asian Academy of International Law (AAIL).
Acknowledgements

This volume is the outcome of a project that started as a research cooperation between scholars from Taiwan and the Netherlands, coordinated by Academia Sinica in Taipei and the University of Groningen, and grew over time to include further academics of different origins and institutional affiliations. The intention was from the outset to approach an issue that by its nature crosses the boundaries of academic disciplines, from an interdisciplinary perspective. In order to explore why and how EU policymakers choose between, or combine, legal and diplomatic strategies in their efforts at managing economic relations with international partners, it was indispensable to include both lawyers and political scientists and to create space for discussion and exchange amongst them. For this purpose, the involved scholars gathered on two occasions, first for a research workshop at the University of Groningen and then for a larger conference at Academia Sinica. Disciplinary conventions and perspectives, and to some extent also limitations, remained a challenge throughout the project, but we believe that we managed in the end, through the debates, mutual feedback and the editorial process involving various rounds of paper revisions, to construct bridges across the disciplines that allow for synergies in terms of research findings. We hope this will make it an enriching read for other scholars, in these two disciplines and beyond, policymakers, consultants and, more broadly, anyone interested in questions related to international economic governance.

On its trajectory from a simple idea for research and academic cooperation to an edited volume, this project has benefitted from support from many sides, without which it would not have been possible. This concerns first and foremost all involved scholars, whom we would like to thank for their commitment and contributions. We also feel extremely grateful towards the many academics and practitioners who kindly agreed to serve as hosts, keynote speakers, session chairs or discussants during the workshop and the conference, and also supported the project in many other ways. They include the former Director of the Institute of European and American Studies, Academia Sinica, Dr. Chyong-fang Ko; the former Deputy Head of the European Economic and Trade Office, Viktoria Lovenberg; the former Representative of the British Office Taipei, Dr. Michael Reilly; the Justice of the Constitutional Court of Taiwan and WTO panellist Prof. Chang-Fa Lo; Prof. Tai-Lin Chang and Minister without Portfolio John
Chen-Chung Deng in Taiwan; and in Groningen, Prof. Jan van der Harst, Prof. Herman Hoen, Prof. Jaap de Wilde, Prof. Tjalling Halbertsma and Dr. Francesco Giumelli. Various institutions contributed to the project as well. It received funding from the Taiwanese Ministry of Science and Technology (MOST) and the Netherlands Organization for Scientific Research (NWO). We are most grateful for this support, as without it the scholarly gatherings, which are essential for this kind of project, could not have been organized. Academia Sinica and the University of Groningen also made crucial contributions to these events, through the vital support provided by administrative staff, by making venues available and again through generous funding for many additional expenses related to the organization of international scholarly cooperation.

Finally, we would like to express our gratitude to the persons who played a crucial role in transforming the text into a book manuscript ready for publication. Esther Liao at Academia Sinica did an outstanding job in adjusting the very diverse referencing conventions of the two disciplines into a coherent system that matched the expectations of the publisher. The editorial team at Routledge, in particular the copyeditor, also performed extremely well on the final steps towards publication. We feel particularly indebted to Sophie Iddamalgoda, both for her guidance through the entire editing and publication process and for her patience in the face of the many delays and issues that we (and she) had to grapple with.

Chien-Huei Wu and Frank Gaenssmantel
Taipei and Groningen
Introduction

Chien-Huei Wu and Frank Gaenssmantel

Contemporary international economic relations develop in a highly legalized and institutionalized setting. Nevertheless, in their management, diplomatic consultation and political compromise continue to play crucial roles. In case of disputes, policymakers oftentimes prefer to negotiate rather than refer the cases to judicial or quasi-judicial institutions, or they may opt for some combination of diplomatic and legal approaches, with the latter often serving as a backup option or possibly even as a threat scenario. In negotiations towards future agreements they have to decide which issues to legalize and in what way, and which issues to keep in the realm of diplomacy. This leads to the question of why and how policymakers make these choices, and with what implications and effects. Are there any political, legal or institutional factors that promote either legal or diplomatic approaches to disputes, or specific combinations of the two? Is there any evidence on their respective effectiveness? What are the institutional venues for dispute management available and the specific features of each, and what does this imply for their use by policymakers? What are the roles of private actors in determining the nature and venue of dispute settlement? Has the trend towards legalization changed in recent or ongoing international economic negotiations? Which types of issues are legalized, which not? Is there any new pattern in terms of the degree of obligation and precision of the rules and the nature of dispute settlement provisions?

These questions point to the core of current developments in international trade and investment relations and the answers are crucial for understanding them. Surprisingly, they have received limited scholarly attention. While trade and investment policies, related domestic laws, international agreements and in particular the system of the World Trade Organization (WTO) have been studied extensively by both political scientists and lawyers, interactive dynamics between law and diplomacy have been largely neglected, with some rare and rather limited exceptions. For example, Christina Davis has argued that in trade disputes governments use litigation at the WTO dispute settlement mechanism (DSM) to demonstrate commitment to mobilized domestic industries, while negotiation is preferred in the absence of interest group pressure (Davis 2008, 2012). This is an insightful analysis, but her focus on explaining litigation leaves the advantages of negotiation somewhat underexplored, and more generally, she disregards almost
entirely dynamics at the international level, which are an important dimension of the contributions to this book. Other scholars have analyzed the conditions under which negotiated settlements can be reached after cases have been filed with the WTO DSM but before a panel is established (Busch and Reinhardt 2000; Reinhardt 2001; Guzman and Simmons 2002). Lastly, the impact of the legalization of the WTO trade regime on further multilateral negotiations has been studied (Goldstein and Martin 2000; Poletti 2011; De Bièvre and Poletti 2015). While these studies contribute significantly to our understanding of international economic relations, they remain limited in that they focus only on very specific aspects of the WTO system.

This volume proposes to fill this gap in the literature on international trade and investment. It brings together lawyers and political scientists from Europe and Asia in an interdisciplinary effort at tracing the respective roles of law and diplomacy in the relations of the European Union (EU) with its trade and investment partners in Asia. The contributions explore how policymakers choose between diplomatic, legal and mixed approaches in managing international economic relations and with what effects. We will pay particular attention to aspects like policymaking dynamics, the preferences and perceptions of policymakers, the role of private actors, the institutional and legal environment in which a specific case unfolds, the nature of formal procedures available and the characteristics of the cases in question.

The European Union and Asia

The EU presents a particularly interesting case for this project, as it has been a strong proponent of a rules-based international economic order for years and a frequent user of the formal procedures established in international treaties in case of disputes, while at the same time remaining very active diplomatically to adjust dispute management and international agreements to the needs and demands of all partners involved. The EU’s role as promoter of a rules-based system is visible, for example, in its regular use of the WTO DSM or of trade defence mechanisms in a manner consistent with the WTO rules. Beyond the trade regime, through bilateral negotiations with Singapore, Vietnam, Canada and other countries, the EU has been trying to replace the established investor–state dispute settlement (ISDS) with an investment court system and thereby resolve the legitimacy deficit plaguing the ISDS. In the context of substantial rule-making, the EU strives to bring non-trade issues, such as environmental provisions or human rights, into the scope of trade agreements, to subject them to the same degree of scrutiny, and to fill the gap of the trade rules in regulating export restrictions and redefine the concept of “right to regulate” in the investment law context.

To illustrate, data from the WTO DSM, the single most important mechanism to address disputes in the commercial field, show that the EU accounts for the lion’s share of complaints, taking into consideration all cases where it acts as either complainant or respondent, as illustrated in Figure I.1. On average, the EU is involved in around 40 per cent of WTO disputes. It is difficult to say whether the EU is more active in complaining or responding in the WTO DSM since the trend
Figure I.1 EU-related disputes in the WTO (from 1995 to 2018). Source: Compiled by the authors based on WTO, Chronological List of Disputes Cases, retrieved from https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm; https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.
varies from time to time. There are two peaks, in 1998 and 2014. In these 2 years, EU-related disputes account for about 60 per cent of the total WTO disputes.

Other instances of EU external economic relations show the continuing importance of diplomacy. The bilateral negotiations that ended the dispute with China on textile trade in 2005 are a case in point, and one can also think of the many requests in the past to Japan to address European concerns over non-tariff barriers. More recently, China’s overcapacity in the steel sector and resulting commercial tensions have also seen the EU involved in various initiatives at finding mutually acceptable solutions, including in the broader setting of the G20, even though these diplomatic efforts were combined with trade defence measures and WTO DSM cases. Another recent example concerns the attempts by the EU at finding a diplomatic solution to the severe commercial tensions that have built up in relations with the United States under the Trump administration.

Trade and investment relations with Asia (understood as including Northeast, Southeast and South Asia, but not Middle Eastern countries, Central Asia or other former Soviet Republics) play a crucial role in EU external relations, due to the presence of both vigorous emerging economies, such as China, India and Vietnam, and more established partners, such as Japan. Altogether, the region accounts for about one-third of the EU’s total external trade and contains economies that have experienced fast growth over the past decades. But EU–Asia relations are also of great relevance in the broader context of global economic exchanges, not least as they display a broad set of economic disputes and recent negotiation efforts, many of which are likely to work as precedents for economic interactions in the future. This provides for a rich set of cases to be analyzed in the contributions to this volume (Figure I.2).

If we take the WTO DSM as a reference once again, it becomes apparent that of the EU’s trade disputes, a large proportion is related to Asia, as visible in Figure I.3. A closer look at the graph reveals a growing general trend in the ratio of EU–Asia trade disputes to total EU-related trade disputes, with a peak in 2008 when the global financial crisis took off.

**Relevant literature: a broader view**

Aside from the limited existing literature that addresses specific dimensions of the diplomacy vs. law *problématique*, naturally there is a broader set of writings that bear relevance for this collective research project. In the first place, this includes the many publications on the WTO DSM, the most important legal procedure with a court-like body in international economic relations, including between the EU and Asia. Contributions to this volume have built on earlier research on the origins and function of this institution, both by lawyers and political scientists (Davey 2014; Petersmann 1994; Petersmann and Pollack 2003; Trachtman 2006; Elsig and Eckhardt 2015). Literature on the political dynamics around the WTO DSM has also been helpful. This includes the work on diplomatic settlement of a dispute before a panel is established, already mentioned above, but also issues like the impact of the relative power of parties to a dispute, the role of third party submissions, and industry-specific submission strategies of WTO members (Sattler and Bernauer 2011; Busch and Pelc 2010; Davis and Shirato 2007).

Another huge body of literature that has played a crucial role in the preparation of the contributions to this volume regards the formal procedures and political dynamics of decision-making, especially in the highly complex polity of the EU. This concerns first and foremost the relevant legal and institutional provisions and how they play out in practice, in particular regarding the central role of the European Commission and its interaction with member states (Cremona and de Witte 2008; Eeckhout 2011; Koutrakos 2015; De Bièvre and Dür 2005; Woolcock 2011; Heron 2007; Gaenssmantel 2012). Such institutional dynamics have also been linked to the EU’s behaviour in international trade negotiations, along with certain external factors that impact positions within the EU (Meunier 2000; Dür and Zimmermann 2007; Frennhof Larsén 2007; Damro 2007; Young 2007; da Conceição-Heldt 2011; Woolcock 2011). This literature, in combination with work on the choice between bilateral and multilateral negotiation strategies (Elsig 2007), has fed into the contributions to this volume that focus on international negotiation and law creation (see especially Part 3). The fact that legal provisions disciplining trade and investment relations, and related DSMs, may exist at bilateral, regional and global levels, has also led to links between these institutions and even the possibility of choosing preferred venues for the management of economic relations (Flett 2015; Busch 2007).

In looking at EU trade and investment policymaking, and also EU–East Asia economic relations more broadly, this project has been particularly sensitive to the
Figure I.3 EU–Asia disputes in the WTO (from 1995 to 2018). Source: Compiled by the authors based on WTO, Chronological List of Disputes Cases, retrieved from https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm; https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.
multiple levels and multiple types of actors involved in contemporary regional and global economic governance. In this context, studies on new dynamics involving interest groups and business actors have also been relevant (Dür 2007; De Bièvre and Eckhardt 2011; Eckhardt 2011; Curran 2015; Liu and Peng 2016). A last group of publications that is relevant for this project analyzes the characteristics of specific issues on the bilateral economic agenda, their perception by the public and by policy elites and how this impact international interaction. Whether or not foreign policy in general is salient to the population, and how specific issues are perceived, oftentimes conditions available policy options (Oppermann and Viehrig 2008, 2009; Oppermann and Spencer 2013). Also, the way policymakers view a certain issue at stake may constrain their approach to managing it in their relations with international partners, including the choice between diplomatic and legal strategies (Sylvan and Voss 1998; Gaenssmantel and Liu 2017).

Naturally, many more sources have been used by the contributors, and these will be mentioned in the chapters and listed in their respective bibliographies. However, most of the groups of literature or analytical traditions that have had a broader influence on the project as a whole have been listed here.

Overview of the contributions

One of the main challenges of this undertaking has been its interdisciplinary nature. Political scientists and lawyers identify and analyze problems in very different ways. It was simply impossible to force each contributor to familiarize herself or himself with the concepts and methods of the respective other discipline to arrive at truly interdisciplinary individual contributions. What was asked of all participants, however, was to keep the overall purpose in mind when designing and orienting their individual research and to develop results that are not only relevant for their own discipline but can contribute to building a relevant set of conclusions for the project as a whole. A general framework was provided as a reference point for the contributors to draft their contributions to this project, which with revision and further elaboration has become Chapter 1 of this volume. Frank Gaenssmantel and Chien-Huei Wu propose a systematic approach to the various dimensions that influence the choice between diplomatic and legal approaches in the EU’s external economic policy. The discussion starts from fundamental comments on law and diplomacy in the EU’s external economic policy and on the context of multilevel and multi-actor governance in which it unfolds. The authors then discuss legal and diplomatic options available to EU policymakers, reflect how the two may be combined and examine the implications of these various strategies. The chapter addresses both economic disputes and negotiations towards international agreements, and it includes comments on institutional rules and policymaking practice in the EU’s external economic relations as well as a thorough review of legal mechanisms available. The last section explicitly identifies factors that promote legal and diplomatic strategies respectively.
After the framework chapter, Part 1 of the volume continues with a focus on recent developments of the legal and institutional context in which economic relations between the EU and Asia unfold and analyzes some specific political dynamics that can be observed in these settings. Andrés Delgado Casteleiro, in Chapter 2, addresses the decreasing influence of the Court of Justice of the EU (CJEU) in external trade relations. The chapter first examines the extent to which the European institutions can be criticized for allowing trade disputes to be litigated in Luxemburg. It then looks at the substance of the CJEU’s approach to trade disputes so far. In a last step, the chapter discusses whether and how the newly concluded EU trade agreements are downsizing the role of the CJEU in external trade relations through the exclusion of direct effects and limitation of exceptions. A key argument of this chapter is that the EU is moving away from domestic judicialization of trade disputes, and with two driving forces. The EU political institutions, when negotiating trade agreements, explicitly exclude trade disputes arising therefrom, from the realm of the CJEU, which, itself, also prefers the disputes be dealt with at an international level. Chapter 3 by Jappe Eckhardt provides a historical analysis of EU–China trade disputes and of how the use of diplomatic and legal tools has developed over time. Eckhardt identifies three phases. The first phase, from 1978 until the Tiananmen Square massacre in 1989, was dominated by EU protectionism against Chinese imports and a relatively powerless China, which lacked the legal and political means to stop the EU from imposing protectionist measures. During the second phase, from 1989 until 2002, trade relations where increasingly driven by China’s economic pull, yet the EU still had plenty of leeway to adopt protectionist measures against China. The third and final phase, which started with China’s WTO accession in 2002 and is still ongoing, can be characterized by increased politicization of trade disputes between the EU and China but also among EU member states. Eckhardt argues that China’s WTO membership and its increased trade law capacity enable China to defend its trade interests. He also observes that with China’s central position in global value chains, import-dependent firms in the EU have started to play a more vocal role in intra-EU politics.

Closing Part 1, Leïla Choukroune in Chapter 4 delves into the larger question of how Asian governments have mixed legal and diplomatic approaches in their international economic relations, and in the context of their own development strategies. Through an in-depth analysis of China’s and India’s record of trade and investment dispute settlement, the author shows that these two countries have been active but selective in their approach to (and acculturation in) the structures of international trade and investment dispute settlement. She argues that in this domain China and India (and also a number of other Asian countries) have deployed heterodox economic strategies backed by normative autonomy in the service of development. The idea of normative autonomy has implications for the readiness to further legalize trade, investment or more or less directly related issue-areas in future agreements. With a view to preserving such autonomy, some countries thus decide to terminate such BITs that contain investor–state dispute settlement mechanisms. Choukroune’s analysis points to the reversing
trend of investment disputes. BITs, which were originally an instrument invented by European countries to protect their investors, come back to “bite” European countries themselves.

In Part II, the discussion turns to diplomatic and legal strategies in handling specific disputes. In Chapter 5, Frank Gaenssmantel traces legal and diplomatic elements in the European Commission’s approach to the China–EU solar panel dispute, from the start of trade defence investigations in 2012 to the bilateral negotiations on a minimum price undertaking in 2013. It shows that initially the European Commission had virtually no diplomatic options, and the conditions for it to engage successfully in diplomacy were also not given. Amongst legal options, trade defence procedures had a number of advantages, both vis-à-vis China and in the EU context. Towards third countries they are powerful tools due to their unilateral nature and for the fact that the burden of proof lies with the targets. Within the EU, treaties and relevant regulations unambiguously establish Commission authority in trade defence measures, thus strengthening its position towards member states. Since the procedure is started by a complaint from the private sector, the Commission can avoid criticism for excessive activism. Nevertheless, the opposition of a significant number of member states made this approach untenable, and the Commission was forced to envisage a diplomatic approach. It relied again on the formal rules to turn this adverse situation somewhat more to its favour. It did so firstly, by using preliminary anti-dumping duties to construct a threat scenario, and secondly by making use of the provisions in the relevant regulations on negotiating minimum price undertakings. The outcome was still criticized as more favourable to China than to EU industries, but the exercise of “legally embedded diplomacy” allowed the Commission to avoid the worst.

Shaofeng Chen in Chapter 6 analyzes the same dispute but from a different angle, in that he develops an explanation of the very different reactions amongst EU member states to the trade defence investigations targeting imports of Chinese solar panels. He first discusses the role played by member states in the decision-making process on trade defence and then presents a framework for explaining member state preferences based on both values, i.e. underlying preferences regarding free trade vs. protectionism, and economic interests in relation to China. Case studies of German, Italian and Polish positions on solar panel trade defence show that these two variables can indeed explain member state position to a large extent. The chapter shows that different preferences on economic policies towards third states are structurally embedded in the political economies of member states. The challenges this implies for the Commission in the management of external economic relations are therefore unlikely to disappear any time soon.

Chapter 7 by Chien-Huei Wu then examines the EU’s trade dispute management strategy with regard to export restrictions by looking at the interaction between negotiation and litigation. Wu first explores the role of export restrictions in the GATT/WTO regime and traces both, negotiation efforts at disciplining export restrictions during China’s accession process, and attempts by the
EU to secure enforcement of such obligations and commitments through WTO litigation. As China could comply with WTO rules by switching from export taxes to production quota, he then asks whether the EU may have to return to diplomatic tools to resolve its differences with China. He then concludes the chapter by investigating how the EU globalizes China-specific rules to all WTO members, or at least to the new WTO members during the accession negotiations and to its counterparts in FTA negotiations.

In the concluding chapter of Part II, Ching-Wen Hsueh studies difficulties of finding a legal solution to EU–China disputes over China’s treatment as a non-market economy (NME). She first looks at the origin of the NME concept and its problematic legal definition, and then turns to the specific provisions for NME treatment under the EU’s anti-dumping regime. In a further step she analyzes EU–China anti-dumping cases to show the limits, if not impossibility, of solving the NME disputes through legal means. The limited role of a legal approach in resolving the dispute on NME lies in the lack of a clearly defined concept that prevents the judiciary from adjudicating the case. Moreover, given that political and economic complexity surrounding the NME, the judiciary tends to take a lenient approach and endorses a broader scope of manoeuvre for the political branches.

The third and last part of the volume analyzes the creation and development of law in relations between the EU and Asian partners. This concerns the ongoing negotiations on a bilateral investment treaty, but also how non-trade issues are treated in bilateral negotiations and agreements. In Chapter 9, Julien Chaisse, Qian Xu and Xueliang Ji probe the future of the EU–China economic relations and explore how the EU and China are rearranging their investment relations by negotiating a new investment treaty that will replace the 26 investment treaties concluded by China and 27 member states, except Ireland. By concluding a new investment treaty, the EU may shield itself from investment disputes arising from various investment treaties as investors may rely upon treaties favourable to them and sue the EU. In response, China, by reviewing and modernizing its investment treaties, aims to pursue a better balance between the foreign investors’ rights and the host state’s ability to regulate in the public interest. Against the backdrop of other negotiations of investment treaties or FTAs with investment chapters, Chaisse, Xu and Ji show how the EU and China use their BIT negotiation as an effort to set global norms on international investment regimes.

In Chapter 10, Herman Voogdgeerd analyzes the treatment of non-trade issues in free-trade negotiations between the EU and major commercial partners. First, the author discusses the implications of the EU’s institutional structure and EU law, and then he turns to the international legal context under the WTO. In a last step he uses the recently closed EU–Japan negotiations as a case study for how negotiations develop between two similarly advanced economies. The author argues that due to the political context surrounding bilateral free-trade negotiations, non-trade issues are unlikely to be included with a high degree of precision and obligation. Instead, related provisions mostly serve as focal points for further diplomatic consultations. Chapter 11 by Gerda van Roozendaal studies the role
of labour standards in the negotiations towards a free-trade agreement between the EU and India. She examines normative and rational considerations from both the EU and the Indian side, and she adds an extensive discussion on legal and institutional options for labour standards in a future EU–India free-trade agreement. Normative differences between the two sides have created particular tensions in the negotiation process. While for the EU the inclusion of labour standards follows international norms and practice, from the Indian perspective this would represent interference in its sovereignty. The author argues that even if negotiators eventually agree on the inclusion of labour standards in the treaty, one should expect them to serve as reference for further diplomatic consultation, while enforceable legal provisions are highly unlikely.

In the last chapter of Part III, and the volume as a whole, Yumiko Nakanishi looks at trade and sustainable development (TSD) chapters in EU–Asia trade agreements and examines how environmental issues are regulated in the context of trade and investment relations. She first traces the development of sustainable development within the EU and investigates how the EU introduces this issue into the scope of trade negotiations. She uses TSD chapters as an example to show how the EU, through bilateral FTA negotiations, legislates new trade rules focusing especially on dispute settlement in the TSD chapters, as opposed to a general dispute settlement mechanism, and on the right to regulate in the investment context. A core argument of this chapter is that environmental issues constitute a particular challenge in the context of both negotiations and dispute management, as they go to the heart of each side’s right to regulate in the name of public interest and related domestic policies.

Conclusion

The contributions to this volume cover a wide array of instances where law and diplomacy interact and lead to conclusions that allow us to provide some solid answers to the questions laid out at the beginning of this introduction. In the conclusion of the volume the editors will bring together the findings from the individual chapters in the context of the conceptual framework. This will allow us not only to show the insights added by this collective project, but also to point to some persisting gaps, which we hope can inspire further academic research.

References


Part I

Conceptual discussion and historical evolution
1 Managing international economic relations through diplomacy and law

Towards a framework for understanding the external policies of the European Union

*Frank Gaenssmantel and Chien-Huei Wu*

In an interdisciplinary project as the one we present in this volume, some theoretical and conceptual considerations are necessary to bridge the gap between the involved disciplines and bring the involved scholars closer together in their analytical efforts. Given the considerable differences between law and political science, and also between the approaches and methods adopted by the participants of this project, our purpose here is not to present a theoretical framework in the narrow sense, with concrete hypotheses or observable implications, which can be assessed or tested in subsequent chapters. Instead, we aim at exploring the various dimensions of the topic and problem at hand, and at structuring the field of investigation, in order to show the conceptual connections between the contributions and to set the stage for presenting a set of conclusions at the end of the volume.

The conceptual framework developed here will thus present the characteristics of diplomatic and legal approaches in the management of external economic relations by the European Union (EU), discuss the role of policymaking processes in this connection and elaborate on the governance and institutional environment within which economic relations are managed. It will also point to various factors that we expect to make diplomatic or legal approaches, or specific combinations thereof, more or less likely, and with what effect.

The chapter starts with a discussion of diplomacy and law in EU external relations and the issue of choosing between different approaches in a highly diversified, yet legalized and institutionalized context of governance. The two subsequent sections comment respectively on diplomatic dynamics and legal tools for managing commercial disputes. We close the chapter by bringing these two aspects together and discussing conditions that favour either diplomatic or legal approaches, or combinations of the two.

**Diplomacy and law as alternatives for the EU**

Diplomacy and law are fundamentally different ways of managing international relations, including economic relations; in the following paragraphs, we discuss
some of the specific features of each. Before doing so, it is important to emphasize a crucial commonality of diplomacy and law: the fact that both are means to solve disputes (Laswell and McDougal 1991). Therefore, both can be seen as essentially political processes in the famous Eastonian sense of an “authoritative allocation of values” (Easton 1965). But while the legal approach to this allocation of values is based on a system of binding rules and procedures, and sometimes delegation of the authority to interpret the rules and adjudicate (typically to a court or court-like body), diplomacy steers clear of general rules, formal procedures and delegation and instead seeks compromise on the basis of the specific character of the issue at hand.

**Diplomacy and the EU**

Going a step further, diplomacy can be understood in two different senses. Firstly, it is one of the techniques available to policymakers pursuing their foreign policy (Baldwin 1985), a concept that we understand as “the sum of official external relations conducted by an independent actor (usually a state) in international relations,” (Hill 2003, p. 3) and which therefore comprises commercial and other external economic policies. More specifically, diplomacy “consists of communication between officials designed to promote foreign policy either by formal agreement or tacit adjustment” (Berridge 2010). This is a broad definition and includes, but is not limited to, international negotiations, which have been the focus of some classical discussions of diplomacy (see for example Nicolson 1961). Secondly, taking representation as a central element of diplomacy (Sharp 1997), diplomacy is not only about the pursuit of specific goals but also a “state of affairs,” in that communication is regular and ongoing through embassies, representative offices and the like. This differs from the idea of a tool that is deployed whenever deemed necessary in the pursuit of a specific foreign policy goal. Considering diplomacy as a state of affairs, the use of diplomatic channels to raise an issue with the concerned counterpart to “sound out” their interests and disposition, and possibly start working towards a mutually agreeable arrangement, is typically the most immediate approach when any kind of questions or tensions arise in international relations.

Who are the actors of diplomacy? The trained diplomats from foreign ministries certainly remain the principle agents of diplomacy, as they are typically in charge of negotiations and representation. But their field of activity has been progressively constrained by competition from various other levels of social organization and different types of actors, including other branches of their own governments (Devin 2002), but also the administrative services of international organizations. On the one hand, most departments of the executive now maintain their own contacts with international counterparts, often with only marginal involvement of professional diplomats, and sometimes none at all. In the field of commercial diplomacy, trade ministries lead negotiations and typically second their own staff
to embassies abroad, thus frequently side-lining their colleagues from the foreign ministry. On the other hand, the increasingly active summit diplomacy of top leaders also complicates the work of trained diplomats who are better prepared for international interaction but less authoritative in the politico-administrative hierarchy. At the same time, international organizations have their own staff involved in diplomatic interactions (among member states and with respect to outsiders), with interests and ideas that may diverge from national officials and thus further constrain the activities of foreign ministries. Lastly, one should not forget that the international activities and interests of transnational private actors, like business corporations or nongovernmental organizations, also bring pressure to bear on diplomats and condition their scope for action.

If we say, as quoted above, that foreign policy is “usually” related to a state, then how does the EU fit into a discussion of diplomacy? In the form of its common commercial policy (CCP), as well as development policies to a certain extent, the European integration project has had a foreign policy dimension since the Treaty of Rome. The European Commission has provided, for a long time already, a pool of officials ready to engage in diplomacy as a tool of foreign policy, for example, in the negotiation rounds of the General Agreement on Tariffs and Trade (GATT). Through its delegations in virtually all countries of the world it also takes part in diplomacy as a state of affairs. Over the past decades, the EU has progressively broadened the ambition and scope of its foreign policy activities, and with the High Representative of the Union for Foreign Affairs and Security Policy and the European External Action Service (EEAS), it has even created a de facto foreign minister and a diplomatic service. This means it has developed an outward-facing diplomatic profile that looks surprisingly similar to that of states.

Nevertheless, EU diplomacy displays a series of particular features that distinguish it from that of states. First, the scope of competence is limited by its nature as an international organization. Without a basis in the European treaties, EU legislation or court decisions, EU officials cannot authoritatively talk to international counterparts. Second, all member states maintain their own foreign policy and diplomatic services, which means that we can oftentimes observe parallel, and possibly even competing, claims for (and efforts at) external representation, at EU and member state levels. Third, the EU’s foreign policy process and its diplomacy are subject to an unusually wide array of constraints. This includes, first and foremost, pressure from the member states but also lobbying by private actors. In the trade policy field, the European Commission and the Trade Policy Committee (TPC, formerly 133 Committee) in the Council have long been important targets for private actors in their efforts to influence decision-making in their favour (Woll 2009). Since the Treaty of Lisbon, with the CCP now subject to the EU’s “ordinary legislative procedure,” and thus scrutiny by the European Parliament (EP), the parliamentary International Trade Committee (INTA) has also attracted lobbyists’ attention (Marshall 2010).1
International law and the EU

In parallel to diplomacy, international law plays a key role in the management of international frictions. On the one hand, it provides a set of procedures that public and private actors can follow when they feel disadvantaged by violations of shared rules. On the other hand, law defines the boundaries of discretion, or policy space, available to decision makers and diplomats. In international economic relations, there has been a trend towards legalization over the past few decades, with the key development being the coming into being of the World Trade Organization (WTO) in 1995 (Petersmann 1994; Weiler 2001; Reich 1996). With its compulsory jurisdiction, the establishment of a permanent Appellate Body and quasi-automatic adoption of panel/Appellate Body reports by virtue of negative consensus, the WTO dispute settlement mechanism (DSM) significantly contributes to this legalization process (Petersmann 1997; Palmeter and Mavroidis 2004).

The term “legalization” has been used both by scholars of international law and international relations. According to Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal (Abbott et al. 2000), legalization refers to “a particular form of institutionalization characterized by three components: obligation, precision and delegation.” According to them, “[o]bligation means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. […] Precision means that rules unambiguously define the conduct they require, authorize, or proscribe. Delegation means that third parties have been granted authority to implement, interpret, and apply the rules; resolve disputes; and (possibly) to make further rules” (Abbott et al. 2000, p. 401). In applying this definition to the WTO agreements, it can be concluded that such agreements can be characterized by a high degree of legalization given the binding nature of international obligations and commitments, precise and detailed regulation of trade rules and the compulsory third-party DSM. Similar phenomena of legalization, to a various extent, can also be observed in the bilateral agreements concluded by the EU. The most illustrative examples are free trade agreements (FTAs), which provide for clearly defined obligations and compulsory DSMs. Some investment chapters of the EU FTAs and EU bilateral investment treaties (BITs) move a step forward by providing individuals an option for resorting to investor–state dispute settlement (ISDS).

This broader context of the legalization of international trade law, especially under the auspices of the WTO, inevitably affects the legal regulatory framework of the EU’s trade dispute management. On the inward-looking (defensive) side, the EU has strengthened its trade defence mechanisms, which cover anti-dumping, countervailing and safeguard measures, while emphasizing WTO conformity. On the outward-looking (offensive) side, the EU has developed tools to expand its markets abroad, in particular the Trade Barriers Regulation (TBR), but also a broader “market access strategy.” Private actors, individuals or enterprises may refer to the TBR with petitions to request the European Commission to bring a legal challenge in the WTO DSM or DSMs under the bilateral agreements to address trade barriers in third countries (Bronckers 1996).
It is thus clear that boundaries set by law that constrain the discretion of diplomats and policymakers also arise from the EU’s internal legal order. Whereas the Anti-Dumping Agreement (ADA), the Agreement on Subsidies and Countervailing Measures (ASCM) and the Agreement on Safeguards (ASG) set out the rules to be followed when the EU initiates a trade defence measure, which would be subject to the scrutiny of the WTO DSM, the EU domestic counterparts of these three WTO agreements, namely the Anti-Dumping Regulation, Anti-Subsidy Regulation and Safeguards Regulation also dictate the policymakers’ behaviour within the EU legal order, which could be reviewed by the Court of Justice of the EU (CJEU). Law governing the EU’s trade dispute management can therefore be located at two levels: EU law at the domestic level and international trade law, including both the multilateral WTO DSM and bilateral FTAs with the DSMs they set up. Between these two levels, a linkage may be found through the resort to the TBR.

Just as for diplomacy, the competence of the EU also plays a pivotal role with regards to legal tools for managing economic external relations, naturally along with the jurisdiction of the pertinent DSM, if applicable. With various treaty revisions, from Amsterdam to Lisbon, the EU has gradually obtained exclusive competence on almost every aspect of trade relations, including also international investment (Herrmann 2002; Krajewski 2005, 2012; Young 2000; Wu 2011). The EU, and only the EU, is supposed to argue for, and defend, the EU and its member states before the DSMs as provided by the WTO and bilateral agreements. However, it happens from time to time that third countries identify both the EU, and at the same time some of its member states, as defending parties (see most famously European Communities – Selected Customs Matters 2006, and most recently EU – Feed-in-Tariffs [China], which included a consultation request but not a request for the establishment of a panel). This may complicate the EU’s trade dispute management strategy, especially when it comes to sectors that member states consider sensitive, such as public health or cultural areas. When representing the EU at the WTO DSM, the European Commission, in particular its legal service, takes the lead; nonetheless, the influence of private interests in shaping the course of disputes is also apparent. A “public-private partnership” in advancing the EU’s interests before the WTO DSM can often be registered in the sense that EU institutions, through policy instruments such as trade defence mechanisms and TBR, cooperate with enterprises in challenging WTO-inconsistent measures of third countries and defending the legality of EU measures (Shaffer 2006).

**Choice and constraints**

One ambition of this project is to account for choice by policymakers, i.e. between diplomatic or legal approaches to the management of trade disputes, or otherwise any combination of the two. Given the fact that there are different strategies for managing relations with trade partners, exploring how policymakers decide
between these alternatives will significantly enhance our understanding of international commercial relations. This recalls the “logic of choice,” proposed by David Baldwin (1999/2000), as well as his earlier work in which he compares “techniques of statecraft” (Baldwin 1985, pp. 12–18). Following Baldwin, our purpose is to move a step beyond the common tendency of looking only at single tools of external relations and their effectiveness, as for example either the WTO’s DSM or commercial negotiations, and to view them as alternatives and in terms of respective advantages and disadvantages.

In Baldwin’s discussion, choice results from a rational process of comparing costs and expected benefits. In this respect our approach differs from the original logic of choice. The process of choosing between diplomacy and law in the context of a specific interaction with a commercial partner, as well as the definition of concrete diplomatic or legal strategies, may reveal a variety of features of social interaction. It is true of course that typically we think in terms of a rational process, both in the choice between law and diplomacy and in the ensuing interactions with the representatives of the concerned partner economy. However, in addition to rationality, issues falling under the so-called “logic of appropriateness” may also play a role (March and Olsen 2009), for example, when the decision to use legal procedures is based on the profound conviction that a certain behaviour by the counterpart is in violation of shared norms or in the case of disagreement on the extent to which non-trade norms, like labour rights, can be invoked in relation to trade issues. Lastly, both the decision and the interaction are subject to the “logic of arguing” and “rhetorical action,” i.e. put simply, how effectively a specific argument is presented and whether one side can make strategic use of prior normative commitments of the counterpart (Risse 2000; Schimmelfennig 2001).

“Choice” in this context does not necessarily mean “freedom.” Although the very existence of alternatives implies a minimum of freedom, policymakers are subject to myriad constraints when deciding how to deal with a commercial dispute. First of all, in many situations, institutional procedures reduce de facto the number of alternatives. For example, when private actors launch an anti-dumping investigation, the European Commission has to follow established procedures, even if it might favour solving the issue through diplomatic consultations with the concerned government. Second, numerous factors condition the diplomatic or legal dispute management. Diplomatic action may be constrained by the activities of other actors, like EU member states, while legal strategies crucially depend on formal institutional structures of international trade law.

Therefore we propose a “logic of constraints” as a necessary counterpart to the logic of choice. The constraints that EU policymakers face when managing commercial disputes are rooted in the multilevel and multi-actor nature of contemporary governance (Hooghe and Marks 2003; Kahler and Lake 2004; Dingwerth and Pattberg 2006), whereby governance is understood in a very broad sense “to refer to all coexisting forms of collective regulation of social affairs, including the self-regulation of civil society, the coregulation of public and private actors, and authoritative regulation through government” (Dingwerth and Pattberg 2006, p. 188). The emphasis on multiple levels points to the fact that processes
of governance unfold around venues at different levels of social organization, meaning that constraints on policymakers may come from both the bottom and the top. Concretely, EU policymakers must take the state and substate level into account, but also other regional organizations and bilateral or multilateral dynamics towards the outside. Multi-actor governance implies that governance processes at all levels are not limited to public entities but crucially include private actors, whereby their interests, expectations or formal initiatives constitute constraints for policymakers. The factors shaping the logic of choice and the logic of constraints are summarized in (Figure 1.1).

The EU and the diplomatic approach to external economic relations

The CCP of the EU stands out as “by far the most integrated of the EU’s external policies” (Marsh and Mackenstein 2005, p. 57). It is an exclusive competence of the EU, meaning that member states cannot make their own commercial policy (unlike, say, in the field of development cooperation) and have a rather limited influence on formal decision-making (unlike, for example, under the Common Foreign and Security Policy). The CCP goes back to the Treaty of Rome, but its scope has been growing over the decades as new policy areas have been progressively integrated, like trade in services, intellectual property rights and foreign direct investment.

EU trade policymaking and commercial diplomacy

If we look at who designs the EU’s commercial policy, the European Commission plays such a crucial role that the EU’s foreign service, the EEAS, may appear to be yet another body of professional diplomats crowded out by institutional competition. This is misleading though, as the explanation for the Commission’s
influence lies in its long history as a central player of EU policymaking, which stands in stark contrast to the very recent creation of the EEAS. Since the Treaty of Rome, the Commission has had the exclusive right of initiative with regards to the definition of rules for imports into the customs union.\(^5\) In the past, such initiatives could be accepted by the Council with a qualified majority but would need unanimity for modification, and this further enhanced the influence of the Commission.\(^6\) As the Treaty of Lisbon subjected trade policy to the “ordinary legislative procedure,” things have become more complex due to the involvement of the European Parliament.\(^7\) The Commission is also central to the core business of diplomacy: communication. The Treaty of Rome made the Commission the sole negotiator in international commercial negotiations,\(^8\) and officials of the Directorate-General (DG) for Trade are ensuring proper representation and communication with third parties in the trade policy field.

The combination of exclusive EU competence and a central position for the European Commission would suggest strong and unified EU commercial diplomacy. However, this is only partially true due to the growing complexities of diplomacy in general and EU external diplomacy in particular. More specifically, member states exert strong pressure on the Commission despite the high level of integration. The latter also has to keep in mind the role of both the Council and the European Parliament in formal decision-making, while private actors engage in lobbying and make frequent use of formal procedures available to them, like anti-dumping complaints.

These constraints can be illustrated by taking a closer look at how the Commission uses diplomacy in its pursuit of EU commercial policy, and in particular in commercial disputes. Fundamentally, officials of the Commission’s DG Trade have two diplomatic options when tensions arise with trade partners. The first is to attempt to solve the issue in the context of regular diplomatic consultations, i.e. based on diplomacy as “state of affairs.” The second involves asking the member states in the Council of the EU to approve a mandate to engage in formal negotiations towards an agreement that would resolve the dispute, in the sense of diplomacy as a tool of foreign policy.

The first of these options has the advantage of low visibility: what happens in the regular consultations of the Commission’s trade officials with their international counterparts can hardly be scrutinized by member states, members of the European Parliament or lobby groups, which leaves space for informal and indirect approaches, including through “friendly” officials on the other side, as well as for issue linkage if possible and expedient. The disadvantage, of course, is that if the consultations go public, the Commission risks considerable pressure from interested parties within the EU. Oftentimes, member states do not fully trust the Commission and are fearful of the Commission engaging in “horse-trading” in pursuit of its own agenda (interview with Council Secretariat officials, 2008). Such an impression may impose a heavy burden on an agent like the Commission. In a huge and complex polity like the EU, building an agreement among all necessary players is a challenging task and requires a significant level of confidence among the member states. This is particularly important if consultations lead to an agreement that includes concessions on the part of the
EU; as for changes to import rules, the Commission needs the approval of the European Parliament and the member states in the Council.

In the second hypothesis, the Commission has to propose a negotiating mandate, have it accepted by the Council of the EU and then engage in international negotiations under the close scrutiny of the TPC. This is a rather lengthy undertaking and therefore not adequate to address new and possibly urgent issues within a tight time frame. The formal mandate and regular reporting to the TPC also create awareness and visibility among member states and lobbies (even though the contents of the mandates are secret), and this reduces much of the flexibility in terms of channels of communication and issue linkage. At the same time, with the “red lines” of member states defined in advance, it is easier to keep them on board, which is particularly important for ambitious long-term projects, like trade agreements, where failure is simply too costly. This means that this scenario is of particular relevance in cases of law creation through diplomatic negotiation, but less relevant for managing current developments in the relationship, including disputes.

**Diplomatic interaction between the EU and its trading partners**

So despite the comparatively deep integration of commercial policy, the internal politics of the EU, and in particular member states and their positions, remain a key factor in EU trade diplomacy. This recalls the logic of two-level games, as first proposed by Robert Putnam, and the notion of “win-set,” i.e. the group of outcomes of a diplomatic interaction that are acceptable to both the international counterpart and the domestic constituency (Putnam 1988). Of course, two levels are not sufficient to adequately depict the numerous constraints that weigh on EU trade diplomacy in a multilevel and multi-actor system of governance, as described above. Still, in comparison to later adaptations to processes that stretch across more than two levels (Collinson 1999; Patterson 1997), the clarity of Putnam’s original discussion allows us to focus on the core mechanism of interaction at various levels, which can be flexibly adapted to the specific needs of a diversity of cases.

Elaborating on Putnam, one should expect that the following factors enhance the capacity of EU commercial diplomacy to find solutions to trade disputes:

- A big win-set on the EU side. This presupposes a wide agreement within the EU on the range of outcomes that would be acceptable. However, the multitude of players participating in the EU’s policy process and their diverging interests typically tend to restrain the win-set (Putnam 1988, pp. 437–438).
- In case of a narrow win-set, the ability to turn this into bargaining power on the basis of the “tied hands” argument (or Schelling conjecture) (Putnam 1988, pp. 440–441; Schelling 1956). This has been considered a strong tool in the hands of EU negotiators (Meunier 2000). At the same time though, the fact that member states (who are supposed to be “tying the hands” of Commission officials) are themselves in diplomatic contact with the commercial counterparts and often voice their positions directly to the counterparts, despite the delegated competence, tends to counter this effect.9
But aside from the dynamics “at home”: how do EU trade diplomats interact with their counterparts? As a first step we can say that this depends on whether they are able to develop a common understanding of the dispute. This has to do with psychological and ideational factors. Psychology is relevant insofar as the compatibility of diplomats’ characters, the right personal “chemistry,” may play an important role. Ideational factors refer to the compatibility of worldviews on the one hand and perceptions about the nature of the issue at stake on the other. Worldviews form the general ideational background within which diplomats’ words and deeds acquire meaning and which also comprise normative notions of what is right or wrong. Similar issue perceptions do not necessarily imply agreement on what to do, but they may facilitate cooperation in managing commercial tensions (Gaenssmantel and Liu 2017).

Classical bargaining tools, such as threats and side payments, also play a role in direct diplomatic interaction. EU commercial diplomats can develop threat or reward scenarios in the context of the EU’s rules on imports. WTO tariff schedules constitute a binding constraint of course, but they often leave some flexibility to design implementation in a way more or less beneficial for specific partners. Another example is China’s market economy status: recognition would have required adjustment of the Anti-Dumping Regulation, and the EU tried, without success, to use this as a reward for market opening in China (Gaenssmantel 2012).

Apart from the rules on imports, diplomats may also use legal mechanisms as threat scenarios, or the cessation thereof as rewards (Busch and Reinhardt 2000; Reinhardt 2001). Beyond the classical idea of “carrots and sticks,” legal mechanisms can also serve to alter the status quo and thus make the concerned trade partner more amenable to the diplomatic agreement preferred by the EU. If the expected legal settlement appears worse than what can be achieved through consultation, this can be a winning strategy. This can be read in parallel to the “lesser evil strategy” in intra-EU politics, as described by Susanne K. Schmidt (2000), in which the Commission forces member states to converge on its preferred policy through the use of the CJEU.

Negotiations to create law constitute a particular category in this discussion. Rather than an effort at managing current developments between various diplomatic and legal options, they aim at structuring and facilitating the future management of economic relations through concerted yet selective legalization. “Concerted” points to the fact that law is purposefully created by unanimous agreement amongst all parties to the negotiations. “Selective” indicates that, even in bilateral or multilateral negotiations towards new agreements, the parties have to choose between more or less legalization, and conversely less or more room for diplomatic activity, in the treaty text. This is visible, for example, in trade-related non-trade issues, for which in most agreements we find less precision, fewer obligations and special DSM provisions.

This means that when we talk about negotiations towards new treaties or treaty changes, the choice between law and diplomacy concerns the nature of the provisions in the future agreement rather than the method of, or approach
Managing international economic relations

Managing international economic relations

to, interaction between the parties involved. Still, the above considerations on factors facilitating diplomatic interaction between the EU and third parties apply also in this situation. The negotiation mandate pre-conditions the win-set, and the option of using the “tied-hands” strategy in order to push through a specific agenda depends on discipline on the part of the member states. Psychological and ideational factors can also be decisive. The quality of personal relations may play an important role in a lengthy negotiation process, and worldviews and issue perceptions may crucially predetermine whether an agreement is possible and of what kind. For example, divergent worldviews regularly complicate negotiations between the EU and their former colonies amidst concerns about post-colonial attempts to infringe on the sovereignty of developing countries.

The EU and the legal approach to external economic relations

Like diplomacy, the EU’s legal approach to managing economic relations is conditioned by the distribution of competences and the rules and procedures of the CCP. At the same time, though, it also depends on the available legal instruments, and in particular related DSMs. The choice of the forum for dispute settlement is indeed one of the factors – along with the nature of this forum and the involved actors – determining whether or not a legal approach can be successful.

The fora of dispute settlement mechanisms: multilateral, bilateral and domestic

At the international level, the EU may refer a trade dispute to the multilateral WTO DSM. In addition, given that most FTAs to which the EU is a contracting party set up distinct DSMs, such bilateral DSMs may also be available to the EU. Moreover, such FTAs may contain ISDS and thus create opportunities for foreign investors to refer investment disputes to arbitral tribunals. In this case, the DSM is no longer state-to-state, but investor–state, in nature. Therefore, international DSMs available to the EU and its nationals may be summarized as shown in Table 1.1.

The multilateral WTO DSM is the prime forum for the EU to settle trade disputes with its trading partners. The strength of the WTO DSM lies in its compulsory jurisdiction, permanent Appellate Body and quasi-automatic adoption of panel and Appellate Body reports. However, the jurisdiction of the WTO DSM

Table 1.1  Legalized dispute settlement mechanisms and their forms

<table>
<thead>
<tr>
<th></th>
<th>State-to-state</th>
<th>Investor–state</th>
</tr>
</thead>
<tbody>
<tr>
<td>Multilateral</td>
<td>WTO DSM</td>
<td>N/A</td>
</tr>
<tr>
<td>Bilateral</td>
<td>FTAs</td>
<td>FTAs (investment chapters) and BITs*</td>
</tr>
</tbody>
</table>

* Bilateral Investment Treaty
is limited to the WTO agreements and does not extend to “WTO-plus” issues, oftentimes regulated in FTAs, or investment disputes. Therefore, when a pertinent dispute concerns a subject matter falling outside the scope of WTO agreements, either legal resort has to be sought in bilateral DSMs as set out in the FTAs, or, alternatively, diplomatic approaches may be relied upon.

Bilaterally, the EU has woven a dense web of agreements with its Asian trading partners, ranging from partnership and cooperation agreements (PCAs) with broader political and security implications to FTAs and bilateral investment treaties (BITs) with a specific trade and investment focus. In some cases both PCAs and FTAs have been concluded, for example, with Vietnam and Singapore. These agreements also provide a different set of DSMs. In the trade area, FTAs are most relevant to this chapter. Currently, the EU has concluded FTAs with South Korea, Singapore, Vietnam and Japan and it is still negotiating an FTA with India. Moreover, the EU is negotiating a stand-alone BIT with China (Sally 2007; Wu 2015a) and investment issues between the EU and Singapore and Japan will be dealt with through agreements distinct from the FTAs.

These bilateral agreements set out three types of DSMs with varying degrees of legalization. Firstly, the DSMs provided in PCAs have the broadest coverage with the least legalization, with general obligations, oftentimes imprecise commitments, and no delegation. Such mechanisms largely take the form of joint committees with consensus-based decision-making. One of the main tasks of the joint-committees is to resolve differences arising from the infringement of so-called “essential elements,” a notion that refers to general EU external relations policy objectives, such as democracy, human rights and rule of law. Suspension of trade preferences may be used as a sanction for the violation of such principles. The second type of DSMs is state-to-state arbitral proceedings, which may cover trade or investment issues. The EU and its trading partners agree to refer the dispute to a third party, i.e. arbitral tribunals, to find a resolution. This type of DSM demonstrates a certain degree of legalization as procedures are obligatory for involved members, rules tend to be precise and settlement is delegated to a third party. However, the scope of jurisdiction is limited to trade or investment (see for example EU–Korea, EU–Canada, EU–Vietnam and EU–Japan FTAs). A third type of DSM is ISDS, or the EU’s proposal for an investment court system, which allows private actors, individuals or enterprises, with their status of foreign investors, to resort to investment arbitral tribunals. Such DSMs, in offering private actors access to arbitral tribunals, and thus extending the range of actors for whom they are creating obligations, demonstrate the highest degree of legalization (see for example, investment chapters in EU–Canada and EU–Vietnam FTAs). The characteristics of these three categories of DSMs can be summarized as shown in Table 1.2.

Within the EU’s domestic legal setting, management of economic relations, and in particular trade disputes, can be perceived from two perspectives: inward-looking (defensive) and outward-looking (offensive). From an inward-looking perspective, the EU shields its domestic industries from unfair trade practices (dumping and subsidization) and relieves serious injury, or the threat of serious
injury, arising from an increase in the quantity of foreign imported products by means of trade defence measures, including anti-dumping, countervailing and safeguard measures. The CJEU plays a gatekeeping role in ensuring EU institutions’ due exercise of trade regulatory power and providing resort to affected European and foreign enterprises. From an outward-looking perspective, the EU helps its industries to access foreign markets by minimizing trade barriers. The primary legal tool employed in achieving this objective is the TBR.14

From an inward-looking perspective, during trade defence investigations, EU domestic industries play a key role. In fact, most investigations are initiated in response to petitions from domestic industries. In this context, the importers of the subject products and their downstream producers, and even consumers, share an interest that differs from that of EU domestic producers. In order to ensure that these divergent interests are taken into due account during investigations, the CJEU plays the role of a final arbiter. Private actors, regardless of whether they are importers or exporters, domestic or foreign industries, are offered an opportunity to challenge the decisions of EU institutions. This stands in stark contrast to international-level WTO DSM, or bilateral DSMs, as set out in the FTAs (except for ISDS), where only states have the standing to sue. That being said, the CJEU has long taken a deferential approach in reviewing trade defence measures and largely respected the decisions of the political branches.15

From an outward-looking perspective, the EU explores ways and means to obtain access to foreign markets, in particular with a view to reaping the fruits of the Uruguay Round negotiations. European private actors, individuals and enterprises, may opt for the legal instrument of the TBR, a more political strategy based on lobbying, or a combination of both. The virtue of the legal instrument approach is that even weak private actors may rely on the TBR to petition for launching a WTO complaint, regardless of the attitude of the European Commission. Resort may be had to the General Court or the CJEU when such a petition is rejected. This legal recourse is especially appealing should member states block the decision; also, private enterprises may thus challenge Council decisions before the CJEU if the criteria for standing are satisfied. The disadvantage of such an approach is nonetheless the exposure of the individuals and

**Table 1.2** A typology of dispute settlement mechanisms and their characteristics

<table>
<thead>
<tr>
<th>Genre of agreements</th>
<th>Joint committee</th>
<th>State-to-state arbitral tribunals</th>
<th>Investor–state arbitral tribunals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scope of coverage of the agreement</td>
<td>Broad and general</td>
<td>Narrow and specific</td>
<td>Narrow and specific</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Optional</td>
<td>Compulsory</td>
<td>Compulsory</td>
</tr>
<tr>
<td>Degree of legalization</td>
<td>Low</td>
<td>Medium</td>
<td>High</td>
</tr>
</tbody>
</table>
enterprises in the spotlight and the related risk of facing potential retaliation by foreign industries or governments. By contrast, powerful private actors may wish to exercise influence through political mobilization and lobbying. This can be done directly before the European Commission or indirectly through the TPC of the Council of the EU or the INTA in the European Parliament. Via this political approach, private actors may hide behind European institutions.

As an outward-looking domestic instrument, the TBR constitutes a linkage between international and domestic levels of DSMs. It was adopted on the eve of the coming into being of the WTO with a view to providing a transparent and effective legal mechanism for the EU to react to obstacles to trade adopted by third countries which cause injury or adverse trade effects. The objective of the TBR is to offer EU enterprises an opportunity to file a complaint before the European Commission when a Union industry considers that “it has suffered injury as a result of obstacles to trade that have an effect on the market of the [Union]” or a Union enterprise considers “it has suffered adverse trade effects as a result of obstacles to trade that have an effect on the market of a third country.”

When the injury and adverse trade effects are found to exist, and when it is in the interests of the Union to exercise the EU’s rights under the international trade rules, three main possible measures may be adopted:

- Suspension or withdrawal of any concession resulting from commercial policy negotiations
- Raising of existing customs duties or the introduction of any other charge on imports
- Introduction of quantitative restrictions or any other measures modifying import or export conditions or otherwise affecting trade with the third country concerned

Nonetheless, the adoption of such CCP measures can only be made in conformity with relevant international obligations, in particular the WTO agreements. Therefore, with the affirmative finding of injury or adverse trade effect, the European Commission will adopt a formal decision on commencing the dispute settlement procedures either under bilateral agreements or multilateral WTO agreements. Only with authorization from the relevant DSMs can the aforementioned three types of measures be referred to. Therefore, the TBR serves as a linkage between international and domestic levels of DSMs by offering an opportunity in the EU legal order for private actors to petition before the European Commission and urge the Commission to seek redress in the international legal order.

When and how do legal approaches work: actors and forum?

We now need to examine whether these mechanisms, operating at the multilateral, bilateral or domestic level, can solve the problems they are supposed to – that is, whether they are effective (Young and Levy 1999; Iida 2004). In examining
whether institutions and their related procedures function effectively in resolving disputes between the EU and its Asian partners, several factors must be taken into account: the nature and characteristics of DSMs in question and their reach; the actors within such DSMs; and the choice between multiple fora. Note that institutional effectiveness does not necessarily imply attractiveness to policymakers, as will be discussed in the following section.

From the outset, the institutional design of a given DSM, notably, its jurisdictional exclusivity and compulsoriness, matters in resolving EU–Asia trade disputes through legal approaches. The CJEU enjoys exclusive jurisdiction on the interpretation and application of EU law whereas the WTO DSM reserves exclusive jurisdiction in resolving disputes arising from the implementation of WTO agreements. This exclusivity precludes EU institutions, EU member states and EU nationals from subjecting EU disputes to fora other than EU courts, and WTO members from referring to international courts or tribunals other than the WTO DSM. Such exclusive jurisdiction may contribute to the effectiveness of a given DSM at the expense of other DSMs, such as at the regional or bilateral level (Busch 2007; Hillman 2009; Qin 2010). By contrast, the state-to-state DSM provided in FTAs is normally complementary to the WTO DSM with the common drafting technique of a choice of forum clause. States may thus refer to bilateral mechanisms to resolve their dispute arising from FTAs; nonetheless, they may still seek recourse to the WTO DSM, wherever a dispute relating to a WTO agreement arises.

The compulsoriness of a given DSM relates to the question of whether the respondent party is obliged to present itself in the proceedings. If an ad hoc agreement between the complainant and respondent is necessary for the DSM to exercise its jurisdiction, its effectiveness is definitely undermined. The WTO DSM and the CJEU enjoy compulsory jurisdiction; a complaint before these two DSMs is not contingent on the consent of the respondent party. Similarly, in DSMs under bilateral FTAs, the EU and its trading partners have agreed to refer the disputes resulting from the pertinent FTAs to arbitral tribunals. The request by the complaining party is sufficient for the establishment and composition of an arbitral tribunal. In the context of ISDS, the consent of the state to refer to an arbitral tribunal is given previously; therefore, whenever an investor–state dispute arises, the investor can initiate the proceedings without depending on the consent of the respondent state. Overall, it may be said that DSMs available to the EU and its trading partners generally enjoy compulsory jurisdiction. The respondent state is unable to block unilaterally the gate to such DSMs.

Finally, the breadth and width of a given DSM also affects legal approaches in managing EU–Asia trade disputes. Whereas the WTO DSM has general jurisdiction over the WTO agreements, its jurisdiction does not extend to “WTO-plus” obligations in bilateral FTAs between the EU and its trading partners. When a dispute relates to subject matters falling outside the scope of the jurisdiction of the WTO DSM, the EU may have to refer to other fora to settle trade disputes. A similar observation can be made regarding investment disputes, which have to be dealt with by state-to-state DSMs or ISDS. Moreover, for disputes in certain
sensitive service sectors, the EU and its trading partners may choose to set up a special DSM in their FTAs with less legalized characteristics (in particular concerning delegation).

An illustrative example for this is the Protocol on Cultural Cooperation annexed to the EU–Korea FTA of 2011, which addresses such sensitive areas as audio-visual services, otherwise excluded in the agreement, and other cultural services. Art. 3.6 of the protocol underlines the importance of mutually satisfactory agreements and instructs the Committee on Cultural Cooperation to “make every attempt to arrive at a mutually satisfactory resolution of the matter.” In case of failure to reach such agreement, the protocol excludes disputes arising therein from the general DSM but establishes a distinct DSM where the Committee on Cultural Cooperation plays a key role. The establishment of an arbitral panel is possible only in case the matter “has not been satisfactorily addressed through the consultation procedure.”

The spirit of the Protocol on Cultural Cooperation demonstrates the resistance to delegation in negotiations on certain matters considered sensitive. This special arrangement indicates that DSM design depends to a large extent on the subject matter at stake, which thus also determines how the EU and its trading partners subsequently resolve their disputes.

Different actors, governments and private litigants may have a role to play in resolving trade disputes through legal approaches, which in turn depend on the standing of the DSM in question. The WTO DSM and DSMs provided in FTAs remain largely state-to-state in nature whereas domestic courts and ISDS provide access to judicial remedies for private litigants. The breadth and width of the gate to such DSMs heavily impact on their success.

One is tempted to endorse such a view that private access to dispute settlement mechanisms would contribute to its effectiveness, which can be evidenced by the cases of the CJEU and ISDS. The virtue of granting standing to individuals and enterprises and opening the door for private access to the DSMs lies in the possibility of resolving disputes directly at their origin, for private actors can then activate legal dispute resolution independent from their home states and their broader interests and decision-making procedures. Nonetheless, we should remember that the WTO DSM, which is limited to states and not available to private litigants, is also widely hailed as a great success. The reputation of the WTO DSM may be attributed to the fact that in major economies, such as the EU and US, there is a mechanism that links DSMs at the international and domestic level (like the TBR in the case of the EU) and opens the door for public-private partnership in defending trade interests. Moreover, the success of the WTO DSM is relative to other international tribunals and courts, which are limited to states as well, with the exception of the International Centre for the Settlement of Investment Disputes (ICSID). The least effective DSMs turn out to be the bilateral state-to-state DSMs provided in FTAs. On the one hand, they suffer from the weakness of being state-to-state in nature; on the other hand, it is difficult to compete with multilateral WTO DSM in terms of resources, secretariat support as well as the rich body of WTO jurisprudence.
When developing a legal approach to managing trade disputes, the EU may have a certain degree of freedom over the choice of forum, except of course in cases of exclusive jurisdiction and/or if the respondent is subject to compulsory jurisdiction. In fact, resort may be sought in different fora with different considerations being factored in. Governments and individuals may have different legal strategies in choosing their forum. When faced with unfair trade practices, such as anti-dumping, subsidization and safeguard measures, a state may either impose trade defence measures in response or challenge the foreign measures in the WTO DSM. The choice of resort sought will depend greatly on where the burden of proof lies in the possible fora.

To be more specific, in cases of unfair trade practice such as subsidization, a state (or the EU) has two options. In the first scenario, it may opt to start an investigation with the goal of imposing countervailing duties against the foreign subsidized products. In this case, the investigated industry will have to prove the absence of subsidies or, if measures are imposed, prove their illegality before the domestic courts of the investigating country (i.e. go to the CJEU in the case of the EU). At the same time, the investigated industry may also request its home country to file a complaint in the WTO DSM and challenge the WTO consistency of such countervailing measures. Then the investigated industry or its home country bears the burden of proof for EU illegality or a prima facie case for WTO inconsistency. Under the alternative scenario, the state (or the EU) that feels disadvantaged by the subsidy policy may bring the case to the WTO DSM. Yet it then bears the burden of proof to make a prima facie case.

The choice between trade defence measures and a direct WTO challenge depends not only on the burden of proof but also on the nature of the subject matter. A countervailing investigation against foreign subsidized products focuses on foreign products rather than the foreign subsidy policy that is at the origin of the issue; by contrast a legal challenge in the WTO directly confronts the foreign country that imposes such a policy. A similar observation may be applicable to safeguard measures. When a foreign country imposes safeguard measures, a state may respond either with its own domestic safeguard measures (against the concerned products) or legal challenges in the WTO (against the state policy). Of course, a state may opt for both approaches simultaneously. The best example illustrating this option is US – Steel Safeguards Measures (2003) where the EU responded to US safeguard measures on steel products with domestic steel safeguard measures and with a legal challenge in the WTO.

The case of anti-dumping measures is slightly different. As dumping is a business strategy rather than a state policy, a challenge at the WTO DSM is not an option. When faced with dumping from foreign industries, a state can only impose anti-dumping measures against the products in question. In response, the investigated industry has two options: it may seek judicial remedies in the domestic courts of the country that imposes such anti-dumping measure; otherwise, it has to request that its home country refer the dispute to the WTO DSM to rule on their WTO consistency.
Moreover, commercial disagreements may go beyond trade defence measures or trade disputes, investment disputes being the prime example. When an investment dispute arises, the investor is entitled to launch a complaint before the investment arbitral tribunal without relying on its home state. Given the public discontent about the ISDS, the EU has recently strived to reform the ISDS with an investment court system. This attempt has been successful in the EU’s FTAs with Vietnam and Canada, which establish investment and appeal tribunals to hear investment disputes. In addition, the EU has concluded with Singapore a separate investment protection agreement that contains similar dispute settlement mechanisms. Such practices may be also appearing in EU–Japan negotiations in the context of investment protection. Therefore, the fora for resolving the commercial disputes between the EU and its Asian trade partners are even more diversified.

Towards a new framework: choosing between or combining diplomatic and legal tools

After looking separately at diplomatic and legal approaches, how can we make sense of the EU’s choice between them, or of a combination of both? On the basis of diplomacy as a “state of affairs,” in the sense of continuous communication and representation, one should expect informal diplomatic consultations to be the initial, or “default,” approach for virtually all issues that arise in relations with a partner economy. Still, the question remains how far the Commission can go with this approach. The discussion in the section on diplomacy allows us to identify a series of conditions that facilitate successful informal consultations.

First, if there is broad agreement within the EU on its goals with respect to the trade partner in question, i.e. a large win-set, this will allow for greater flexibility on the part of EU trade diplomats and therefore make an informal diplomatic solution more likely. Second, if the commercial issues at stake are contested within the EU, the “tied hands” argument may afford considerable bargaining power to EU diplomats, but only if member states do not use their own diplomatic channels to communicate their diverging preferences (which they are free to do despite exclusive EU competence) and thus influence the consultation process.

So, the broader the agreement among member states and the more disciplined they are, the higher the probability that the Commission’s trade negotiators will manage to resolve a disagreement with a trading partner through informal consultations. However, generally speaking, both conditions are rather daring, and one should assume that in the majority of cases trade diplomats have to deal with a very narrow win-set and active communication on the part of member states with the concerned trading partner. Of course, the low visibility of such an informal diplomatic process may strengthen the hand of the Commission, as it will face less scrutiny during the consultations and member states will have fewer incentives to get in touch directly with the concerned trading partner. At the same time, the other factors discussed above, namely matching psychological and ideational dispositions among the involved diplomats, as well as the ability to make use of classical bargaining tools, can also promote diplomatic approaches.
In contrast to informal consultations, formal negotiations, in line with the idea of diplomacy as a tool to pursue broader foreign policy goals, are far less likely in reaction to specific episodes of commercial tension. Instead, this type of EU diplomacy, with a Council mandate and under the scrutiny of the TPC, should be expected in the context of law creation through international agreements, as for example in FTAs, where the stakes are sufficiently high to justify the lengthy and burdensome procedures. Nevertheless, the factors that facilitate diplomacy are at work also in this context. In particular, a broad win-set is related to a flexible negotiation mandate for the Commission, and the formal role of the Commission as the sole negotiator strengthens its ability to make use of the tied hands argument, under the condition that member states keep a low profile.

With regard to legal tools, the previous section has presented a series of factors that can be expected to influence whether EU trade policymakers choose to employ them rather than diplomacy. First, while compulsory jurisdiction enhances the effectiveness of a DSM in terms of rule enforcement, it also makes recourse to this mechanism a double-edged sword: if the EU’s case is not watertight, policymakers may not want to run the risk of having to implement a verdict that is not in their favour. More generally, one can say here that legalization may also work to the disadvantage of the party who initiates the claim, as the process has been delegated, and therefore it cannot be controlled by the European Commission, and the decisions at its end are precise and obligatory. This means that recourse to the WTO DSM is not an easy alternative to a diplomatic settlement and subject to extensive checks by the EU’s legal services. By contrast, joint committees of PCAs or some of the special DSMs for “WTO plus” issues may present an attractive alternative to purely diplomatic approaches, as they display some characteristics of delegation but at the same time the diplomats retain some control over the case in question. Moreover, “WTO-plus” issues tend to be broad and general in nature, more political and less legal, which means the obstacles to break through in terms of legal preparation are lower.

Second, the discussion on private actors has shown the limits of choice and the importance of constraints in a context of multi-actor governance. In procedures that allow for private actor involvement, public officials are indeed limited in their freedom of choice between diplomatic and legal approaches. This is most obviously the case in investor-state arbitral tribunals or when private actors make use of the domestic court system. But it is also visible in the EU’s trade defence and TBR procedures: it is private actors who lodge anti-dumping, anti-subsidy or safeguards petitions, thus forcing the European Commission to open formal procedures, and they are also the ones who initiate proceedings under the TBR. What is interesting here is that the procedures under EU law include their own “safeguards”: when verifying a trade defence claim, the Commission has the somewhat flexible tool of assessing whether defensive measures would be in the interest of the EU as a whole. In case of anti-dumping and anti-subsidy procedures, the Commission can also bring diplomacy back in by opting to negotiate a minimum price undertaking, if the concerned exporters agree to do so.
Similarly, under the TBR the Commission may initially attempt to use diplomatic consultations rather than going directly to the WTO’s DSM. In other words, whereas the TBR aims to establish a legal mechanism for private actors to file a complaint against barriers to access to foreign market, it retains a strong diplomatic dimension, visible also in a close link with political bodies through consultation with advisory committees comprised of representatives from member states. In some cases, the Council of the EU may also revise the proposed decisions of the European Commission, which brings politics back into a legal mechanism. While legal challenges and subsequently retaliation are envisaged by the TBR, it nonetheless underlines the importance of a mutually satisfactory agreement through negotiations. Therefore, the negotiations between the EU and its trade partners can be best termed as “negotiations in the shadow of WTO legal challenges” (Shaffer 2006). Obviously, private actors may also create constraints outside formal procedures, for example by lobbying through political venues to lodge a legal complaint against the EU’s trading partners or request the EU to consult with them.

Lastly, even in the context of legal approaches based on formal procedures in resolving the disputes between its partners, the EU still has a certain latitude between unilateral measures or international complaints, which may in turn shift the burden of proof, or more broadly the costs, to the investigated industry or counterpart country. In choosing between unilateral measures or international complaints, the EU is also able to target either particular enterprises or engage with a specific country. Such a calculation is most salient in the context of subsidy as domestic anti-subsidy investigations target subsidized products while international complaints provoke foreign governments.

With regards to the issue of choice between diplomatic and legal approaches, this still leaves us with a complex picture, as shown in Table 1.3. Generally speaking, the stronger the impact of factors that facilitate a diplomatic solution, the more likely EU trade policymakers will continue with informal consultations. By contrast, the more factors that facilitate legal approaches are in place, the stronger the incentive to make use of them. Given that both a broad win-set and disciplined member states are rare in the EU’s commercial policy, one should expect a consistent tendency towards formal legal approaches.

Of course, the choice for one rarely excludes the other, and combinations are likely to be the rule rather than the exception. In particular, legal mechanisms can be used as parts of a broader diplomatic bargaining strategy. For example, the outlook of an anti-dumping procedure can be used as a threat, and the same is true for bringing a case to the WTO DSM. Similarly the interruption of such procedures can be a reward, also through issue linkage in the context of a different dispute. As mentioned above, in this sense legal procedures can serve negotiators to alter the status quo for the counterpart and make a diplomatic agreement a better option than no agreement and a legal procedure.

So the use of legal mechanisms may often be strategic. But aside from that, the decision by EU trade policymakers to use either diplomatic or legal tools does not necessarily depend only on the feasibility or opportunity of each of the two.
A last set of factors has to do with non-rational aspects of trade policymaking in the EU. This is to say that the decision to use a legal mechanism may also be the result of a profound conviction among the involved officials that this is the right thing to do: someone else has violated the rules, so the correct reaction is to use the procedures available for the defence of those rules. This argument refers to norms and values and is in line with the logic of appropriateness. At the same time, though, a logic of arguing may be at work, i.e. the question of who in the policymaking process makes the most effective use of arguments, be they norm- or value-based or purely rational.

A final point of attention relates to law creation, where there is no legal alternative to diplomatic negotiation. Instead, the choice between law and diplomacy concerns the contents of the agreement, in particular the degree of legalization versus the space kept for diplomatic solutions. Here, we typically find a divergence between highly legalized provisions on trade issues and less legalization for trade-related non-trade issues. This concerns both the degree of obligation and precision of rules and the nature of dispute settlement, including also whether or not there is delegation.

Table 1.3 Factors facilitating/promoting diplomatic and legal approaches in resolving EU–Asia disputes

<table>
<thead>
<tr>
<th>Factors facilitating/promoting a ...</th>
<th>... legal approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>Broad win-set</td>
<td>Nature of the dispute settlement mechanism:</td>
</tr>
<tr>
<td>Ability to use tied-hands argument/ disciplined member states</td>
<td>Exclusive and/or compulsory jurisdiction implies greater effectiveness in rule enforcement but policymakers submit complaints only if they are positive to have a strong case</td>
</tr>
<tr>
<td>Psychological factors: good personal relations between diplomats</td>
<td>Nonexclusive and/or noncompulsory jurisdiction makes for less effectiveness in rule enforcement but more control for policymakers and hence less caution in making use of such fora</td>
</tr>
<tr>
<td>Ideational factors: similar world views and perceptions about issues at stake</td>
<td>Availability for private actors to initiate formal proceedings</td>
</tr>
<tr>
<td>Ability to use bargaining tools (threats and side payments)</td>
<td>Burden of proof with defendant who is nonstate actor</td>
</tr>
<tr>
<td></td>
<td>Ideational factors: profound conviction that legal or formal mechanisms are the right options in rules-based international order and given the relevant legal culture</td>
</tr>
<tr>
<td></td>
<td>Strategic use of legal or formal mechanisms to support diplomatic approaches</td>
</tr>
</tbody>
</table>
Conclusion

This chapter set out to present diplomacy and law as alternatives in EU external economic relations in such a way as to structure the research, show the connections between the various contributions to this volume and facilitate the development of final conclusion at its end. With this goal we first discussed diplomacy and law in the context of EU rules and institutions related to external economic relations. This also led to reflections on the importance of viewing policymaker decisions as output from both a logic of choice and a logic of constraints. Secondly, the chapter devoted two sections to the EU’s diplomatic and legal options for managing economic relations. For the former, a central point that emerged was that the Commission’s diplomatic efforts tend to be complicated by internal divisions (small win-sets) and member states’ own diplomatic contacts with external partners (weakening of the tied-hands argument). For legal options, it was developed how relevant rules and DSMs extend from domestic EU settings to bilateral or multilateral venues. Furthermore, the relevance of various specific features was discussed, such as in particular exclusivity and compulsoriness of jurisdiction, whether or not settlement is delegated, and where the burden of proof lies in a specific procedure.

At the end of the chapter these two perspectives were brought together to develop a set of conditions that promote diplomatic or legal approaches to the management of economic relations, or a combination thereof. Overall, it seems likely that in many instances the use of legal procedures is embedded in broader diplomatic strategies. For negotiations towards new agreements, the choice between diplomacy and law concerns the degree of legalization of their contents and, conversely, the room afforded to (future) diplomatic efforts.

These considerations will inform and structure the discussion and conclusions in the following chapters, even though disciplinary differences and the particularities of the chosen topics imply that the way in which the points from this opening chapter are used differs for each author. At the end of the volume the conceptual points will then play a core role for the development and presentation of general conclusions to the project as a whole.
Notes

1 While the emphasis here has been on the role of the European Commission as the most actively and directly involved body in EU trade diplomacy, the Council also plays a role and so does the EP, especially since the entry into force of the Treaty of Lisbon; see Smith and Woolcock (1999); den Putte, De Ville and Orbie (2014) and Richardson (2012).


3 The EU’s market access strategy is continuously updated, most famously in the context of the Lisbon Agenda at the Lisbon European Council in 2000 and with the Global Europe strategy in 2006. The EU’s updated market access strategy emphasizes “a partnership between the Commission, Member States, and business, based on extensive public consultation”; see European Commission, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: The Global Challenge of International Trade: A Market Access Strategy for the European Union, COM(96) 53 final, 14 February 1996.

4 For a critique of the lack of participation of private sectors in the WTO, see Bown and Hoekman (2005).

5 Treaty of Rome, Art. 113(2).

6 This has been referred to as “formal agenda-setting” by the European Commission; see Pollack (1997).

7 Treaty on the Functioning of the European Union (TFEU), Art. 207(2).

8 Treaty of Rome, Art. 113(3), TFEU, Art. 207(3–4). Moreover, the Treaty of Rome provided for a similarly central role for non-commercial negotiations as well (Art. 228(1)), but this provision has been loosened by the Treaty of Lisbon; see TFEU, Art. 218.

9 Schelling recognizes that if the third party to which a binding commitment is made is brought to the negotiating table, the effect of the commitment is nil; see Schelling (1956, p. 284); see also Meunier (2000, p. 132).

10 The TRIMS agreement includes some regulation on investment issues but does not touch upon investment protection, nor does it include anything regarding state-to-state or investor–state investment dispute settlement.

11 E.g., EU–Indonesia PCA, arts. 44 and 41.


13 The EU–Korea FTA does not contain ISDS but only state-to-state dispute a settlement mechanism on investment matters. As regards EU–Singapore and EU–Japan FTAs, they do not cover investment issues, which will be dealt with separately by another agreement.

14 In addition to the formal procedure of the TBR, this objective may also be achieved by political lobbying directly at the European Commission or indirectly in the TPC and INTA.

15 In reviewing trade defence measures cases, in particular on such sensitive issues as non-market economy status, non-market economy treatment or the selection of analogue countries, the CJEU in principle limits its review to “establishing whether the relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated and whether there has been a manifest error of assessment of the facts or a misuse of power” (Shanghai Teraoka
Electronic Co. Ltd. v. Council of the European Union 2004, para. 49; for further discussion, see Wu, 2015b).

16 Trade Barrier Regulation (TBR), recitals 10-11.
17 TBR, Art. 3.1.
18 TBR, Art. 4.1.
19 TBR, Art. 12.3.
20 TBR, Art. 12.3.
21 EU–Korea FTA, Protocol on Cultural Cooperation, Art. 3.6.
22 EU–Korea FTA, Protocol on Cultural Cooperation, Art. 3bis.
23 EU–Korea FTA, Protocol on Cultural Cooperation, Art. 3bis(c).

1 See introduction to this volume.
3 Art. 38 (1) Statute of the International Court of Justice: The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
5 The first part of the test focuses on the analysis of the international agreement as a whole, whereas the second part of the test applies the classical criteria for direct effect under EU Law to the provision of the international agreement being invoked. See: Case 22-24/72 International Fruit Company NV and others v. Produktkschap voor Groenten en Fruit [1972] ECR J-0021 (hereinafter International Fruit Company NV and others v. Produktkschap voor Groenten en Fruit), for a more recent application of the test to a wider range of sources of international law see: Case C-366/10 Air Transport Association of America and Others [2011] ECR I-13755 (hereinafter Air Transport Association of America and Others).
6 Case C-308/06 The Queen on the application of Intertanko and Others v. Secretary of State for Transport [2008] ECR I-4057, para. 45 (hereinafter The Queen on the application of Intertanko and Others v. Secretary of State for Transport).
7 Case C-366/10 Air Transport Association of America and Others [2011] ECR I-13755, para. 51 (hereinafter Air Transport Association of America and Others).
8 The Queen on the application of Intertanko and Others v. Secretary of State for Transport, para. 66.
10 See Portugal v. Council.

Panel Report on United States-Sections301-310 of the Trade Act 1974, WT/DS152/R of 22 December 1999, (hereinafter Panel Report on United States-Sections 301–310 of the Trade Act 1974) paras. 7.72. “Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect; the GATT/WTO did not create a new legal order the subjects of which comprise both contracting parties or Members and their nationals.”

Art. 14.17 (2) EU–South Korea FTA: “Any ruling of the arbitration panel shall be binding on the Parties and shall not create any rights or obligations for natural or legal persons.”

For instance, the EU–Singapore FTA in its Art. 17.15 entitled “No Direct Effect” emphasizes that: “For greater certainty, nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law.”

So far only the FTAs with Singapore and Vietnam include some sort of ISDS.

The link between direct effect and validity of an EU norm can be easily seen in Portugal v. Council.


See Art. 9.27 EU–Singapore FTA and Art. 27 of Chapter II of Chapter of EU–Vietnam FTA.


Ibid., para. 28.

Ibid., paras. 31–32.


Ibid., para. 2.


“Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member’s national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.”

European Union – Measures Related to Price Comparison Methodologies. DS516. A panel was established in 2017 but no decision has been reached at the time of writing.


Art. 2(7) of Council Regulation (EC) 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community,

32 Commission v. Rusal Armental, para. 44.
33 See Zhejiang Xinan v. Chemical Industrial Group Co.
34 Commission v. Rusal Armental, para. 46.
35 Commission v. Rusal Armental, para. 50.

2 PPP adjusts currencies so that a basket of goods/services has equal value in different countries.
5 Ibid.
12 ICSID Case No. ARB/12/14 and 12/40 Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia [2017] (hereinafter Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia).
14 Art. 4(5) of the India-Kuwait BIT provided that: “Each party shall ... provide effective means of asserting claims and enforcing rights with regard to investments...”. Each
Contracting State shall maintain a favourable environment for investments in its territory by investors of the other Contracting State. Each Contracting State shall in accordance with its applicable laws and regulations provide effective means of MFN.


13 PCA Case No. 2010-20 Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinchuangdaosht Qinlong International Industrial Co. Ltd. v. Mongolia [2010] and ICSID Case No. ADHOC/17/1 Sanum Investments Limited v. Lao People’s Democratic Republic (II) [2017].

14 Civil Appellate Jurisdiction on Vodafone International Holdings B.V. v. Union of India [2012].

15 Ibid.

16 Ibid.

17 Vodafone Group Plc and Vodafone Consolidated Holdings Limited v. India (II) [2017].


19 ICSID Case No. ARB/01/13 SGS Société de Surveillance SA v. Islamic Republic of Pakistan [2004].

20 Union of India vs Vodafone Group Plc United Kingdom, CS(OS) 383/2017 & I. A. No. 9460/2017, adopted 7 May 2018.

21 Ibid.


23 Ibid., para. 66.

24 Ibid., Section F (overall conclusion).


26 Ibid., paras. 337–342.

27 See Churchill Mining Plc and Planet Mining Pty Ltd v. Indonesia.

28 ICSID Case No. ARB (AF)/10/1 David Minnotte & Robert Lewis v. Republic of Poland [2014].

29 See Churchill Mining Plc and Planet Mining Pty Ltd v. Indonesia, para. 39.

30 Ibid., paras. 508, 510–511 and 529.

31 Ibid., para. 79.


1 This is visible in the dispute summary provided on the website of the WTO; see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds452_e.htm.

2 Since the final products were mostly destined for export, the situation has been termed liang tou zai wai or “both ends out” (Chen 2015, p. 98).


5 Regulation 1225/2009, Art. 7.

6 Regulation 1225/2009, Art. 8(1).

1 As of 2013, 138 countries around the world had reportedly implemented renewable energy support schemes (Renewable Energy Policy Network for the 21st Century 2012).

2 As noted by Van de Graaf (2013), the 2012 China–EU solar panel trade dispute should be read in a global context.


4 European businesses acquired by Chinese solar PV companies between 2012 and 2015 (including Hanergy, LDK, Shunfeng Photovoltaic and Chint Solar) have recurrently stated the positive effects derived from having established closer ties with China. European companies such as Astronergy, Solibro GmbH and S.A.G. Solarstrom were able to withdraw their declarations of insolvency and undergo restructuring thanks to China’s growing investment presence in the Union’s solar sector.

5 “Politization” here refers to the situation where EU member states’ attitudes towards an EC proposal of imposing AD duties to a foreign product are mainly decided by their domestic politics or foreign policy interests.


8 Regulation 1225/2009, Art. 9(4); Regulation 2016/1036, Art. 9(4) & 15(3).

9 The World Bank sets the share at 85 per cent, the International Energy Agency at 92 per cent.


5 GATT Panel Report, Japan – Semi-Conductors, para. 117.

6 GATT Panel Report, Japan – Semi-Conductors, para. 117.

7 The author owes this point to Dr. Han-Wei Liu.

8 Paragraphs 155 and 156 of the Working Party Report of China’s Accession to the WTO recorded the concerns of these existent members: ‘[s]ome members of the Working Party raised concerns over taxes and charges applied exclusively to exports. In their view, such taxes and charges should be eliminated unless applied in conformity with
GATT Article VIII or listed in Annex 6 to the Draft Protocol. The representative of China noted that the majority of products were free of export duty, although 84 items, including tungsten ore, ferrosilicon and some aluminum products, were subject to export duties. He noted that the customs value of exported goods was the F.O.B. price of the goods’. Working Party Report of China’s Accession to the WTO.

9 China’s Accession Protocol, para. 11.3.

10 It should also be noted that before the EU’s challenge against China’s export restrictive measures, the EU, in the WTO era, challenged the WTO consistency of Argentinean export administration and export licensing regime and in Argentina – Hides. However, given the paucity of regulation of export restrictions under the WTO agreements, the EU relied mainly on Articles X and XI of the GATT 1994 to challenge the legality of the Argentinean export administration and export licensing regime and had not been successful in making a prima facie case.

11 Negotiating Proposal on Export Taxes, Communication from the European Communities, TN/MA/W/11/Add.6 (27 April 2006).


17 Appellate Body report, China – Publications and Audiovisual Products, paras. 213–221.

18 Appellate Body report, China – Publications and Audiovisual Products, paras. 223.


21 Panel Report, China – Rare Earths, para. 7.62.

22 Panel Report, China – Rare Earths, para. 7.59.

23 Panel Report, China – Rare Earths, para. 7.76.

24 Paragraph 1.2 of China’s Accession Protocol.

25 Panel Report, China – Rare Earths, para. 7.79.

26 Paragraph 1, Part II of China’s Accession Protocol.

27 Panel Report, China – Rare Earths, para. 7.84–88.

28 Panel Report, China – Rare Earths, para. 7.90.

29 Panel Report, China – Rare Earths, para. 7.90.

30 Panel Report, China – Rare Earths, paras. 7.84–88.

31 Panel Report, China – Rare Earths, para. 7.91.

32 Panel Report, China – Rare Earths, para. 7.103.

33 Panel Report, China – Rare Earths, para. 7.110.

34 Panel Report, China – Rare Earths, para. 7.460.


36 Panel Report, China – Rare Earths, paras. 7.378–448.

37 Non-Tariff Barriers, Communication from European Communities, TN/MA/W/11/ Add.3 (1 April 2003), para. 13.
38 Proposed Agreement on Export Taxes, Art. 3.1(a).
39 Proposed Agreement on Export Taxes, Art. 3.1(b).
40 Proposed Agreement on Export Taxes, Art. 6.
41 Proposed Agreement on Export Taxes, Art. 5(a) and (b).
42 Proposed Agreement on Export Taxes, Art. 5(c).
43 Proposed Agreement on Export Taxes, Art. 8.
44 Proposed Agreement on Export Taxes, Art. 7.
45 Panel Report, *China – Rare Earths*, paras. 7.268.
4 Regulation (EEC) No 459/68, of the Council of 5 April 1968 on Protection against Dumping or the Granting of bounties or Subsidies by Countries Which Are Not Members of the European Economic Community, 1968 O.J. (L 93) 1,3.
5 Regulation (EEC) 1681/79 of 1 August 1979 amending Regulation (EEC) No 459/68 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community, OJ L 196/1, 2 August 1979, (hereinafter Regulation 1681/79), Art. 3.2 (c).
9 See Regulation 1681/79.
10 Regulation (EC) 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ L 56/1, 6 March 1996, Art. 9(5).
11 See Regulation 2017/2321, Art. 2.7(a).
15 See Regulation 2017/2321.

19 See Regulation 2017/2321, Art. 2.6a.(a).

20 Ibid., Art. 2.6a.(b).

22 See Regulation 2017/2321, Art. 2.7(c).


26 See Regulation 2017/2321.

27 Ibid.


30 See Detlef Nölle v Hauptzollamt Bremen-Freihafen.

31 Rotex Chemie case [1997], para. 22.


35 See Council v. Zhejiang Xinan Chemical Industrial Group Co., Ltd.


37 See Council v. Zhejiang Xinan Chemical Industrial Group Co., Ltd.


41 Ibid., para. 102.


47 See Regulation 451/2011, para. 165.
48 See Regulation 452/2011, para. 272.
49 See Regulation 452/2011, para. 273.
50 See Regulation 451/2011, para. 165.
52 Ibid.
53 Ibid.
54 Ibid.
56 Paragraph 15(a) provides: In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
58 Ibid.
59 Ibid.
60 Ibid.
61 Ibid.
63 Ibid.
64 Ibid.
65 See paragraph 15 of China accession protocol: (d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member’s national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.
70 Ibid.
71 Ibid.
1 Council Decision (EU) 2011/265 of 16 September 2010 on the Signing, on behalf of the European Union, and Provisional Application of the Free Trade Agreement
between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127/1, 14 May 2011.


9 The idea of bargaining under the “shadow” of obligations is borrowed from Shaffer (2006).

10 Art. 20 of the Uruguay Round Agreement explicitly states that non-trade concerns should be taken into account during the negotiations on agriculture.


12 Vogt is critical on the GSP+ of the EU in that decisions made in this framework do not take into account the reports of the ILO supervisory bodies. In the JEFTA there is now at least the possibility for the panel of experts to take into account the views of the ILO committees concerning the sustainability.


1 The EU includes social human rights as a subcategory of human rights (Beke et al. 2014, pp. 14–16).
Such commercial agreements include “exclusive trade agreements,” “trade and economic cooperation agreements,” “association agreements” and “wide-ranging partnerships” (Beke et al. 2014, p. 57).

Currently, human rights are part and parcel of the EU’s international agreements (sometimes through a link with a framework agreement) and include a non-execution provision, allowing for measures to be taken in case of human rights violations (Beke et al. 2014, pp. 60–63).

In contrast to the European Parliament, the role of the Indian Parliament with respect to trade negotiations is very limited in the phase of drafting the negotiating mandate, during the negotiations as well as in the treaty approval phase, as the Indian Constitution gives these powers to the central government or gives the government leeway to circumvent approval by parliament (email correspondence with Professor Biswajit Dhar 13 June/19 June 2018; Daruwala and Nayak 2013). This is not the case in the EU, where the parliament, and with respect to mixed treaties also the members states individually, have a much stronger role in the process (Van den Putte, De Ville and Orbie 2014; see also Voogsgeerd in Chapter 10 of this volume).

The European Parliament has also demanded that European companies working in Indian export processing zones should adhere to the CLS, the four priority conventions and other conventions ratified by India (European Parliament 2011). These priority conventions were identified by the ILO in 2008 as conventions that help to govern labour relations. They include conventions no. 81 and 129 on labour inspection, no.122 on employment policy and no.144 tripartite labour consultation (ILO 2015).

While the EU is India’s largest trading partner (in 2016 the main destination for exports and the second main origin of imports), India occupies the ninth position amongst the EU’s trading partners (WTO 2016; European Commission 2019).

In fact, some of India’s current FTAs have caused increased trade deficits with the respective countries, which makes India cautious about other agreements (Dhar 2018).

India also aims for the European market to open up for service suppliers such as call centers. The EU, on the other hand, wants to have access to India’s service sector such as banking and insurance (Wouters et al. 2013, p. 8).

Or “Board” in case of Singapore.

This is different in the Generalized System of Preferences+ (GSP+). Under this mechanism, trade preferences can be cut in case of violations of labours standards. This has actually happened in the instances of Burma and Belarus (Van den Putte and Orbie 2015, p. 227).

Bartels (2015, p. 85) suggests that even without such explicit cross-referencing, a human rights clause combined with a non-execution clause in one agreement may have consequences for another agreement.

While the EU–Korea FTA itself does not make such a connection, the EU–Korea Framework Agreement makes its essential elements and non-execution clause consequential to the FTA between the two parties (Hachez 2015, p. 12).

There is some debate about whether stronger enforcement options would actually be helpful. A study by Zhou and Cuyvers (2011) on the EU GSP, where the EU actually can and has cut preferences in case of systematic violation of labour standards, has shown that the effects in cases of Burma and Belarus are limited, although it has been pointed out that the effects may depend on the strength of the trading relation and the availability of other trading partners to the sanctioned countries. Also, while some FTAs do allow for sanctions, such as some of the US ones, this instrument has never been used (see Giumelli and van Roozendaal 2016).

2 Ibid.
3 CAFTA-DR is the first FTA between the US and a group of smaller developing economies, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic.
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