

# *The EU-Indian Comprehensive Free Trade Agreement*

## *EU procedural requirements*

Lecture in Cochin, NUALS  
January 2026



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Co-funded by the  
Erasmus+ Programme  
of the European Union



## Table of contents

1. EU competence to conclude a FTA with India

2. EU procedural arrangement to conclude a FTA



# 1. EU competence to conclude a FTA with India



## 1. Competence

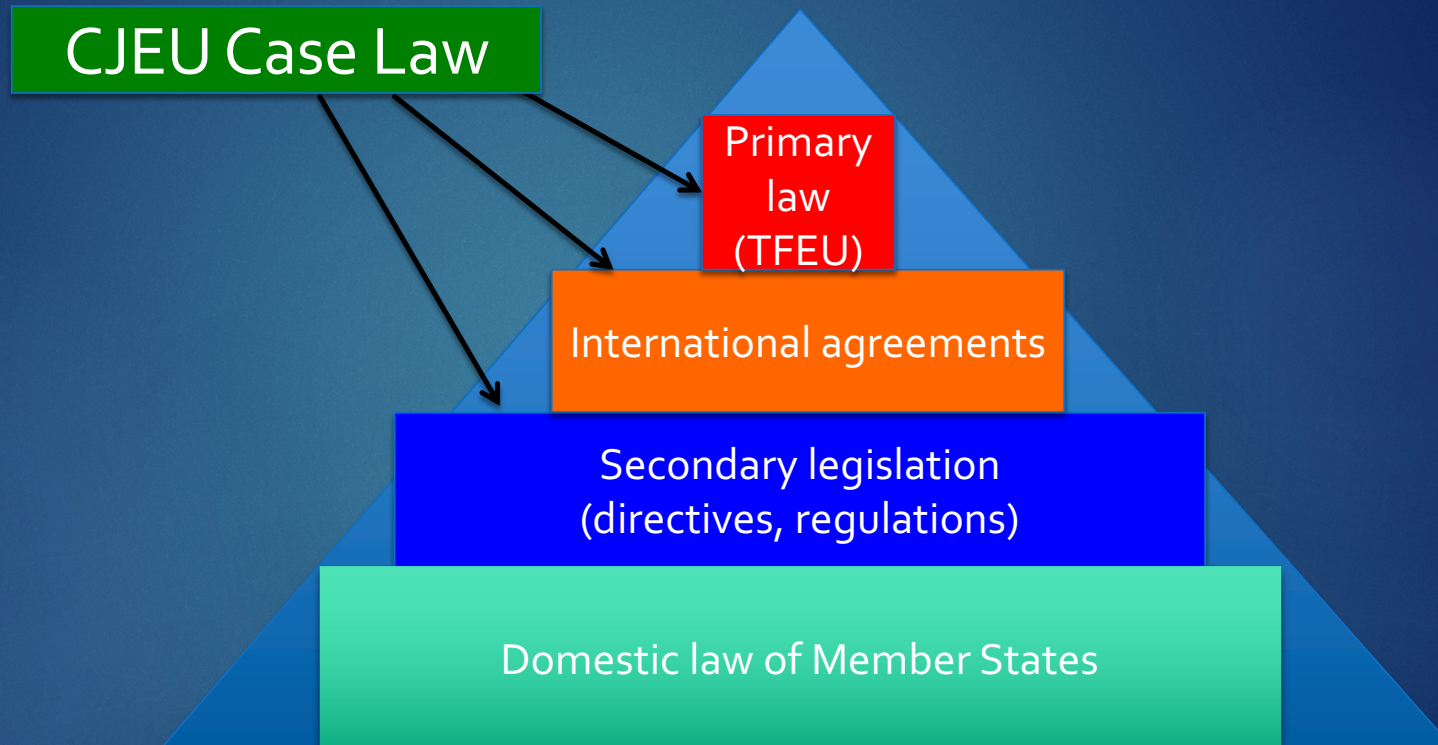
### Conferral of powers

EU may conclude international agreements in so far as the treaties or the case law provide specific powers.

**Art. 5(2) TEU.** Under the **principle of conferral**, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.



# 1. Competence



## 1. Competence

Express conferral of powers to conclude an international agreement: the environmental policy

**Art. 191(4).TFEU** Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of **agreements** between the Union and the third parties concerned.



## 1. Competence

### External competences of the EU

In accordance with 216 TFEU, the EU may conclude international agreements:

- in the cases provided for by the **founding treaties**;
- where the conclusion of an agreement is **necessary** in order to achieve one of the **objectives** of the EU, even in the absence of internal EU legislation;



## 1. Competence

## Multilateral trading system

In EU is one of the key players and increasingly concludes bilateral and regional trade agreement.

# TRADE

Common commercial policy (CCP) encapsulated in  
**Articles 206 and 207 TFEU**



## 1. Competence

## Objectives of the PCC

**Art. 206 TFEU** provides for a **specific trade policy**:



- harmonious development of world trade,
- the progressive abolition of restrictions on international trade
- and lowering of customs and other barriers

# Common commercial policy (CCP)

- CCP derives largely from the rules and provisions contained in WTO agreements, which govern the multilateral trading system.
- CCP is the interface between the increasingly **integrated internal market** and its **external trade partners**
- The consolidation of the internal market strengthened the EU's position as a pole of attraction and influence for trade negotiations, conducted bilaterally with other countries and multilaterally in the GATT.
- Nexus of international political economy, regulatory governance, and foreign policy

## 1. Competence

## Objectives of the CCP

**General objectives and principles** of Union's external policy 'democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, equality and solidarity, and respect for the UNC and international law'(Article 21 TEU) apply to the CCP by reference of Article 205 TFEU.



+ **Art. 21(2) TEU**: 'foster the sustainable economic, social and environmental development of developing countries, ...'

- 'politicisation' of trade policy?
- Wide discretion for the EU institutions to pursue the relevant policy.



## 1. Competence

## Objectives of the PCC

Trade policy may pursue non-economic objectives: trade sanctions



ECONOMIC  
SANCTIONS

Trade liberalisation has never been an end on its own.



## 1. Competence

### Exclusive Competence

Art. 3(1)(e) TFEU: exclusive EU competence in the area of the CCP.

Art. 207 TFEU: 'The CCP shall be based on uniform principles, particularly with regard to changes in **tariff rates**, the conclusion of tariff and trade agreements relating to **trade in goods and services**, and the commercial aspects of **intellectual property**, **foreign direct investment**, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of **dumping or subsidies**'

**Only the EU may adopt legally binding acts.**



# Conclusion of Free Trade Agreement

*'In the course of taking the measures necessary to implement the principles of the common commercial policy, the Community is empowered, pursuant to the powers which it possesses, not only to adopt **internal rules** of Community law, but also to conclude **agreements with third countries**' (Opinion 1/75)*

CCP is a **combination** and **interaction** of internal and external (trade agreements ) measures, without priority being taken by one over the others



# CCP Regulatory Approach

The CCP is implemented by means of

>> **autonomous measures** adopted by the EU

Applications of uniform principles –custom duties

Generalized System of Preferences

Trade Defence Measures (anti-dumping)

▶ FTA

## Internal legislation Decision-Making Process

**European Commission** – proposes regulations to the EU lawmaker

### Legislative co-decision

- **Council of Ministers** (representatives of the Member States' governments)
- **European Parliament** has acquired since 2009 joint decision rights in the adoption of framework Regulations implementing the CCP
- **European Commission** – implementing measures (anti-dumping, ....)

# A two-pronged approach



**AUTONOMOUS MEASURES  
ADOPTED BY THE EU INSTITUTIONS**



**INTERNATIONAL AGREEMENTS  
CONCLUDED WITH THIRD STATES**

## 1. Competence

### Content of a Comprehensive Free Trade Agreement

Cutting tariffs, opening up services and encouraging investment, mutual recognition of professional qualifications, public procurement, investment protection, geographical indications (GI), intellectual property protection, investment, public procurement, competition, sustainable development, etc.



## 1. Competence

## Market Access

- 'National Treatment and Market Access for Goods', 'tariff and trade',
- 'commitments to trade in goods',
- 'Trade Remedies',
- 'Technical Barriers to Trade' and 'Sanitary and Phytosanitary Measures'



are intended to '**facilitate trade in goods**' between the EU and India.



## 1. Competence

## Foreign Direct Investment (FDI)

Long-term investment in a foreign country (**exclusive competence**)



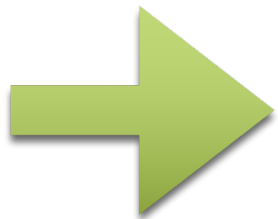
**Short-term portfolio investment** made without any intention to influence the management and control of an undertaking (EU has not an implied external competence, **shared competence**)



## 1. Competence

## Investment protection

Principles of non-discrimination, fair and equitable treatment and full protection and security, and expropriation.



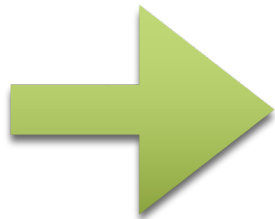
Principle of neutrality vis-a-vis the Member States' systems of property ownership (Article 345 TFEU) does not exclude an EU competence regarding expropriation.



## 1. Competence

## Commercial aspects of intellectual property

**Art. 207(1) TFEU:** the CCP includes 'the commercial aspects of intellectual property'.



Copyright and related rights, trade marks, geographical indications, designs, patents, test data and plant varieties

## 2. EU procedural arrangement to conclude a FTA



## 2. EU procedural arrangement to conclude a FTA

The EU is India's 3rd largest trading partner (€88 billion worth of trade in goods in 2021 or 10.8% of total Indian trade).

India is the EU's 10th largest trading partner (2.1% of EU total trade in goods in 2021).

The EU and India had first launched negotiations for a free trade agreement in 2007, before the talks were suspended in 2013.

In 2022, EU-India negotiations were relaunched.



**Art. 218 TFEU** (Title V, entitled 'International agreements', of Part Five of the TFEU, itself entitled 'The Union's external action') is a provision of a general nature.

It creates a **single unified procedure** for the conclusions of treaties by the EU.

The procedure for concluding agreements specifies the procedural arrangements at the various stages of treaty negotiations, as well as the respective roles and powers of the various institutions involved.



## 2. Procedural arrangement

### The proeminent role of the EU Council

The Council plays a key role as it adopts decisions on the **opening of negotiations**, the **signing** and the **conclusion** of the agreement, on the basis of proposals from the Commission. Its decisions are, in principle, adopted by qualified majority.



## 2. Procedural arrangement

### EU procedural requirements

- **opening of negotiations by the Council** Art. 218 (2) (3) TFEU
- **conduct of negotiations by the Commission** Art. 218 (4) TFEU
- **signature of the FTA by the Council** Art. 218 (2)(5) TFEU
- **conclusion of the FTA by the Council** Art. 218 (6) TFEU
- **approval of the FTA by the European Parliament** Art. 218 (6) TFEU
- **provisional implementation of the FTA** Art. 218 (5) TFEU



## 2. Procedural arrangement

### Opening of negotiations by the Council art. 218 (2) (3) TFEU

- The Council adopts a decision authorising the **Commission** to negotiate the FTA on behalf of the EU.
- The Council has been authorising the Commission (the EU executive branch) to negotiate with INDIA.



# European Commission

- ▶ Leading the negotiations under the supervision of the Council



## 2. Procedural arrangement

### Opening of negotiations by the Council art. 218 (2) (3) TFEU

- “2. The Council shall authorise the **opening of negotiations**, adopt **negotiating directives**, ....”
- 3. The Commission, ..., shall submit recommendations to the Council, which shall adopt a **decision** authorising the opening of negotiations”.



## 2. Procedural arrangement

### Conduct of negotiations by the Council art. 218 (4) TFEU

The Council supervises the negotiations by issuing directives to Commission officials and requiring the assistance of a **committee of representatives** of the Member States ([Art. 218\(2\) and \(4\) TFEU](#)).

- “4. The Council may address **directives** to the negotiator and designate a **special committee** in consultation with which the negotiations must be conducted.”





## 2. Procedural arrangement

# No role for the European Parliament



Although the European Parliament is informed of the opening of negotiations, it does not participate directly in them, as this could compromise the confidentiality of the negotiations.



Greater involvement by the European Parliament is likely to undermine diplomatic effectiveness, which is characterised by confidentiality and compromise.



However, the Commission is required to report regularly to the European Parliament on the progress of negotiations on trade agreements with one or more third countries (Art. 207(3)(3) TFEU).





## 2. Procedural arrangement

### Signature of a FTA by the Council art. 218 (2) (5) TFEU

After the negotiations have been concluded, the Commission reports to the Council, which decides whether to sign the agreement.

Its signature is subject to a prior decision by the Council (sui generis decision) authorising its President to sign on behalf of the institution ([Art. 218\(5\) TFEU](#)).



The Council decides on the **signature** and **conclusion** of the agreement following a proposal of the Commission.

- “2. The Council shall authorise ..... the signing of agreements and conclude them.”
- 5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement ....”

## 2. Procedural arrangement

### Consent from the European Parliament art. 218 (6) TFEU

The Council shall adopt the decision concluding the agreement: (a) after obtaining the **consent** of the **European Parliament** in the following cases:

- (iv) agreements with important budgetary implications for the Union;
- (v) agreements covering fields to which either the **ordinary legislative procedure** applies, or the special legislative procedure where consent by the European Parliament is required.



## 2. Procedural arrangement

# Consent from the European Parliament art. 218 (6) TFEU

- The consent of the European Parliament is supposed to guarantee the democratic legitimacy of several EU policies.
- However, the power of consent granted to the European Parliament does not allow it to amend the treaty as negotiated.



- In other words, the approval procedure amounts to either accepting or rejecting the international agreement, without the possibility of amending it.



## 2. Procedural arrangement

### Conclusion of an FTA by the Council art. 218 (6) TFEU

“The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.”



## 2. Procedural arrangement

# Council decision on the Conclusion of a FTA art. 218 (8) TFEU

## VOTES Art. 218 (8) TFEU

“The Council shall act by a **qualified majority** throughout the procedure.”



## 2. Procedural arrangement

No ratification at national level because a FTA falls within the EU exclusive competence

**Mixed agreements**: individual Member States have to ratify the agreement alongside the EU according to their national ratification procedures.



## 2. Procedural arrangement

# Provisional implementation of a FTA art. 218 (5) TFEU

**Art. 218 (5)** “The Council, on a proposal by the negotiator, shall adopt a decision authorising (the) **provisional application** (of the agreement) before (its) entry into force.”

That provision reflects **Art. 25 VCLT<sup>1</sup>**. A treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed.

EU-Mercosur, provisional entry into force, January 18th



## 2. Procedural arrangement

### At the end of the day

The FTA will fully enter into force when the European Parliament and the EU Council have completed their respective ratification procedure.



