Managing International Economic Relations through Diplomacy and Law

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1 Managing international economic relations through diplomacy and law

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

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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 oftentimes 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),[2] but also a broader "market access strategy."[3] 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).[4]

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

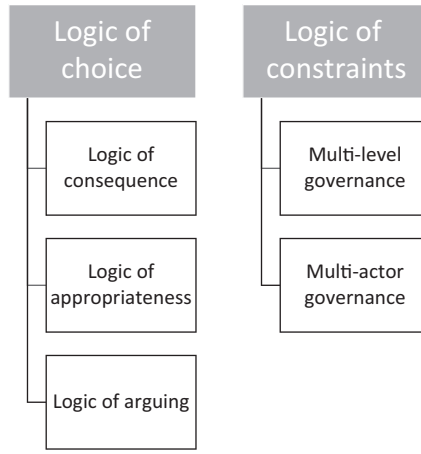

Figure 1.1 The different influences on policy-maker decisions.

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

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

	State-to-state	*Investor–state*
Multilateral	WTO DSM	N/A
Bilateral	FTAs	FTAs (investment chapters) and BITs[a]

a Bilateral Investment Treaty

is limited to the WTO agreements and does not extend to "WTO-plus" issues, oftentimes regulated in FTAs, or investment disputes.[10] 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.[11] 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.[12] 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.[13] 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

Table 1.2 A typology of dispute settlement mechanisms and their characteristics

	Joint committee	*State-to-state arbitral tribunals*	*Investor–state arbitral tribunals*
Genre of agreements	PCAs	FTAs (trade and investment)	FTAs (investment chapters), BITs
Scope of coverage of the agreement	Broad and general	Narrow and specific	Narrow and specific
Jurisdiction	Optional	Compulsory	Compulsory
Degree of legalization	Low	Medium	High

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

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.[16] 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]"[17] 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."[18]

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[19]

Nonetheless, the adoption of such CCP measures can only be made in conformity with relevant international obligations, in particular the WTO agreements.[20] 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."[21] 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.[22] The establishment of an arbitral panel is possible only in case the matter "has not been satisfactorily addressed through the consultation procedure."[23]

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.

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

Factors facilitating/promoting a …	
… diplomatic approach	*… legal approach*

• Broad win-set
• Ability to use tied-hands argument/ disciplined member states
• Psychological factors: good personal relations between diplomats
• Ideational factors: similar world views and perceptions about issues at stake
• Ability to use bargaining tools (threats and side payments)
	• Nature of the dispute settlement mechanism:
	  • 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
	  • 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
	• Availability for private actors to initiate formal proceedings
	• Burden of proof with defendant who is nonstate actor
	• Ideational factors: profound conviction that legal or formal mechanisms are the right options in rules-based international order and given the relevant legal culture
	• Strategic use of legal or formal mechanisms to support diplomatic approaches

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.

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).

2 Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, OJ L 349/71, 31 December 1994.

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.

12 Treaty on European Union, TEU, Art. 21.

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).

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