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The Evolution of EU Trade Law Through the Prism of Competence: A Quantitative, Longitudinal Perspective

Michal OVÁDEK^{*} & Akhil RAINA^{**}

Most trade law scholarship analyses developments on a case-by-case basis, which makes the discipline liable to miss changes that occur in the aggregate. In an attempt to partially rectify this lacuna, this article compiles a quantitative, longitudinal picture of European Union (EU) trade law based on a primary dataset of over 6000 acts, along with additional data on international agreements, decisions thereunder, and implementing and delegated acts. The selection of this simplified corpus of EU trade law is driven by the so-called legal basis which signifies the existence of EU competence in a given area – in this case international trade. We focus on the EU's competence regarding the common commercial policy and the common customs tariff which constitute the core of EU trade powers. We find that the expansion of the latter has, counter-intuitively, not translated into an increase in the quantity of trade acts produced by the EU, and we sketch out possible explanations for the quantitative trends observed in our data.

1 INTRODUCTION

Our article concerns, essentially, the composition of European Union (EU) trade law and how it has developed over the years of European integration. We analyse the main quantitative patterns and subject matter of EU legal acts based on either of the two core trade competences: Article 31 (common customs tariff) and Article 207 (common commercial policy) of the Treaty on the Functioning of the European Union (TFEU). Our examination timeline is 1958–2017, nearly the entire history of the EU. We explain the observed trends in law-making, for certain aspects of EU trade law and policy, by connecting the hard data with evolving EU trade competence and developments in the legal arrangements governing the Union's external trade, in order to create comprehensible narratives about the evolution of EU trade law over the decades. In this way we wish to at once ground the study of trade law in empirical data of quantitative importance – a growing research enterprise in international

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economic law – ¹ while also engaging with the more traditional, narrative form of legal scholarship.

To our knowledge, our article is the first one that attempts to paint an aggregated longitudinal picture of EU trade law. The size of our database is one of the salient features of our work. In comparison to the usual law-review article, which concerns itself with rarely more than five or six cases, countries or laws, we depart from a principal database of more than 6000 EU trade acts. This represents the entire corpus of acts adopted on one or the other main (trade) legal basis – Article 207 and 31 TFEU – and therefore we do not face sampling issues.² To make our article completely wholesome, we have further collected data on (1) EU international agreements, (2) decisions taken under these treaties and (3) implementing and delegated acts concerning trade remedies.

Our article's utility is twofold. Primarily, it acts as a source of evidence on the development of EU trade law, and gives backing to one or the other side in debates on how and what the EU does (and has done) when it comes to international trade. While relatively straightforward, it moves discussion about EU trade law from anecdotes to facts. Secondly, we identify a number of trends that are fertile for future research. The fact that our work presents a 'big picture' of EU trade law also means that it naturally becomes relevant to a larger pool of people; it also allows specialists to situate their work in our data and find adjacent topics of interest to take up for research.

Two caveats are warranted at the outset. We do not claim to conclusively determine the reason(s) behind the observed trends, though we do hint (and logically explain) some very plausible ones. We also do not develop a fully-fledged theory of EU trade law evolution, although our findings could contribute to such a research agenda, and we do engage with existing 'big picture' trade law scholarship to the extent that it touches upon our analysis. Second, while we refer to our data as concerning 'EU trade law' generally, the competence (legal basis) prism we adopt in this article may result in some omissions, notably the abundant EU regulation of agricultural trade which is captured only in small part by our dataset.

Our article's structure is simple. After this brief introduction, we describe the dataset and the scope of our study, including an explanation of the legal bases of EU trade competence; we also delimit the breadth of the dataset and present its limitations. Part 3 contains the core of our contribution – here we present the

¹ Wolfgang Alschner, Joost Pauwelyn & Sergio Puig, *The Data-Driven Future of International Economic Law*, 20(1) J. Int'l Econ. L. 217 (2017). See also other articles in the issue, particularly Todd Allee, Manfred Elsig, Andrew Lugg, *The Ties between the World Trade Organization and Preferential Trade Agreements: A Textual Analysis*, at 333 and Tomer Broude, Yoram Z. Haftel & Alexander Thompson, *The Trans-Pacific Partnership and Regulatory Space: A Comparison of Treaty Texts*, at 391.

² With the obvious caveat that we exclude EU trade law based exclusively on other provisions of the TFEU. In quantitative terms, the most important omission relates to agriculture (Art. 43 TFEU).

evolution of EU trade law, both, in general quantitative terms and by focusing on five specific narratives. Part 4 concludes.

2 DATASET, SCOPE AND EU TRADE COMPETENCE

In order to construct a quantitative, longitudinal image of EU trade law we have built a dataset consisting of 6154 legal acts published in the Official Journal of the European Union between 1958 and 2017.³ Applying the typology of Article 288 TFEU, 4369 (71%) of these acts are Regulations, 1758 (28%) Decisions and 27 are Directives. We have drawn from the entire universe of approximately 200 000 acts which have been published in the Official Journal in this period and are available online in the Eur-Lex database (the central database of EU law, curated by the EU).⁴ As mentioned before, these acts were selected according to their legal basis: they are all acts which have been based, at least in part, on either Article 207 TFEU or Article 31 TFEU (in 115 cases, both provisions were employed as legal bases).⁵ While acts based on other provisions of the EU Treaties conceivably also form part of what can summarily be called 'EU trade law', Articles 207 and 31 TFEU constitute the core of the EU's trade competence. Delineating the scope of our study on this basis is therefore a parsimonious yet demonstrative way of capturing what 'EU trade law' has consisted of throughout the decades.

As most quantitative endeavours, ours also faces certain inherent limitations. For one, despite being the most complete and precise source, there are some inaccuracies in the underlying database (Eur-Lex) which can also impact our data. As the legal basis of legislation is input individually by EU officials, human error is inevitably present in some observations.⁶ Second, and more importantly, our data and findings are circumscribed by the legal criterion of the two legal bases selected. This means that other legal bases which are relevant to trade are omitted. The most notable impact of this is in the agricultural sector where the EU enacts plentiful legislation for both internal and external purposes. However, as the external and internal trade aspects are not easily distinguished quantitatively, we chose to limit our study to the aforementioned legal bases. Some agricultural measures, and others adopted under other sectoral competences

³ The dataset can be made available by the authors on request.

⁴ Corrigenda are excluded from our datasets.

⁵ Throughout this article we refer to the two provisions in the form in which they are currently applicable, i.e. as Art. 207 TFEU and Art. 31 TFEU, regardless of numbering in the previous versions of the EU Treaties.

⁶ Having said that, we know from working with the data (as illustrated in the subsequent section) that the observations are sufficiently reliable. For instance, only 7 out of 1136 machine-collected observations of acts based on Art. 31 TFEU have been mistakenly marked as such (they are all concerned with the Common Foreign and Security Policy for which the correct legal basis was meant to be Art. 31 TEU). For simplicity, we do not estimate statistically the extent of non-sampling error.

such as transport,⁷ are still included in the dataset, provided that they were adopted, at least in part, on the basis of either Article 31 or 207 TFEU. Similarly, implementing and delegated acts (which are based on EU legislation) are also not part of the primary dataset. We mitigate this limitation by additionally compiling data on the quantitatively by far the most important implementing and delegated acts, which turn out to be trade remedies. Further, we also compile data on EU international agreements and decisions adopted thereunder to dovetail the general picture of EU trade law, as this additional data helps us understand some developments in the principal dataset and it also connects to existing quantitative literature on trade agreements and their depth.

The concept of legal basis of EU legislation, which we utilize in the creation of our dataset, has been said to be of ‘constitutional significance’ in EU law.⁸ This derives from the foundational principle of conferral, which the concept of legal basis operationalizes in practice. According to the principle of conferral, the EU possesses only those competences attributed to it by the Member States in the Treaties.⁹ As a result, every legal act of the EU must be directly or indirectly¹⁰ based on the Treaties.¹¹ The choice of legal basis is often subject to litigation, as conflicts arise between EU institutions as to which provision is the correct legal basis for a given act. These conflicts are motivated by a desire to have recourse to legislative procedures deemed as most favourable by the respective institutions,¹² and enabled by the fact that the subject matter of legislation frequently does not neatly align with a single provision of the Treaties. Nonetheless, it is the established doctrine of the European Court of Justice (ECJ) that:

⁷ To a quantitatively lesser extent, this limitation also applies to trade acts adopted under the residual powers provision (Art. 352 TFEU).

⁸ ECJ, *Opinion 2/00* [2001], ECLI:EU:C:2001:664, recital 5.

⁹ Art. 5(2) TEU provides that: ‘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.’

¹⁰ An act is based indirectly on the Treaties when its direct legal basis is in existing EU legislation, as is the case for implementing and delegated acts. Nevertheless, even implementing and delegated acts can ultimately be traced to a competence enshrined in the Treaties, as the basic act on which they are based must have a legal basis in the Treaties. For example, anti-dumping decisions taken by the Commission are currently based on Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016] OJ L176/21, which in turn is based on Art. 207(2) TFEU.

¹¹ In the words of the Court of Justice, ‘having only conferred powers, the Community must tie [a] decision to a Treaty provision which empowers it to approve such a measure’. ECJ, *Case C-370/07, Commission of the European Communities v. Council of the European Union* (2009) ECLI:EU:C:2009:590, para. 47.

¹² Joseph Jupille, *Procedural Politics: Issues, Influence, and Institutional Choice in the European Union* (Cambridge: Cambridge University Press, 2004).

*the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review [...]. Those factors include in particular the aim and content of the measure.*¹³

We now briefly introduce the two legal bases which define the scope of our core trade law dataset.

2.1 ARTICLE 207 TFEU (COMMON COMMERCIAL POLICY)

Article 207 TFEU (ex Article 133 and 113), laying down the essential rules governing the EU's common commercial policy (CCP), is not only a core provision of the EU trade competence but arguably one of the central provisions of the EU Treaties as such. It has been and still is continuously squabbled over by the European Commission, the European Parliament and the Council of the EU, with the ECJ acting as the ultimate arbiter. The original Article 113 of the Treaty of Rome became principally active only in 1969 when the transitional period of EEC integration ended.¹⁴ Although its scope has been gradually and substantially expanded through judicial interpretation and Treaty revision, the opening line of the first paragraph of the provision has remained the same:

The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements [...]

Two other aspects of Article 207 TFEU have further remained essentially unchanged since the Treaty of Rome: first, that the CCP is fundamentally a supranational policy with an important role for the Commission (notably the negotiation of trade agreements) where the Council acts, as a rule,¹⁵ by qualified majority. Second, that the Council has always attempted to keep the Commission in check through the so-called Trade Policy Committee which advises and assists the Commission throughout trade negotiations.¹⁶

Contrary to these relatively stable aspects of Article 207 TFEU, the role of the European Parliament developed significantly over time, from a position where it

¹³ ECJ, Case C-300/89, *Commission of the European Communities v. Council of the European Communities (Titanium Dioxide)* (1991) ECLI:EU:C:1991:244, para. 10.

¹⁴ Prior to the creation of the CCP, the initial legal steps towards this end were taken on the basis of Art. 111 of the Treaty of Rome. While not part of our dataset, Art. 111 served as the legal basis (at least in part) of 107 acts, more than eighty of which were enacted in 1967–1969 to pave the way towards the CCP.

¹⁵ Art. 207(4) TFEU. Unanimity is required for the negotiation and conclusion of agreements 'in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment' and 'where such agreements include provisions for which unanimity is required for the adoption of internal rules'. These rules have been further nuanced in the case law of the ECJ, most recently and notably in ECJ, *Opinion 2/15 (Singapore FTA)* [2016], ECLI:EU:C:2016:992.

¹⁶ Art. 207(3) TFEU.

did not participate whatsoever in the conduct of EU trade policy to the present, whereby almost all international (including trade) agreements signed by the EU require the consent of the Parliament prior to their conclusion.¹⁷

Article 207 TFEU has provided the basis of a myriad of often wildly different legal measures adopted by the EU in the pursuit of its trade policies. Perhaps the most obvious and established acts based on Article 207 TFEU are those providing for the signing and conclusion of trade agreements, or, more generally, international agreements with a trade component (where Article 207 TFEU is invoked alongside other Treaty provisions). The scope of the provision is typically comprised of changes in tariff rates and liberalization measures as regards trade in goods, export policy and trade defence instruments (chiefly anti-dumping and anti-subsidy measures).

Over time, the scope of the CCP has been enlarged to include trade in services, commercial aspects of intellectual protection and, most recently, investment.¹⁸ Nevertheless, the evolving nature of Article 207 TFEU had been affirmed in the case law of the ECJ already prior to any Treaty revisions, the Court on more than one occasion accommodating an expansive reading of the trade competence.¹⁹

2.2 ARTICLE 31 TFEU (COMMON CUSTOMS TARIFF)

Compared to Article 207 TFEU, Article 31 TFEU (ex Article 26 and 28) has been a much less conspicuous presence in EU law. The provision consists nowadays of merely a single curt sentence:

Common Customs Tariff duties shall be fixed by the Council on a proposal from the Commission.

The presence of this provision can be slightly puzzling in light of Article 207 TFEU, seeing as the latter, too, explicitly governs tariff changes. However, the two provisions have been assigned quite different roles in practice. Article 31 TFEU has served as the basis for the enactment and modifications of the basic Common Customs Tariff (CCT), especially when this has not involved agreements with third countries.²⁰ The scope of

¹⁷ Art. 218(6) TFEU.

¹⁸ For an explanation of how foreign direct investment became part of Art. 207 TFEU, see Sophie Meunier, *Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment*, 55 J. Comm. Mar. S. 593 (2017).

¹⁹ For example, as regards the enactment of the Generalized System of Preferences (GSP), the ECJ held that these could be validly based on Art. 207 TFEU (then Art. 113 of the Treaty establishing the European Economic Community), inter alia because the Treaty 'presupposes that commercial policy will be adjusted in order to take account of any changes of outlook in international relations'. See ECJ, Case C-45/86, *Commission of the European Communities v. Council of the European Communities (Generalized tariff preferences)* (1987) ECLI:EU:C:1987:163, para. 19. This is not to say that the ECJ does not from time to time impose limits on the scope of Art. 207 TFEU, as exemplified most recently in Opinion 2/15, *supra* n. 15.

²⁰ Prior to the Treaty of Amsterdam, Art. 31 TFEU was explicit about the unilateral nature of the competence, referring to '[a]ny autonomous alteration or suspension of duties in the common customs tariff' as falling thereunder.

Article 31 TFEU is understandably much narrower than that of Article 207 TFEU, being only concerned with EU duties imposed on trade in goods, as opposed to also other, increasingly more prominent, aspects of international trade. Nonetheless, the CCT should be viewed as a critical component of the EU's customs union which had been established prior to the activation of the CCP (Article 207 TFEU); the CCP is the next step in upholding the integrity of the customs union through uniform rules on external trade which go beyond the CCT.²¹

Article 31 TFEU looked significantly different under the Treaty of Rome (then Article 28). It contained two constraints on the competence it provided ('autonomous alteration or suspension of duties') in the form of a 20% cap on deviation from the rate of any one duty and a time limitation of six months, renewable once. This was presumably to ensure the relative uniformity and consistency of the CCT at a time when the common tariff and the customs union were still in their infancy. While the two restrictions were removed from the Treaty provision with the entry into force of the Single European Act, the Commission has issued guidelines in which it has consistently pointed out that alterations to the CCT are an exception to the norm and should therefore be applied prudently.²²

Moreover, the original stipulation of Article 31 TFEU, applicable until 1968, provided for no involvement of the Commission or the Parliament – the CCT was at first entirely in the hands of the Member States, acting unanimously. Since 1968, the Council has acted by qualified majority and on a proposal of the Commission, although the procedure remains a special one, with still no role for the Parliament.²³

3 EVOLUTION OF EU TRADE LAW

Figure 1 graphically represents our core dataset. From 1970 onwards we can observe that the (quantitative) pattern of adoption of legal acts is similar for both legal bases under examination. Prior to that date, the CCP was essentially non-operational, so the divergence in the early stages of EU integration is consistent with the legal development

²¹ Most customs unions around the world do not manage to effectively operationalize the CCP in the manner the EU has done due to the sovereignty-costs entailed in the transfer of trade competence to the supranational level.

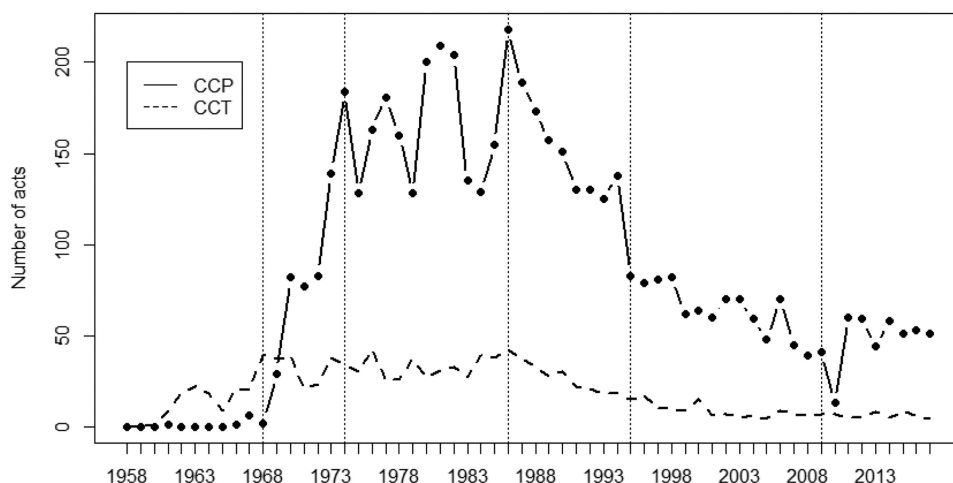
²² Commission communication concerning autonomous tariff suspensions and quotas OJ 1998 C128/2, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.1998.128.01.0002.01.ENG&toc=OJ:C:1998:128:TOC, para. 2.3.3 (accessed 23 July 2018); Communication from the Commission concerning autonomous tariff suspensions and quotas OJ 2011 C363/6, https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ:C:2011:363:TOC&uri=uriserv:OJ.C_.2011.363.01.0006.01.ENG (accessed 23 July 2018).

²³ The phrase 'acting by a qualified majority' was dropped from Art. 31 TFEU in the Treaty of Lisbon due to this voting majority becoming the standard one, as per Art. 16(3) TEU.

of Article 207 TFEU during the transitional phase of the Treaty of Rome. The most interesting aspect of the graph is, however, the almost linear decline in the quantity of EU trade law acts beginning in 1986.²⁴ Prima facie, we could entertain a number of factors contributing to this decline: revision of EU Treaties starting with the Single European Act; the fall of communism and the accompanying liberalization; the creation of the WTO; the creation of the European Economic Area (EEA) and a customs union with Turkey; the proliferation and deepening of free trade agreements (FTAs) concluded by the EU; and EU enlargement – these are just some of the more prominent candidates for explanatory variables of this trend. On the other hand, the overall trend can also be seen as somewhat counterintuitive – while the scope of Article 207 TFEU has gradually grown over time, the number of acts has, on the contrary, declined. The expansion of EU trade competence has not translated into a greater quantity of legal acts, as some could reasonably expect.²⁵

Figure 1 Evolution of EU Trade Law 1958–2017

Acts adopted on the basis of Article 207 (CCP) and 31 (CCT) TFEU



²⁴ The aggregate EU legislative output in the corresponding period has also declined but much less starkly and more gradually.

²⁵ The average number of legal bases used per measure (most often only one) has not increased over the years. This means that no more additional sources of EU competence have been invoked on average to create EU trade law recently; in fact compared to the 1980s, fewer legal bases were used in the 2000s. This suggests that whatever trade acts are created nowadays, the primary trade powers (Arts 207 and 31 TFEU) are by and large sufficient for their enactment, which potentially corroborates the narrative about the consolidation of EU trade competence.

Moreover, there is an apparent degree of correlation between the observations of Article 31 and 207 TFEU acts, which is confirmed statistically.²⁶ This may suggest that law-making based on both legal bases is affected by similar underlying factors (internal and/or external), despite the two provisions being concerned with different aspects of trade law. Although we do not specify upfront any causal mechanisms by which a common set of factors could be said to generally predict change in the trade law output of the EU, the two legal bases are (thematically) sufficiently linked to not reject, off-handily, their correlation as a mere coincidence.

In order to arrive at a more granular picture of the trade law captured in Figure 1, we take a closer look in the following paragraphs at what the EU's acts are about and what factors appear to most impact the evolution of EU trade law. We write out coherent narratives about the change in the frequency of certain legal acts where they emerge from the analysis. We do not, however, propose a generalized claim about causal relationships between explanatory variables and our observed dependent variable (number of acts). A more detailed analysis linking cause and effect would be needed for that, for example by relying on process-tracing methods to establish why and how the various EU trade acts came into being.²⁷ The pointers we identify in our study will, nevertheless, prove useful in future research.

3.1 GENERAL OBSERVATIONS

Some of the aspects of the trends observed in Figure 1 have somewhat obvious reasons behind them. For example, the steep rise in number of acts during the first two phases (that is 1961 to 1967 and 1968 to 1973) can be partially attributed to the large number of 'basic' regulations enacted during the time. These include acts

²⁶ The value of the Kendall correlation coefficient tau is $\tau = 0.4681$ with p-value = $6.814e-07$ rejecting the null hypothesis of no correlation between the two sets of observations, aggregated and paired by year. The correlation is obviously stronger if discounting the pre-1970 period during which the CCP was not yet fully operational. The Pearson and Spearman tests – the two most commonly used measures of correlation – give similar results but the non-parametric Kendall test is the most appropriate here due to the data not being normally distributed (an assumption of the Pearson product-moment correlation test without bootstrapping) and due to the presence of ties (which are handled more accurately by Kendall than Spearman).

²⁷ Modelling the decision-making behind any EU trade act would be a complex exercise, not least because it is embedded in an environment ripe with influential and multi-directional developments. For example, in the mid-1990s, at least the following political-legal processes were taking place *concurrently*: the creation of the WTO; establishment of new trading relations with formerly communist European countries; creation of the EEA and customs union with Turkey, etc. The EU decision-makers, moreover, co-sponsored to varying degrees these processes which in return condition the EU's legislative activity. This is a complex political-legal ecosystem where the effects of any variable on a given trade act would need to be carefully disentangled (if at all possible) from the rest.

establishing common rules for administration of quotas, or rules for exports and imports from state-trading countries, as well as acts that define concepts like 'origin of products'.²⁸ Over time the need for enacting such acts anew reduced, thereby contributing to the eventual decline in total number of acts. Another example consists of acts establishing 'indicative ceilings and Community supervision' for imports of certain products from certain countries', these countries being exclusively European Free Trade Association (EFTA) members, which were a strong theme during the peak(s) of the period between 1974 and 1985²⁹; these acts are not present in any other time period.

Almost 20% of all EU acts under Articles 207 and 31 concern the conclusion of one or the other type of trade agreement (or a protocol thereof).³⁰ These include agreements negotiated under Articles II, XXIV, and XXVIII of the General Agreement on Tariffs and Trade (GATT); those concerning food and developmental aid; those concerning tariff adjustments; and those concerning trade in a specific products or commodity (such as jute, olives and fruit salads). In Figure 2 we juxtapose the total number of international agreements concluded by the EU over the years against those which were concluded (at least in part) on the basis of Article 207 (and 31) TFEU.³¹ While the trend displayed by the latter (vertical dotted bars) is understandably linked to the Article 207 line in Figure 1, the quantitative picture of all EU international agreements looks fairly different.

Article 31 acts, for their part, are fairly homogenous over all phases of examination. They are concerned with either: (1) temporary suspension of CCT duties for a certain product or group of products, (2) modification of the CCT, or (3) opening, allocating/management of EU duty-free quotas. Overall, the decreasing quantity of acts based on Article 31 TFEU appears to suggest that tinkering with the CCT has gradually become of lesser interest to the EU. This would be broadly in line with globally shifting attention to less traditional trade domains than tariffs on goods (for example to services, intellectual property, competition) following the establishment of the WTO.

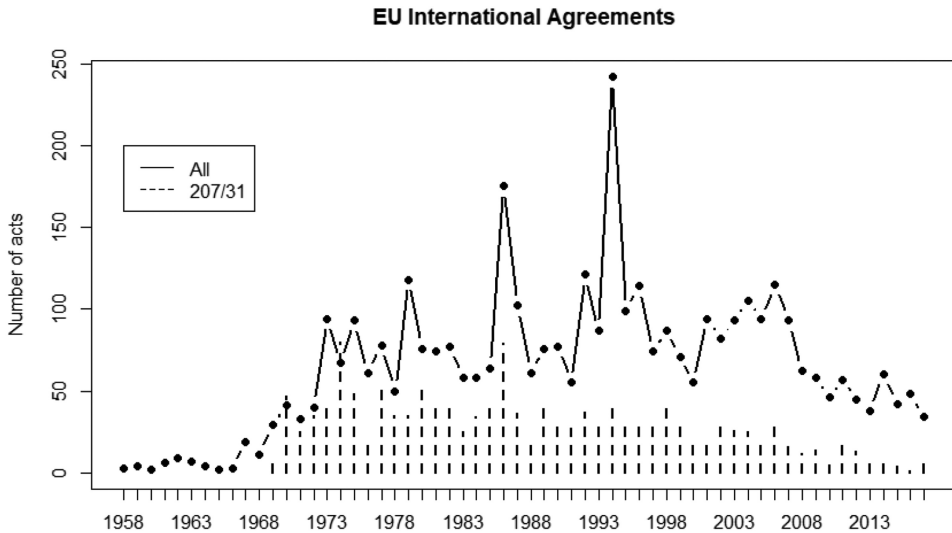
²⁸ For example, EEC Regulation No 1023/70 of the Council of 25 May 1970 establishing a common procedure for administering quantitative quotas; EEC Regulation No 109/70 of the Council of 19 Dec. 1969 establishing common rules for imports from state-trading countries; EEC Regulation No 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods.

²⁹ For example, EEC Council Regulation No 90/76 of 20 Jan. 1976 establishing indicative ceilings and Community supervision for imports of certain products originating in Norway.

³⁰ A few are not purely trade agreements: For example, in 1984 the Council took a decision (84/256/EEC) on the conclusion of the 1980 Food Aid Convention.

³¹ The conclusion of an international agreement by the EU takes the form of a Council Decision which specifies on which legal basis the EU concludes the treaty.

Figure 2 Number of Concluded EU International Agreements with a CCP/CCT Component 1958–2017



The discrepancy between all international agreements and those concluded under Articles 207 or 31 TFEU can be attributed to several factors. Arguably the most important one is the expansion in the scope of EU competences, in particular following the Treaty of Maastricht (1992), which means that in practice the Union can conclude treaties in a greater number of areas. This is particularly so due to the existence of the so-called *ERTA* doctrine, established in 1971 and codified in the Treaties since, under which the EU is implicitly empowered to take external action (conclude treaties) in areas where it has only explicit internal competence.³² Nevertheless, both specific to trade and generally, wider competences acquired by the EU in the last three Treaty revisions (Amsterdam, Nice, Lisbon) have not translated into the conclusion of more international agreements than before. The declining trend appears at a more disaggregated level as well. To take a sectoral example, acts relating to trade in textiles display a similar pattern: they grow, somewhat steadily, up till the mid-1980s, after which they fall, gradually and

³² ECJ, Case 22–70, *Commission of the European Communities v. Council of the European Communities* (1971) ECLI:EU:C:1971:32. Art. 3(2) TFEU largely codifies the case law as it has developed over the years: ‘The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.’

constantly and then flatten out after 2008. These figures are broadly consistent with other studies' findings that the number of newly concluded trade agreements has decreased globally, at least from the 1990s onwards.³³

The clearly observable decline in acts under Articles 207 and 31 could be accounted for by the following reasons: (1) the EU, having already concluded many trade agreements is left with few countries to pair up with; (2) over time the agreements have become deeper, so the conclusion of one wide-ranging trade agreement in the 2000s may cover areas which otherwise would have necessitated new future agreements; (3) the number of available country-pairs also decreased because of the effect of EU accessions and the formation of the EEA (which are also notably deep treaties): trade partners went from being outsiders to insiders (or semi-insiders in the case of the EEA), thereby removing the need for further individual trade agreements.

Finally, the extension of the Union's external competences other than Articles 207 and 31 TFEU may have effectively reduced the need to rely on the traditionally powerful CCP competence, as exemplified below with respect to acts concerning the Generalized Scheme of Preferences (GSP) and food aid, and as regularly illustrated by court cases adjudicating the delineation between trade and non-trade legal bases.

3.2 GENERALIZED SCHEME OF PREFERENCES (GSP)

The idea of the GSP was developed during the 1960s at the UN Conference on Trade and Development (UNCTAD) and it has been implemented by the EU since 1971. Initially the GSP constituted duty-free quotas and ceilings (for almost all developing countries), but in 1995 all quantitative restrictions were removed, and from then on preferences were granted in the form of tariff reductions, depending on the sensitivity of the concerned product.³⁴ Since the EU originally had no dedicated development competence (other than provisions concerning relations with former colonies), the question of appropriate powers for the adoption of GSP-related acts arose. The Commission had consistently proposed to adopt this type of legislation on the basis of what is today Article 207 TFEU but, until 1986, the Council refused to accept the argument that GSP forms part of the

³³ Andreas Dür, Leonardo Baccini & Manfred Elsig, *The Design of International Trade Agreements: Introducing a New Database*, 9 (3) Rev. Int'l Orgs. 353 (2014).

³⁴ Maria Persson & Fredrik Wilhelmsson, *Assessing the Effects of EU Trade Preferences for Developing Countries*, in *The European Union and Developing Countries: Trade, Aid and Growth in an Integrating World* 31 (Yves Bourdet et al. eds, Edward Elgar 2007). In general, see also Arvind Panagariya, *EU Preferential Trade Arrangements and Developing Countries*, 25(10) World Eco. 1415 (2002).

EU's commercial policy. This also means that until 1986, GSP-related acts are not part of our dataset.

In 1986, the Commission finally challenged the Council's practice of avoiding the CCP legal basis. It argued, as in other instances, that the CCP is an evolving concept which must adapt to world trade developments, the introduction of the GSP representing precisely such progress. The ECJ agreed with this view of the CCP when it reiterated that:

*it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of means of action going beyond instruments intended to have an effect only on the traditional aspects of external trade.*³⁵

From that point onwards, acts concerning the GSP have been adopted on the basis of Article 207 TFEU. There are 63 such acts in our dataset. The current GSP framework is contained in Regulation No 978/2012,³⁶ which is in principle valid till 2023. The EU GSP system contains three tiers: standard GSP for developing countries, GSP+ for developing countries willing to commit to sustainable development, including monitoring, and the 'Everything But Arms' (EBA) programme open to least developed countries (LDCs).³⁷ The EU GSP is linked to a host of international treaties, the observance of which justifies the differential treatment accorded by the Union to the beneficiary countries.³⁸

3.3 FOOD AID

The story of the EU's food-aid mechanism is another story about the evolution of EU competences, albeit evolving differently than the GSP. Unlike in the early years of the GSP, the CCP was used to pass a substantial number of acts concerning deployment of food aid in the absence of a legal basis for development cooperation or humanitarian

³⁵ *Commission of the European Communities v. Council of the European Communities*, *supra* n. 13, para. 20. The use of the residual powers provision – today Art. 352 TFEU – was in light of the existence of the more specific CCP competence, illegal. The acts were, moreover, vitiated by the fact that the Council, due to its inability to agree on the correct legal basis, omitted a reference to the specific provision of the Treaty which was supposedly conferring the necessary powers on the EEC.

³⁶ EU Regulation No 978/2012 of the European Parliament and of the Council of 25 Oct. 2012 applying a scheme of generalised tariff preferences and repealing EC Council Regulation No 732/2008 OJ 2012 L303/1.

³⁷ See also Commission Delegated Regulation (EU) 2015/1978 of 28 Aug. 2015 amending EU Regulation No 978/2012 of the European Parliament and the Council as regards the modalities for the application of Art. 8 listed in Annex VI to that Regulation; and Commission Implementing Regulation (EU) 2016/330 of 8 Mar. 2016 suspending the tariff preferences for certain GSP beneficiary countries in respect of certain GSP sections in accordance with EU Regulation No 978/2012 applying a scheme of generalized tariff preferences for the period of 2017–2019.

³⁸ See Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (EC – GSP)*, WT/DS246/AB/R (23 Apr. 2004). Note that the EC lost the case since the panel found that there was no reason to exclude certain countries from the EC's GSP basket. Due to this, the EC revised its GSP Regulation, to the satisfaction of the complainants.

action. Once such a legal basis was created in 1993, namely Article 130w TEC,³⁹ food aid stopped being provided under the CCP (while the GSP, finally recognized as part of the CCP by the CJEU in 1986, was not shifted under the new development competence). Thus our dataset does not contain Article 207 acts relating to food aid after that period. In other words, the development of competences in this area is a concrete contributing factor to the overall decline of the number of EU trade acts starting in 1986. Prior to that, one of the visible peaks in Figure 1 – around 1974 – can squarely be attributed to the rise in acts relating to provision of emergency food aid to Africa, Asia, and Latin America, since this was the EU's response to the global famines of the 1970s.⁴⁰ It should be pointed out, however, that the dataset does not include all food-aid measures, some having been adopted on the agriculture legal basis or the residual powers clause (Article 352 TFEU).⁴¹

3.4 RULES OF ORIGIN WITH EFTA COUNTRIES

The evolution of EU trade law concerning rules of origin (ROOs) tells the story of the EU's relationship with European Free Trade Association (EFTA) countries. Initially the EU had separate agreements with Austria, Portugal, Sweden, Iceland, Norway, Finland, and Switzerland, and Protocol 3 of these agreements contained provisions on ROOs. Joint committee decisions (taken under these agreements), which related to Protocol 3 amendments, required the enactment of individual EU acts each time.

These acts gradually died out in the 1990s, as the EU absorbed most EFTA countries, while the rest (with the notable exception of Switzerland) became part of the EEA. In this way there was no longer a need for individual agreements, and thus no need for Protocol amendments or their internal implementation in the EU. The only country that chose to remain outside both the EU and the EEA was Switzerland, which, to date has its own basic agreement,⁴² along other bilateral treaties with the EU. Interestingly, modifications of the Swiss Protocol on ROOs have also reduced over time.

This chapter of trade law-making was to some extent closed by the entry into force of the Regional Convention on pan-Euro-Mediterranean preferential rules of origin (PEM Convention),⁴³ reference to which replaced the content of the (sole surviving)

³⁹ Today Art. 209 TFEU.

⁴⁰ Christian Gerlach, *Famine Responses in the World Food Crisis 1972–5 and the World Food Conference of 1974*, 22(6) E. Rev. History 929 (2015).

⁴¹ See e.g. EEC Regulation No 2052/69 of the Council of 17 Oct. 1969 on the Community financing of expenditure arising from the implementation of the Food Aid Convention OJ 1969 L263/6; EEC Council Regulation No 1755/84 of 19 June 1984 on the implementation in relation to food of alternative operations in place of food-aid deliveries OJ 1984 L165/7.

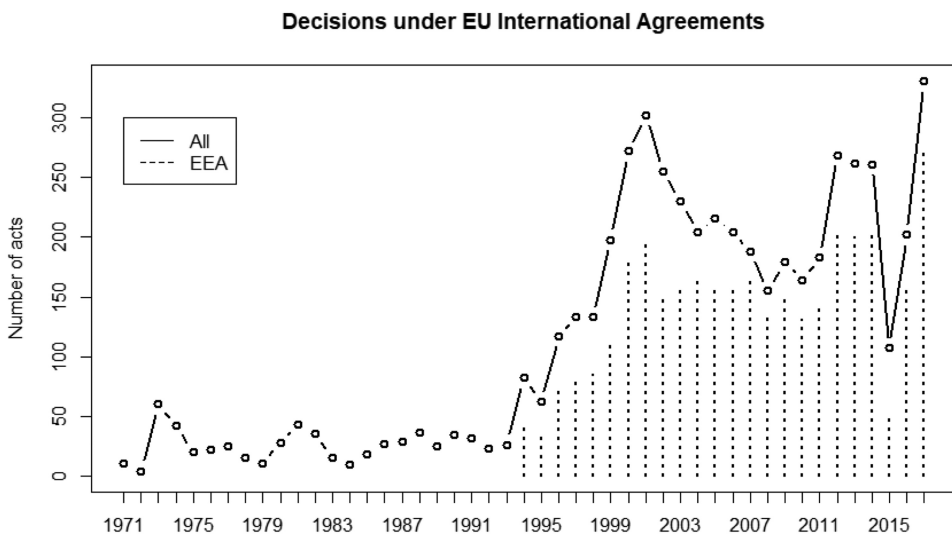
⁴² EC-Switzerland Free Trade Agreement of 22 July 1972 OJ L 300, 31 Dec. 1972, at 0189.

⁴³ Regional Convention on pan-Euro-Mediterranean preferential rules of origin of 26 Feb. 2013, OJ L 54/4.

EU-Switzerland Protocol No 3. The PEM Convention allows diagonal cumulation of origin, and applies to: the EU, the EFTA States (including Switzerland), the Faroe Islands, participants in the Barcelona Process, Syria, Tunisia and Turkey, participants in the EU's Stabilization and Association Process, and the Republic of Moldova.

All this brings out another bigger picture: we see an aspect of EU trade law evolve from bilateral fragmentation, when individual agreements were required, through regional consolidation, with the enlargement of the EU and creation of the EEA, to a more encompassing (regional) plurilateralism, with the signing of the PEM Convention. This gradual consolidation was accompanied by the deepening of the EU itself and of its international agreements, most notably illustrated by the EEA but also other, more recent, treaties such as the EU-Ukraine Association Agreement.⁴⁴ As shown in Figure 3, the establishment of the EEA has in fact enabled the growth of an unparalleled degree of law-making activity under the international agreement. Decisions of the Joint Committees and Joint Council set up under the EEA account for the vast majority of all such decisions taken under EU international agreements, including other association agreements.

Figure 3 *Decisions Adopted under EU International Agreements 1971–2017*



⁴⁴ It must be recognized that the deepening of EU trade agreements has been enabled by the expansion of the CCP competence (Art. 207 TFEU).

Data concerning decisions adopted under EU international agreements is also in consonance with empirical studies concluding that the depth of trade agreements has increased over time.⁴⁵ Greater depth of trade agreements should in theory permit the adoption of a greater range (and thus also quantity) of decisions by the joint institutions established thereunder. This case should not, however, be overstated, as we can see that the overall trend for EU international agreements in the last two decades has been predominantly driven by activity under the EEA. Nevertheless, it might be worthwhile for future researchers to keep an eye on this measure to attain at least some form of understanding of the performance of, in particular, the ‘new generation’ of EU trade agreements which are notable for their increased depth. Should this depth manifest itself in the adoption of more joint decisions, the latter could in the future overtake the already record-high quantity of decisions under EU international agreements observed in 2017.

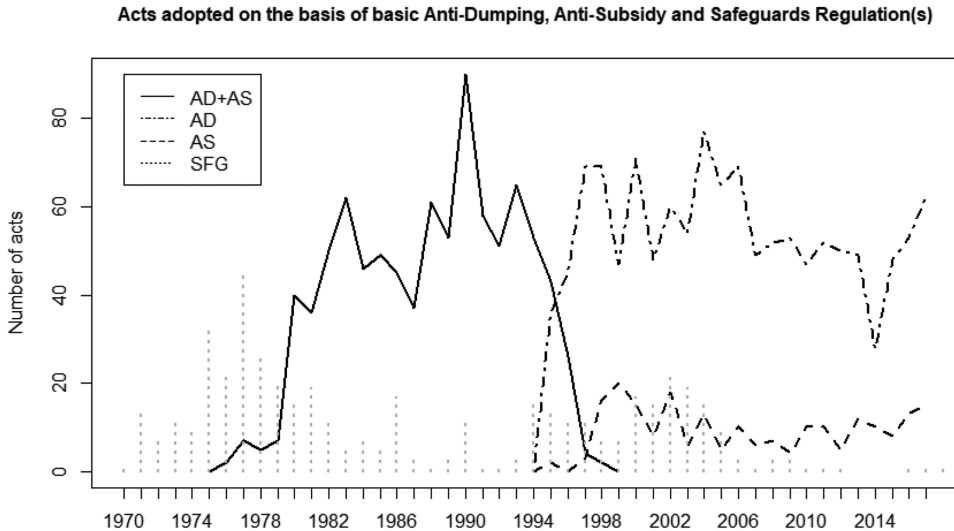
3.5 DELEGATED AND IMPLEMENTING ACTS (TRADE REMEDIES)

As mentioned earlier, our principal dataset only includes legislation based on Articles 207 or 31 TFEU (or both). This selection, however, leaves out an important number of ‘tertiary’ law, which are legal acts based on an enabling provision of existing EU legislation (a ‘basic’ act). We remedy this omission in Figure 4 below, by showing the number of implementing and delegated laws based on selected basic acts – those that are closely linked to central features of EU trade policy. After surveying the field of delegated and implementing acts, we found trade remedies to be the most significant tertiary trade law in regular use; quantitatively, they are the only significant delegated and implementing trade acts. There are plenty of other basic acts concerning EU trade⁴⁶ but they have seen comparatively little implementation (in quantitative terms).

⁴⁵ Andreas Dür et al., *supra* n. 33. See also WTO, *World Trade Report: The WTO and Preferential Trade Agreements: From Co-existence to Coherence* (Geneva, WTO, 2011); *Regional Rules in the Global Trading System* (Antoni Esteveadeordal, Kati Suominen & Robert Teh eds, Cambridge: Cambridge University Press 2009).

⁴⁶ See EU Regulation No 37/2014 of the European Parliament and of the Council of 15 Jan. 2014 amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures OJ L 18/1.

*Figure 4 Implementing and Delegated Acts based on Selected Basic Acts
1970–2017*



There is partial overlap between anti-subsidy and anti-dumping measures as the two initially shared a basic act: our data does not discriminate on the basis of whether the acts concern anti-subsidy or anti-dumping during this period. Decoupling of anti-subsidy and anti-dumping basic acts occurred in 1994,⁴⁷ although the older joint-basic-act was still used for a few more years due to the temporal aspect of infringements.

It is difficult to make clear conclusions about the evolution of anti-subsidy and anti-dumping measures beyond the picture painted by descriptive statistics but we do point to some peculiarities. For example, it is not immediately obvious why there has been little activity prior to changes to the basic anti-subsidy/anti-dumping regulation enacted in 1979,⁴⁸ as a similar Regulation had been in place already since 1968.⁴⁹ One possible explanation, borne out by the

⁴⁷ See EC Council Regulation No 3284/94 of 22 Dec. 1994 on protection against subsidized imports from countries not members of the European Community.

⁴⁸ EEC Council Regulation No 3017/79 of 20 Dec. 1979 on protection against dumped or subsidized imports from countries not members of the European Economic Community; EEC Council Regulation No 1681/79 of 1 Aug. 1979 amending Regulation (EEC) No 459/68 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community.

⁴⁹ EEC Regulation No 459/68 of the Council of 5 Apr. 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community.

data, is that the EU preferred recourse to safeguards during the 1970s as a means of trade defence. This further indicates trade remedy measures' potential interchangeability in practice, despite plainly different legal requirements being at play.⁵⁰ Indeed, Figure 4 shows that measures adopted on the basis of global safeguard Regulations⁵¹ peaked in the mid-1970s and started to decline as the use of anti-dumping and anti-subsidy measures sharply increased following the introduction of the 1979 Regulation on dumped or subsidized imports. Since then, the quantity of acts related to global safeguard regulations has never recovered – anti-subsidy and, in particular, anti-dumping measures have superseded the use of global safeguards permanently.⁵²

At the other end of the period, we cannot say with certainty why anti-dumping acts have been on the decline between 2006 and 2014 (but rising since) and whether this is merely a consequence of the natural fluctuation in the imposition of anti-dumping measures.⁵³ It is in any case notable that the quantitative trends in trade remedies do not mimic well the correlated developments under Articles 207 and 31 TFEU which might suggest a set of different variables influencing the quantity of EU trade remedies as compared to basic trade acts.⁵⁴

⁵⁰ Whereas safeguards are based around the notion of 'unforeseen developments', anti-dumping and anti-subsidy measures aim to remedy putatively unfair trade practices. All trade remedies can, however, be employed to satisfy the protectionist demands of domestic industries.

⁵¹ Safeguards can be essentially divided in two categories: those created in EU law to regulate imports generally ('global' safeguards) and those provided for under bilateral EU agreements (bilateral safeguards). This distinction should not be overstated – the EU implements safeguard clauses inserted in its trade agreements through EU legislation, in which it typically provides further specification on the use of the bilateral safeguards. Incidentally, our research shows that the level of detail of these 'implementing' acts has increased over time. Cf. e.g. Council Regulation of 18 July 1977 on the safeguard measures provided for in the Cooperation Agreement and the Interim Agreement between the European Economic Community and the Arab Republic of Egypt, with Regulation No 19/2013 of the European Parliament and of the Council of 15 Jan. 2013 implementing the bilateral safeguard clause and the stabilization mechanism for bananas of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part. In any case, both types of safeguards are ultimately subject to compliance with the WTO Agreement on Safeguards.

⁵² The rally of safeguard acts in the early 2000s related predominantly to the Commission authorizing transfers of quotas on textile products requested by east- and south-Asian countries. Not included in Figure 4 is data from 2018, when safeguards rose in response to US tariffs on steel and aluminium.

⁵³ For a general overview on the evolution of EU (EC) anti-dumping and anti-subsidy law, see Van Bael & Bellis, *EU Anti-Dumping and Other Trade Defence Instruments* (5th ed., Kluwer Law International 2011); Edwin Vermulst, *EC Anti-Dumping Law and Practice* (2d ed., Sweet & Maxwell 2010). Interestingly, even the 2008 financial crisis did not result in an increased use of trade remedies by the EU.

⁵⁴ But see Dirk De Bièvre & Jappe Eckhardt, *Interest groups and EU Anti-Dumping Policy*, 18(3) J. Eur. Pub. Pol'y 339 (2011) discussing the influence of interest groups on the reform of (basic) EU anti-dumping legislation. See also Jørgen Ulff-Møller Nielsen & Gert Tinggaard Svendsen, *EU Lobbying and Anti-Dumping Policy*, 46 (1) J.W.T 187 (2012).

4 CONCLUSION

Our article presents the overall development of EU trade law to date, and develops narratives that explain major trends in select areas. We are primarily concerned with law-making, and therefore root our work in the concept of legal basis, since it is one of the most important aspects of the act of legislating in the EU. Accordingly, we begin our article by explaining the meanings of, and examining the evolutions of, two core trade legal bases – Article 207 and Article 31 TFEU. Both provisions have evolved at least marginally in the direction of more EU competence – a greater variety of acts can be adopted under them today than was the case at any point in the history of EU integration.

Yet, the most interesting trend we observed in our main dataset of over 6000 EU trade acts runs counter to the intuition that a broader EU trade competence spawns more trade laws. From 1986 onwards, the number of EU trade acts has declined almost linearly despite the fact that the scope of the two legal bases has gradually expanded during this period. Throughout the article we point to several plausible explanations for the observed trends in the data but do not profess to be wedded to any particular one – several factors are likely at play at the same time in any case. Also interesting is the existence of a degree of correlation between the trends observed in Articles 207 and 31 TFEU (but not extending to trade remedies): this may mean that underlying historical or legal developments impacted the evolution of both the provisions in a similar manner, though, again, we do not claim this to be a definitive conclusion in the absence of causal explanations.

Nevertheless, at the partially disaggregated level, we were able to establish fairly straightforward explanations for some observed trends: the rise in food-aid legislation can quite squarely be attributed to the global famines of the 1970s since these acts constituted the EU's response to the crisis and this occurred at a time when the CCP legal basis was used for this purpose (in the absence of a dedicated 'development' legal basis which emerged later). Perhaps more intriguingly, the quantitative picture of amendments to protocols on ROOs between the EU and EFTA countries offers observable longitudinal evidence of the consolidation of European integration in the form of EU enlargement and the formation of the EEA (ultimately substituted by a Euro-Mediterranean treaty on ROO cumulation). We also confirm empirically that trade law activity between the EU and EFTA countries has appreciably shifted from within the EU to the shared EEA forum. Overall, this suggests that the expansion of EU trade competences might have, instead of yielding a greater quantity of acts, produced a comparatively smaller amount of deeper EU trade law, as witnessed in the increasing depth of international trade agreements – a development spearheaded by the EU – evidenced by other studies.

We do not claim that the descriptive statistics presented in this article represent a panacea for trade law scholarship. We have been careful in qualifying our findings and pointing out all the caveats in the data and the analysis. Nevertheless, it is difficult if not impossible to present ‘big picture’ developments such as the evolution of EU trade law – arguably the ‘bread and butter’ of any discipline – without engaging with law quantitatively. Far from exhausting this area with complex models and advanced methodology, we have strived for this article to ease lawyers into the basic quantitative aspects of studying trade law. With empirical approaches on the rise, we hope to have modestly exemplified the contribution accessible aggregate analysis can make to lawyers’ overall understanding of legal systems.