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The Effects of the Lisbon Treaty on the Principles and Objectives of the CCP

ANGELOS DIMOPOULOS*

Abstract. The Lisbon Treaty brings significant changes to the orientation of the Common Commercial Policy (CCP), affecting the principles and objectives that guide the exercise of EU competence in this field. Building upon the EC Treaty (TEC), it strengthens the role of uniformity and the commitment of the EU towards gradual liberalization, incorporating in fact a standstill obligation of the EU to retain the existing level of liberalization. More importantly, the Lisbon Treaty signals the integration of the CCP into EU external relations, providing common objectives and principles that allow for a re-evaluation of the objective of liberalization and the pursuance of other trade and non-trade goals, guaranteeing at the same time unity and consistency in the exercise of Union powers.

I Introduction

Since the establishment of the European Community (EC), the Common Commercial Policy (CCP) has been widely regarded as the most important field of EU external relations, presenting a unique tool for forwarding policy priorities that extended beyond pure trade considerations. The CCP remained a field of greater importance even after the gradual expansion of Community powers in other external relation fields, not only because of the wide scope and the nature of Community competence in the field, but also because of its suitability to promote and integrate a variety of policy objectives in international relations with third countries.

Bearing in mind its importance, it may be expected that the CCP was the most clearly defined EU policy in terms of the principles it adheres to and the objectives it pursues. However, the provisions of the EC Treaty (TEC) remained to a large extent silent regarding the orientation of the CCP. The Treaty amendments in Amsterdam and Nice concerned the scope of the CCP, while the extensive jurisprudence of the European Court of Justice (ECJ) was primarily focused on the scope and exclusive nature of Community competence in the field.

Against this background, the Lisbon Treaty introduces significant changes regarding the orientation of the CCP. Establishing a common set of principles and objectives governing all EU external action, it requires that EU action taken in the

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field of the CCP shall be based upon and promote the general principles, adhering at the same time to the specific principles and objectives of the CCP.

This article aims to identify the legal framework created by the Lisbon Treaty with regard to the principles and objectives of the CCP. In order to assess the significance of the changes, this article examines first the previous legal regime, focusing on the principles of uniformity and liberalization that were provided in the TEC. Afterwards, this article examines how the Lisbon Treaty affects the orientation of the CCP, looking at its effect on the specific principles of uniformity and liberalization, the establishment of general principles and objectives relevant for the CCP, and finally how the balance is struck between the general objectives and the specific objectives of the CCP.

II The Principles and Objectives of the CCP under the TEC

The TEC provided limited assistance for identifying the principles and objectives of the CCP. Articles 131 and 133 TEC provided that the CCP was ‘based on uniform principles’ and ‘aims to contribute to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of standards’. Hence, the TEC text identified uniformity and liberalization as the guiding principles and objectives determining the exercise of Community powers in the field of the CCP.

1. *The Principle of Uniformity*

The principle of uniformity has been a major characteristic of the CCP throughout its evolution, reflecting in external relations the common interests of the EU and the needs of the internal market. Aiming to protect the unity of the common market by avoiding distortions in competition and risks of trade deflection that could arise if Member States pursued their individual external trade policies,¹ the principle of uniformity required the adoption of common rules throughout the EU in the field of the CCP.² Besides the internal market imperative, the ECJ considered that uniformity was necessary to preserve the unity of the EU’s position with respect to third countries and to defend the ‘common interests’ of the EU. It is worth noting that the exclusive nature of Community competence in the field arose as a result of the application of the principle of uniformity. The Court recognized the *a priori*

¹ Joined Cases 37 and 38/73, *Sociaal Fonds voor de Diamantarbeiders v. NV Indiamex et Association de fait De Belder* [1973] ECR 1609; *Opinion 1/78* [1979] ECR 2871, para. 45.

² M. Cremona, ‘The External Dimension of the Internal Market’, in *The Law of the Single European Market*, ed. C. Barnard & J. Scott (Oxford: Hart, 2002), 351–394, at 354–355.

exclusive character of EC competence in the field of the CCP,³ which was justified by the need to protect the unity of the common market.⁴

However, uniformity was an imperative only in areas of the internal market that had been fully harmonized so that common external rules were necessary for the proper functioning of the internal market.⁵ Even with regard to trade in goods, where the need for uniformity has been firmly established,⁶ the substantive deviations from the establishment of common rules in the internal market were reflected in the CCP. For example, different national standards applied to imports from third countries concerning their taxation, to the extent that indirect taxation of EU products was subject to different national rules.⁷ The link between uniformity and internal market harmonization was better illustrated in the areas of trade in services and intellectual property (IP) rights, where full harmonization existed only to a limited extent. The preference granted to the techniques of mutual recognition and minimum harmonization in these areas indicated that uniformity played only a subsidiary role, rendering common rules necessary only to the extent that a minimum level of common standards existed internally in the same area of law.⁸

The link between the CCP and the internal market did not imply that the application of the principle of uniformity required that the CCP aimed at the achievement of the same objectives that existed in the internal market, namely non-discrimination and elimination of all trade barriers. The Court has clearly recognized that there is 'no general principle obliging the Community, in its external relations, to accord to non-member countries equal treatment in all respects'.⁹ Consequently, the Community could discriminate not only between its own and third-country products, producers, or service providers, but also between third countries themselves, based on the common Community interest.¹⁰ However, the lack of a TEC-based obligation of non-discrimination did not mean that the discriminatory treatment of third-country products and service providers was always allowed. The equal treatment of third-country products and service providers with EU-originated products and EU nationals was required by the TEC, insofar as such equal treatment was necessary for the proper operation of internal market rules, such as in the case of

³ *Opinion 1/75* [1975] ECR 1355; Case C-41/76, *Donckerwolke* [1976] ECR 1921; P. Koutrakos, *EU International Relations Law* (Oxford/Portland: Hart, 2006), 13–17.

⁴ Cremona, n. 2 above, 357–358; G. Marin Duran, 'Development-Based Differentiation in the European Community's External Trade Policy: Selected Issues under Community and International Trade Law', EUJ PhD Thesis (Florence, 2008), 25–26.

⁵ Cremona, n. 2 above, 359–370; Marin Duran, n. 4 above, 23–24.

⁶ See n. 1 above.

⁷ Case C-228/90, *Simba SpA* [1992] ECR I-3713.

⁸ Cremona, n. 2 above, 374.

⁹ C-52/81, *Faust v. Commission* [1982] ECR 3745, para. 25; see also S. Peers, 'Constitutional Principles and International Trade', *European Law Review* 24 (1999): 185–195.

¹⁰ M. Cremona, 'Neutrality or Discrimination? The WTO, the EU and External Trade', in *The EU and the WTO Legal and Constitutional Issues*, ed. G. de Burca & J. Scott (Oxford/Portland: Hart, 2001), 151–184, at 165–172.

the assimilation of third-country products with EU-origin products after they are put in free circulation.¹¹ Second, obligations of equal treatment of third-country products/nationals were located outside the TEC, either in World Trade Organization (WTO) law or in bilateral Community agreements. However, in such cases equal treatment was a result of international law obligations of the EC, which were freely adopted in the framework of the CCP in accordance with the policy priorities set by the EC political institutions.

Consequently, the principle of uniformity had only ‘instrumental’ value, determining the areas of the CCP where common rules must be adopted. In areas that were not harmonized internally, uniformity was no longer an imperative but merely a tool that could be used by Community institutions.¹² Furthermore, the principle of uniformity was ‘neutral’ with regard to the substantive orientation of the CCP. It did not impose an obligation of equal treatment or liberalization similar to the internal market but granted almost absolute discretion to the empowered Community institutions to pursue the objectives that according to them served in the best way the Community interest.

2. *The Objective of Liberalization*

The only substantive objective that was provided in the TEC and could affect the content of the CCP was trade liberalization. Article 131 TEC recognized that the CCP aimed at liberalization of world trade through the progressive abolition of trade restrictions. However, liberalization was only as an aspirational aim, unlike the legally binding obligation of creating uniform rules. Article 131 TEC did not in itself impose an obligation on the Community either to liberalize trade unilaterally or to mirror internal trade liberalization at the external level.¹³ In fact, the Court verified the non-binding nature of the liberalization objective, emphasizing that it establishes an objective rather than imposing an obligation.¹⁴ It lay in the discretion of the political institutions to assess whether and to what extent CCP measures achieved trade liberalization.¹⁵

Consequently, liberalization constituted only an aspirational objective that offered guidance to the political institutions in the formation of the CCP. It provided only one possible policy orientation, the specific application of which lay in the hands of the Community institutions, which should assess whether a liberalizing policy would advance the Community interest. It was precisely the determination of the ‘Community interest’ that affected the orientation of the CCP, which

¹¹ Case C-41/76, *Donckerwolke*, n. 3 above; *Marin Duran*, n. 4 above, 37–38.

¹² *Cremona*, n. 2 above, 374.

¹³ Case C-51/75, *EMI v. CBS United Kingdom Ltd* [1976] ECR-811.

¹⁴ Case C-150/94, *United Kingdom v. Council (Chinese Toys)* [1998] ECR I-7235, para. 67; Case C-112/80, *Dürbeck v. Hauptzollamt Frankfurt* [1982] ECR 1251, paras 10–11.

¹⁵ *Cremona*, n. 2 above, 382–384.

could pursue other trade objectives than liberalization. In that regard, other policy objectives could influence the content of the CCP, while liberalization did not take precedence over them.

3. *Non-trade Objectives of the CCP and the Need for Consistency*

Trade policy could pursue objectives other than trade liberalization. The lack of a definition of the content of the CCP in the TEC had led to controversy concerning the types of trade measures that fell within the scope of the CCP.¹⁶ At a time when the TEC lacked specific provisions granting competence to the Community in specific fields, such as environmental protection or development cooperation, the Court endorsed a broad and instrumental approach to the concept of the CCP, so that any type of trade measures would fall under the scope of the CCP.¹⁷ In that respect, the CCP had been used for the adoption of trade measures pursuing objectives other than regulating trade flows and trade restrictions, linked for example with environmental protection and development cooperation.¹⁸

The introduction of specific legal bases granting competence to the Community to take external action in specific fields had a significant impact on the use of the CCP for pursuing non-trade objectives. For example, the introduction of Article 175 TEC on environmental protection and Article 177 TEC on development cooperation led to numerous legal battles concerning the choice of the proper legal basis for the adoption of a specific measure.¹⁹ Bearing in mind that the different Treaty Articles provided different rules on the nature of EC competence as well as on decision-making and may provide specific guidelines to the political institutions concerning the exercise of EC competence, the choice of legal base became extremely important.

The Court, adopting an aim and content test in order to define the proper legal basis,²⁰ reaffirmed in most instances the role of the CCP for the adoption of measures pursuing non-trade objectives, in particular in cases where a Community measure

¹⁶ For an analysis of the type of trade measures falling within the scope of the CCP, see P. Koutrakos, 'Legal Basis and Delimitation of Competences', in *EU Foreign Relations Law – Constitutional Fundamentals*, ed. M. Cremona & B. de Witte (Oxford/Portland: Hart, 2008), Ch. 5.

¹⁷ See *Opinion 1/78*, n. 1 above; *Opinion 1/75*, n. 3 above; Case C-54/86, *Commission v. Council (GSP)* [1987] ECR I-1493.

¹⁸ For example, Art. 133 TEC was used as a legal basis for the conclusion of the Energy Star Agreement, which concerns the coordination of energy-efficient labelling programmes for office equipment, thus pursuing an environmental protection objective as well.

¹⁹ See *Opinion 2/00* [2001] ECR I-9713; Case C-281/01, *Commission v. Council* [2002] ECR I-12049; Case C-94/03, *Commission v. Council* [2006] ECR I-1; Joined Cases C-317 and 318/04, *Parliament v. Council* [2006] ECR I-4721.

²⁰ The Court has insisted that the choice of a legal basis must rest on objective factors, amenable to judicial review, Case C-54/86, *GSP* case, n. 17 above, para. 11.

had more than one purposes or a twofold component.²¹ Within this framework, the Court recognized the need to use the CCP for the adoption of trade measures pursuing other objectives without however clarifying the interaction between trade and non-trade objectives, their legal value and whether, how, and by whom they should be prioritized.²² Discussing only the procedural issues concerning the choice and combination of legal bases, the Court avoided to interfere with the substantive policy choices taken by the legislative and executive organs of the Community.

Consequently, the CCP could be used for advancing non-trade objectives found elsewhere in the TEC. In that respect, the need for coherence and consistency in the formation and application of the CCP appeared particularly important. Indeed, the role for coherence and consistency was stressed in the initial provisions of the old Treaty on the European Union in Article 3, while the TEC provided general principles and institutional guarantees that were valuable for ensuring coherence and consistency in the formation of the CCP as well as its integration within EC external relations. Considering the importance of coherence and consistency for EU action in the field of the CCP after the Lisbon Treaty, these principles are analysed below, in light of their value after the amendments inserted by the Lisbon Treaty.

III The Orientation of the CCP in the Lisbon Treaty

The Lisbon Treaty introduces significant changes in EU external relations, including the CCP. Apart from amending the scope and nature of Union competence in the field of the CCP, the examination of which goes beyond the scope of this article,²³ the Lisbon Treaty has remarkable effects on the principles and objectives of the CCP. First, the Lisbon Treaty creates in Articles 3(5) and 21 TEU a common framework for EU external action, thus subjecting all fields of formerly EC and EU external action to the same common general principles and objectives. Second, Article 206 of the Treaty on the Functioning of the European Union (TFEU), which substitutes Article 131 TEC, offers a different role to the objective of liberalization in the field of the CCP. Within this context, it is necessary to examine how the Lisbon Treaty affects the application of the principles of uniformity and liberalization, the importance of the general objectives for the CCP, and the mechanisms it provides for ensuring coherence and consistency.

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²¹ Case C-411/06, *Commission v. Parliament and Council* [2009] ECR I-0000, paras 45–46; Case C-178/03, *Commission v. Parliament and Council* [2006] ECR I-107, paras 35 and 47.

²² See n. 17 above.

²³ On the scope and nature of Union competence after Lisbon, see indicatively M. Krajewski, ‘External Trade Law and the Constitutional Treaty: Towards a Federal and More Democratic Common Commercial Policy?’, *Common Market Law Review* 42 (2005): 91–127. On the author’s views, see A. Dimopoulos, ‘The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Policy?’, *Croatian Yearbook of European Law and Policy* 4 (2008): 102–131.

1. *The Principle of Uniformity and the Objective of Liberalization*

a) *The Principle of Uniformity.* The principle of uniformity remains at the heart of the CCP. Article 207 TFEU reiterates that ‘the CCP shall be based on uniform principles’. Uniformity holds its character as an instrumental principle of the CCP, providing a link between the exercise of internal powers and the type of external commercial measures.

The requirement of uniformity obtains further importance in light of the explicit recognition of the exclusive nature of Union competence in the field of the CCP.²⁴ As was aforementioned, exclusivity was born as a corollary to uniformity, in order to secure the effective application of the EU-wide uniform measures. However, exclusivity was not extended to trade in services and IP, areas in which full harmonization was achieved internally only to a certain extent.²⁵ In that regard, the extension of exclusivity in the Lisbon Treaty to all areas covered by the CCP, namely trade in services, IP, and Foreign Direct Investment (FDI), requires a reconsideration of the role of uniformity in these fields, in particular with regard to their aspects that have not been harmonized internally.

It is arguable that the exclusive nature of the Union competence does not render mandatory the creation of uniform rules in all fields covered by the CCP. Similar to the current exceptions to uniformity with regard to trade in goods, the creation of uniform rules in the other areas of the CCP is necessary only to the extent that internal harmonization has been achieved. However, even though the Member States can no longer impose directly in these areas of law different rules concerning third countries and their nationals, the Union, as the single actor in the field, may recognize the different national interests and reflect the policy choices of Member States. In fact, the requirement of unanimous voting in the Council for the adoption of CCP measures in the areas of trade in services, IP, and FDI, to the extent that unanimity is required for the adoption of internal rules or insofar as trade in cultural and audiovisual services is concerned,²⁶ indicates that Member States play indirectly a decisive role in the creation of common rules in these areas of the CCP.

b) *The Objective of Trade and FDI Liberalization.* The Lisbon Treaty alters significantly the role of liberalization as an objective of the CCP. Article 206 TFEU defines liberalization in the same terms as Article 133 TEC, adding only a reference to other barriers to trade and FDI in order to reflect the substantive scope of

²⁴ Article 3(1)(e) TFEU.

²⁵ Article 133(5)(4) TEC provided that Member States retained their right to maintain and conclude international agreements with third countries, insofar as they did not conflict with Community law or relevant international agreements. See C. Hermann, ‘Common Commercial Policy after Nice: Sisyphus Would Have Done a Better Job’, *Common Market Law Review* 39 (2002): 7–29, 19–20.

²⁶ Article 207(4)(2) and (3) TFEU.

Union competence.²⁷ However, it substitutes the words ‘aims to contribute’ with stronger language, providing that the Union ‘shall contribute’ to trade liberalization.

The change of the verb indicates that the drafters of the Lisbon Treaty intended to modify the aspirational character of the liberalization objective.²⁸ First, the linguistic difference between the words ‘aim’ and ‘shall’ indicates that liberalization is no longer a non-binding objective of the CCP, the pursuance of which rests in the hands of the Union political organs. On the contrary, Union institutions are bound to formulate the CCP in a way that has positive effects on trade and FDI liberalization.

The mandatory nature of the objective of liberalization becomes obvious, if Article 206 TFEU is compared with other provisions of the Treaties having a similar wording with respect to the objectives of specific Union policy fields. For example, in the field of development cooperation ex Article 177(2) TEC provided the exact same wording (shall contribute) regarding the objective of promoting democracy and rule of law. The mandatory nature of this objective was affirmed by the Court in *Portugal v. Council*,²⁹ where the Court noted that Article 177(2) TEC ‘requires the Community to take account of the objective of respect for human rights when it adopts measures in the field of development cooperation’,³⁰ and proceeded to interpret that obligation as implying that ‘development cooperation must be adapted to the requirement of respect for those rights and principles’.³¹ Drawing a parallel to the conclusion of *Portugal v. Council*, there is little doubt that the objective of liberalization, as is identified in Article 206 TFEU, is mandatory, and thus the legality of Union action could be compromised if a given CCP measure was found incompatible with that objective.

Assessing the limits of the discretion left to Union institutions when formulating the CCP, the normative content of the objective of liberalization is of particular importance. A careful reading of Article 206 TFEU indicates that the Union is committed to contribute to the gradual liberalization of trade and FDI. The Treaty text is clear that the Union is committed to the ‘progressive abolition of restrictions’ and the development of ‘harmonious world trade conditions’. Hence, Article 206 TFEU does not require full liberalization of trade and FDI conditions, similar to the internal market, nor does it oblige the Union to proceed with unilateral

²⁷ Krajewski, n. 23 above, 107.

²⁸ M. Cremona, ‘A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty’, *EUI Working Paper Law* 30 (2006), 29.

²⁹ Case C-268/94, *Portugal v. Council* [1996] ECR I-6177. For a discussion of the case, see S. Peers, ‘Fragmentation or Evasion in the Community’s Development Policy? The Impact of *Portugal v. Council*’, in *The General Law of EC External Relations*, ed. A. Dashwood & C. Hillion (London: Sweet & Maxwell, 2000), Ch. 7.

³⁰ Case C-268/94, n. 29 above, para. 23.

³¹ *Ibid.*, para. 24.

liberalization of trade and FDI conditions. However, this does not mean that the mandatory objective of liberalization is deprived of any normative value. On the contrary, contribution to gradual liberalization could be interpreted as binding the existing level of liberalization and prohibiting the adoption of restrictive measures. Such an interpretation would not only give value to the mandatory nature of the objective of liberalization, but it would also respect the wording of Article 206 TFEU, which views liberalization as the progressive abolition of restrictions. The requirement that existing restrictions have to be gradually abolished indicates that *a contrario* a step back in liberalization is not permitted, as it would contravene the mandatory objective of pursuing further liberalization.

Consequently, the Lisbon Treaty emphasizes the commitment of the EU to the principle of liberalization, by rendering it a mandatory objective of its CCP. However, the binding nature of the objective of liberalization does not imply that the Union institutions lose their discretion concerning the determination of the extent and the means of liberalization. The CCP retains its flexibility, allowing the political organs to determine whether, when, and to what extent liberalizing measures advance the Union interest. However, the margin of appreciation given to the political institutions is limited, as the Lisbon Treaty arguably obliges them to avoid taking any restrictive measures that affect the existing level of liberalization.

2. *The General Principles and Objectives of EU External Action*

a) *The Constitutional Framework of EU External Relations Principles and Objectives.* One of the principal changes brought by the Lisbon Treaty in the field of EU external relations was the creation of a common framework of principles and objectives for Union external action. Seeking to integrate the different external policies and enhance their consistent and effective application, the drafters of the Lisbon Treaty favoured the incorporation of specific principles and objectives of EU external relations in primary law, establishing a common set of rules guiding the Union's external policy making.³² The creation of this 'quasi-constitutional' framework of EU external action influences significantly the CCP, as it creates the necessary legal foundations for coordinating the CCP with other external policies and for pursuing non-trade objectives through the adoption of CCP measures.

Principles and objectives of EU external action appear very early in the Treaties, indicating the significance of creating a common framework for EU external relations.³³ Article 3 TEU includes among the values and general objectives of the

³² M. Cremona, 'The Draft Constitutional Treaty: External Relations and External Action', *Common Market Law Review* 47 (2003): 1347–1366, at 1347–1350.

³³ For the constitutional role of general principles and objectives as values in EU external relations, see M. Cremona, 'Values in the EU Constitution: The External Dimension', Workshop on Values in the EU Constitution (EUI, Florence, 2003).

EU a paragraph concerning EU external relations, summarizing its main principles and objectives. It is worth noting that Article 3(5) TEU identifies ‘free and fair trade’ as one of the basic objectives of EU external action, thus elevating the CCP into one of the fundamental fields of EU external relations and indicating its orientation towards free and fair trade.³⁴

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Based on Article 3(5) TEU, Article 21 TEU presents the general framework of principles and objectives that determine EU external action. In contrast with the Constitutional Treaty, which provided a single chapter on EU external relations, the Lisbon Treaty places the general principles and objectives of EU external action in the TEU, just before the provisions on the Common Foreign and Security Policy (CFSP), while the rest of Union external policies are found in the TFEU. However, despite the abandonment of the single chapter structure, the Lisbon Treaty retained the substantive link between general principles and objectives and all fields of EU external relations.

The Treaties emphasize in more than one place the application of the general principles in the field of the CCP. Being a provision on the values and objectives of the EU, Article 3(5) TEU applies in all fields of EU external relations. Further, paragraph 1 of Article 21 TEU concerns the action of the Union in the international sphere, thus including all fields of Union external action, while paragraph 2 expressly provides that the objectives it states apply ‘in all fields of international relations’. The third paragraph confirms that the first two paragraphs apply in Title V of the TFEU, which includes the CCP. The link between Article 21 TEU and the CCP is reaffirmed in the TFEU as well. Article 205 TFEU establishes an express link between Article 21 TEU and the external policies found in the TFEU. In addition, Article 206 TFEU explicitly incorporates the general principles and values found in Article 21 TEU in the CCP.

A first reading of Articles 3(5) and 21 TEU reveals that the list of principles and objectives of EU external action in reality incorporates principles and objectives that were found in specific policy fields under the TEC.³⁵ For example, the objective of sustainable development existed in Article 177 TEC on development cooperation. Hence, the Lisbon Treaty differentiates substantially from the previous regime in the sense that these principles and objectives apply not only with regard to the specific policy field but also to all other fields of external relations, the CCP included.³⁶

Consequently, Articles 3(5) and 21 TEU incorporate specific trade and non-trade principles and objectives, which guide the exercise of Union powers in the field of the CCP. The pursuance of trade objectives is of utmost importance for determining the orientation of the CCP, as they shed further light on the role of trade and FDI liberalization under Article 206 TFEU. With regard to non-trade objectives,

³⁴ On the concept of free and fair trade and their link to liberalization, see ss II.2(b) and II.3(a).

³⁵ Cremona, n. 28 above, 5.

³⁶ Cremona, n. 32 above, 1349; Krajewski, n. 23 above, 107.

Articles 3(5) and 21 TEU do not add in practice to the previous orientation of the CCP, as the pursuance of non-trade objectives has been already recognized by the ECJ.³⁷ However, Article 21 TEU is of greater legal value, as it provides the legal foundation for the pursuance of non-trade objectives in the field of the CCP.

b) Trade Objectives as General Objectives of EU External Action. Recognizing the importance of trade policy, Articles 3(5) and 21(2)(e) TEU make explicit references to trade objectives as general objectives of EU external relations. They provide that the Union shall contribute to ‘free and fair trade’ and pursue the ‘integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade’. A careful reading of these provisions indicates that the general trade objectives are not only limited to trade liberalization, which is the only objective provided in Article 206 TFEU but include other trade-related objectives.

Closer to the objective of trade liberalization appears to be the objective stated in Article 21(2)(e) TEU. The progressive abolition of trade restrictions is explicitly recognized as an objective. However, trade liberalization as such is not an objective of EU external action of constitutional significance, as it is linked with the broader objective of integrating third countries into the world economy. Given that the latter objective has been one of the objectives of development cooperation,³⁸ Article 21 TEU suggests that trade liberalization is the basic tool for serving a development objective. Hence, it is arguable that in Article 21 TEU the objective of trade liberalization obtains another dimension as it is placed under the umbrella of economic development.

The link between liberalization and economic and social development is strengthened even more in Article 3(5) TEU. The reference to free and fair trade indicates that pursuance of free trade, namely full liberalization of trade conditions, is only the one side of trade policy objectives, which is complemented by fair trade. In contrast with free trade, difficulties arise with the definition of the concept of fair trade. On the one hand, fair trade can be perceived as conformity with international trade rules, so that the pursuance of fair trade is principally linked with non-breaching of WTO rules. On the other hand, fair trade can be perceived as ‘equitable trade’, namely trade linked with social and labour goals aiming at a fairer distribution of trade profits.³⁹ As the Commission has put it, ‘the objective of fair trade is to ensure that producers receive a price that reflects an adequate return on their input of skill, labour and resources, and a share of the total profit commensurate with their input’.⁴⁰ In that sense, fair trade is linked with social

³⁷ See n. 1 above.

³⁸ Article 177(1) TEC.

³⁹ On the concept of fair trade in EU external relations, see M. Cremona, ‘Free and Fair Trade’ (forthcoming, to be added at proof stage).

⁴⁰ European Commission, ‘Commission Communication on Fair Trade’, COM 619 (Brussels, 29 Nov. 1999), 4.

development objectives both with respect to internal producers/service providers and third-country nationals. Hence, even though there is no consensus on the concept of fair trade, it is undeniable that the reference to free and fair trade in Article 3(5) TEU adds another (trade) objective of fundamental value to the CCP.

c) The General Principles and Objectives of EU External Action as Non-trade Objectives of the CCP. Turning now to the specific non-trade principles and objectives that are provided in Article 21 TEU, it is important to categorize them and underline the ones that are of greater practical value for the orientation of the CCP. Starting with the principles of democracy, rule of law, and respect for human rights, as well as the Union's security and integrity and the preservation of international peace and security, which the Union shall 'seek to advance' and 'consolidate and support', the reference to these objectives is of greater importance for the formal recognition of the legality of the use of positive and negative conditionalities.⁴¹ Article 21 TEU legitimizes the current practice of inserting positive and negative conditionality clauses in trade agreements and granting trade preferences to countries adhering to these objectives, as it recognizes that trade measures can be used for the pursuance of the Union's security, human rights, and democracy policy.⁴²

Continuing with an equally important objective for the orientation of the CCP, Article 21 TEU provides that the Union shall work in order to 'help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources'. Environmental protection is explicitly recognized as an objective of EU external action, pursuant to the general recognition of environmental protection as an objective that must be integrated into all Union policies, according to Article 11 TFEU (ex Article 6 TEC).⁴³ As a result, Article 21 TEU enhances the importance of environmental goals as non-trade objectives of the CCP. In addition, the explicit recognition of sustainable economic, social, and environmental development of developing countries as a general objective of EU external action places on a different basis the relation between trade and development cooperation. Similar to environmental protection, Article 21 TEU incorporates the need of integrating development cooperation in all other EU external relation fields, thus rendering the principle enshrined in former Article 178 TEC of fundamental value.⁴⁴

⁴¹ Cremona, n. 28 above, 30.

⁴² On the pursuance of the objectives of human rights and democracy through trade conditionality, see L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press, 2005).

⁴³ On the role of environmental protection in EU external relations, see G. Marin Duran & E. Morgera, 'Towards Environmental Integration in EC External Relations? A Comparative Analysis of Selected Association Agreements', *Yearbook of European Environmental Law* 6 (2006): 179–210.

⁴⁴ On the role of Art. 178 TEC as incorporating development objectives in the Common Commercial Policy, see Marin Duran, n. 4 above, Chs 1 and 5.

Last but not least, Article 21 TEU identifies multilateralism and good governance as basic objectives of EU external action. The recognition of these objectives plays a very significant role for the orientation of the CCP. The objective of multilateralism indicates that the Union shall be committed to multilateral trade negotiations and participate actively in institutions such as the WTO and promote and contribute to their effective operation. Further, the objective of good governance is strongly linked with the broader trade and development objectives. Good (trade) governance can be enhanced internally, which is linked with the objective of fair trade in the sense that the Union is committed to abide by international rules and avoid trade practices that breach its international commitments,⁴⁵ and also externally, in the sense that the EU is required to assist third countries to develop their trade governance capacity.

d) The Legal Effects of the General Principles and Objectives. The recognition of the aforementioned principles and objectives as general objectives of EU external action does not necessarily imply that they have the same legal value as the specific objectives in each external policy field. Articles 3 and 21 TEU use strong language (shall), suggesting that the principles and objectives of EU external action oblige the Union to act within the framework they create. Their mandatory nature is softened, however, by their broad formulation. The Union is required to ‘consolidate and promote’ democracy, respect for human rights, and good governance, to ‘foster’ sustainable development, to ‘help develop’ environmental protection measures, and to ‘encourage’ integration in the world economy. Hence, the Lisbon Treaty leaves a great degree of discretion to the policy-making institutions to assess the means of action and the content of the chosen action.⁴⁶ Articles 3(5) and 21 TEU impose arguably a justiciable obligation upon the EU institutions to pursue these objectives in the field of the CCP as well, but it leaves them a wide margin of appreciation to determine when, whether, and how these objectives can be pursued.

Furthermore, the recognition of general objectives of EU external action impacts on the question of choice of legal basis for a specific EU measure. The choice of a proper legal basis remains important because of its institutional and competence implications.⁴⁷ However, the test of aim and content needs to be reconsidered, since the Lisbon Treaty requires that the same general objectives must be pursued in all external policy fields. It could be argued that the ‘merge’ of objectives of EU external action renders defunct the first limb of the test, so that only the content of a specific measure would determine the legal basis under which it should be adopted.

⁴⁵ See Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy, *The European Consensus*, OJ C46/1 (Brussels, 22 Nov. 2005).

⁴⁶ Cremona, n. 28 above, 5–6.

⁴⁷ *Ibid.*, 7.

Nevertheless, such argument misunderstands the role of the general objectives and overstates their practical effects. The recognition of common objectives is not followed by a lack of specific objectives in each external policy field. For example, the objective of trade and FDI liberalization exists in both Articles 21 TEU and 206 TFEU, but in different terms concerning their scope. Hence, the identification of the specific objectives in each policy field can be used for determining the proper legal basis for each specific measure.

3. Coherence and Consistency in the Pursuance of the Objectives of the CCP

As the pursuance of a general objective may conflict with the specific objectives of the CCP as well as with other general objectives, it is necessary to examine whether the Lisbon Treaty provides rules concerning the balance between different objectives in the field of the CCP. Bearing in mind that coherence and consistency in external action was the imperative for introducing the provisions on general principles and objectives, it is crucial to see how the general objectives link to the specific objectives of the CCP and to whom is their consistent application entrusted.

a) Balancing between Trade and FDI Liberalization and General Objectives

Starting with the balance struck between the general objectives and the specific objective of liberalization, we need to look at the links between the general objectives and the CCP provided in the Treaties. As was aforementioned, both the TEU and the TFEU include a number of provisions concerning the application of Articles 3(5) and 21 TEU in the field of the CCP, each of which has a different wording. While Articles 3(5), 21(3) TEU, and 205 TFEU clearly state that the Union ‘shall pursue’ the general objectives, Article 207(1) TFEU provides that ‘the CCP shall be conducted in the context of the principles and objectives of the Union’s external action’. Hence, Articles 3(5), 21(3) TEU, and 205 TFEU appear to suggest that the general objectives of EU external action are of overarching value so that the pursuance of the specific objectives in each policy field is permitted to the extent that the overarching objectives are not frustrated. On the other hand, Article 207(1) TFEU appears to suggest that the general principles and objectives create only the general context, within which the specific objective of trade and FDI liberalization should be primarily pursued.⁴⁸

Despite the lack of a clear prioritization, in practice a conflict between different objectives will exist only if a specific measure pursuing a general objective is more restrictive than the existing level of liberalization. If the mandatory nature of the objective of trade and FDI liberalization is interpreted as prohibiting the adoption

⁴⁸ Cremona, n. 28 above, 30.

of more restrictive measures,⁴⁹ the pursuance of other general objectives that do not influence the current level of liberalization falls within the margin of appreciation left to the political institutions. However, in many instances the pursuance of general objectives may lead to restrictive measures. Given that the CCP does not have a provision similar to Article 36 TFEU (ex Article 30 TEC) and Article XX GATT allowing exceptions to liberalization, even the adoption of specific restrictive measures in relation to a specific third country does not seem to be able to be accommodated under the general prohibition of adopting new restrictions. However, it is arguable that the adoption of restrictive measures pursuing general objectives is permitted, as otherwise the recognition of the general objectives in the EU Treaties would be negated, since their pursuance would be severely limited in the field of the CCP.

This does not mean that the objective of trade and FDI liberalization is deprived of its normative value. It is arguable that it is only the pursuance of the specific objectives provided in Articles 3 and 21 TEU that can lead to the adoption of restrictive measures. Of course the broad wording of most general objectives, and in particular the reference to fair trade, can be used for the adoption of a wide variety of restrictive measures. Nevertheless, Articles 3 and 21 TEU cannot be used for legitimizing purely protectionist measures. Fair trade, in the sense of equitable trade, could provide the only justification for the adoption of protectionist measures, but even in these cases the existence of a strong link between protectionism and promotion of social development objectives should be demonstrated.

Furthermore, it can be argued that a two-tier test must be fulfilled in order for a restrictive measure to be legitimate, so that it must not only pursue a general objective, but it must also be proportional. Similar to the internal market, the balance between free trade and other legitimate objectives can be based on a proportionality test, so that only the restrictive measures that are suitable for ensuring the achievement of the objective pursued and do not go beyond what is necessary to attain that objective are permitted.⁵⁰ Even though the Treaties do not directly impose the conduct of a proportionality test, its recognition as a necessary tool for balancing free trade and other objectives in the internal market⁵¹ indicates that it can be used in external relations as well, where similar, conflicting objectives are pursued. In this way, both the commitment of the EU towards progressive liberalization is affirmed and the pursuance of other, equally fundamental external relations objectives can be successfully achieved.

⁴⁹ See s. II.1.(b).

⁵⁰ On the role of proportionality for determining the exceptions to free movement of goods, see C. Barnard, *The Substantive Law of the EU, the Four Freedoms* (Oxford/New York: Oxford University Press, 2007), 64–91.

⁵¹ In the cases of *Viking* (Case C-438/05 [2007] ECR I-10779) and *Laval* (Case C-341/05 [2007] ECR I-11767), the Court of Justice entered into a balancing exercise between internal market free movement provisions and social policy objectives, underlining the role of proportionality as an important step in determining the legitimacy of a measure pursuing a social policy objective that is restrictive of free movement rights.

b) *The Role of the Institutions.* It has become obvious that the specific determination of the orientation of the CCP lies within the hands of the political institutions. Article 207 TFEU entrusts the Council and the Parliament with the determination of the framework for implementing the CCP, granting also a significant role to the Commission, which is the main actor initiating Union action. It is worth noting that the Lisbon Treaty changes drastically the institutional balance concerning decision-making in the field of the CCP, rendering for the first time the Parliament as a co-legislator.⁵²

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Guiding the political organs, the TEU provides institutional safeguards to ensure the coherent and consistent formation and effective application of the CCP. Article 21(3)(2) TEU emphasizes the importance of consistency, assigning this role to the Council, the Commission, and the High Representative (HR). These institutions shall ensure the avoidance of conflicts with other policy fields and that the CCP pursues the general objectives determined in the Treaties in a coherent way. In addition, Article 22 TEU assigns this role also to the European Council, which granted the mandate to ‘identify the strategic interests and objectives of the Union’ in general and in each external policy field, including the CCP.⁵³

Hence, the Lisbon Treaty introduces new institutional actors and in particular the HR who can influence the orientation of the CCP. Its double function, acting as a Vice President of the Commission and as the institution responsible for the conduct of the Union’s CFSP, enables the HR to influence the formation of the CCP by participating in the Commission policy-making and by taking autonomous action. Considering that Article 18(4) TEU prioritizes between the roles of the HR so that in cases of conflicts of interests his/her role under the CFSP prevails,⁵⁴ the question arises whether this may lead to the pursuance of more CFSP objectives in the CCP. Although the Lisbon Treaty describes the mandate of the HR very broadly, it should not be expected that the HR will affect the orientation of the CCP more than ensuring coherence with the CFSP. His/her role as a Vice President of the Commission, responsible for external relations, does not mean that the HR substitutes other external relation Commissioners, but mainly that he/she ensures coherence and consistency between the different external relation directorates of the Commission.⁵⁵ Besides, the right to initiate external Union action independently from the Commission under Articles 215(1) and 218(9) TFEU (ex Articles 301 TEC and 300(2)(2) TEC), which provide for the adoption of trade restrictive measures and the suspension of application of Union Agreements,

⁵² On the changes concerning decision-making in the field of the CCP, see Krajewski, n. 23 above, 119–124.

⁵³ Cremona, n. 32 above, 1349–1350.

⁵⁴ M. Cremona, ‘Coherence through Law: What Difference Will the Treaty of Lisbon Make’, *Hamburg Review of Social Sciences* 3 (2008): 11–36, at 33.

⁵⁵ Cremona, n. 54 above, 34; cf. Editorial Comment, ‘Mind the Gap’, *Common Market Law Review* 45 (2008): 317–322, at 318–319.

presents an explicit expression of the HR's role as ensuring coherence between the CFSP and the CCP, since these provisions have always incorporated the main instances where CFSP objectives are relevant for the adoption of EU action in the field of the CCP.

Finally, it is worth underlining the role assigned to the ECJ for ensuring coherence and consistency, balancing between different conflicting objectives and ensuring inter-institutional cooperation and cooperation between the EU and Member States. Considering the mandatory nature of the objective of trade and FDI liberalization and the general objectives of EU external action, a primary task of the ECJ would be to engage into a review of the legality of a specific CCP measure, determining whether it actually pursues the legitimate objective proclaimed and if it is proportional. However, the broad scope of the general objectives leaves large discretion to the political institutions to determine how and whether a policy objective can be pursued. In light of the ECJ's hesitance to interfere with the policy options of EU institutions in external relations so far,⁵⁶ only a marginal control of the exercise of the political discretion by the Court should be expected.

III Conclusions

This article illustrates that the Lisbon Treaty marks a new era for the orientation of the CCP. It signals the transformation of the CCP from an autonomous field of EU external action, subject to its own rules and objectives, into an integrated part of EU external relations, characterized by common values that guarantee unity and consistency in the exercise of Union powers. Within this framework, uniformity and liberalization are no longer the only principles determining the formation of the CCP. EU action in the field shall take into account and pursue the general objectives of EU external relations, thus legitimizing the current practice of adopting CCP measures for achieving other trade and non-trade goals. In particular, the references to fair trade and integration to the world economy next to liberalization illustrate that trade liberalization should not be seen any longer as a self-determining objective, but it should be regarded within the broader context of economic and social development objectives.

In addition, the Lisbon Treaty introduces another, more radical change. It strengthens the commitment of the EU towards gradual trade and FDI liberalization, incorporating in fact a standstill obligation of the EU to retain the existing level of liberalization. Bearing in mind the broader orientation of the CCP towards other potentially conflicting objectives, the task of balancing between

⁵⁶ For example in *Portugal v. Council* (n. 29 above) although the Court recognized the mandatory nature of the objective concerned, it did not deal with the question whether the essential elements clause was an adequate, well-suited, or necessary measure for achieving this objective.

liberalization and other objectives acquires a new dimension, as it is set on different institutional foundations. Apart from the plurality of political organs that have a saying in the determination of the CCP, the role of the ECJ engaging into a review of the legality of specific Union measures in light of the objectives they pursue is enhanced. Whether the Court will entrust the task of ensuring the coherent and consistent application of CCP to the political institutions or it will take a more active role remains to be seen.