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Reinventing Free Trade Agreements in an Interdependent World – India, China and Mercosur

Good morning.

It is a pleasure to be here today. Let me begin by thanking Professor Mónica Dias for her kind invitation and for bringing us together to mark the 250th anniversary of the Declaration of Independence.

If Thomas Jefferson were attending this conference today, he would probably be astonished by many things. Perhaps most surprising would be the session taking place at the same time as this one, on the influence of algorithms and social media on young people's political choices. The technologies would be unfamiliar, the vocabulary incomprehensible, and the scale unimaginable.

Yet one issue would sound remarkably familiar: Trade with other nations.

Among the grievances listed in the Declaration of Independence was the accusation that King George III had been "cutting off our Trade with all parts of the world." It is a useful reminder that debates about political independence have always been intertwined with debates about trade. The American Founders sought self-government, but they did not seek isolation. They wanted the freedom to engage with the wider world on their own terms.

More than two centuries later, we continue to grapple with the same challenge. The question is no longer whether states should trade, but how they manage economic interdependence while preserving political autonomy.

For the European Union, that challenge has a distinctive dimension. The question is not simply how Europe trades with the world, but who in Europe has the authority to shape that trade and under what conditions.

That brings me to my central argument today: in Europe, trade power is constitutional before it is commercial. If we want to understand what the European Union can negotiate with India, how quickly it can operationalise Mercosur, or why its

engagement with China takes the form that it does, we need to begin not with tariffs, market access or GDP figures, but with the European Union's constitutional framework and the way the Court of Justice has defined its boundaries.

Let me start with the constitutional framework behind EU trade policy. The key to understanding EU trade policy is that it operates through a system of divided authority. In some areas, Brussels holds the entire mandate: the Union can negotiate, conclude, and implement agreements on its own. In others, authority is shared with the Member States. Once that happens, what appears to be a single external agreement becomes, constitutionally speaking, a multi-level ratification exercise, with national, and sometimes regional, parliaments entering the picture.

That distinction comes directly from the Treaties. Under Article 3 of the Treaty on the Functioning of the European Union, the Common Commercial Policy is an exclusive EU competence. Article 207 then defines its scope: trade in goods and services, commercial intellectual property, public procurement and, since the Lisbon Treaty, foreign direct investment.

When a trade agreement remains within those boundaries, it is what lawyers call an "EU-only" agreement. The Union can sign it, the European Parliament can give its consent, and implementation can proceed relatively quickly.

The challenge is that modern free trade agreements rarely remain neatly within those boundaries. Once provisions extend beyond exclusive competence, classically, certain forms of investment protection or investor-state dispute settlement, the agreement becomes "mixed". At that point, ratification must also take place at Member State level, and in some countries regional parliaments enter the process as well. The number of political veto points increases, timelines become less predictable, and the constitutional structure begins to shape the geopolitical possibilities.

Many of you will remember the drama surrounding EU-Canada Comprehensive Economic and Trade Agreement (CETA,) when a regional parliament in Belgium came close to blocking the agreement. That episode was not merely a political dispute. It was a reminder that constitutional design has real-world consequences for trade policy.

There is, however, an important pressure valve within the Treaties. Article 218(5) TFEU allows the Council to authorise provisional application of those parts of an agreement that fall within EU competence while national ratification procedures continue.

This may sound like a technical procedural device, but in today's geopolitical environment it has become a strategic instrument. It allows the EU to bring market-access commitments and regulatory provisions into effect before every national parliament has completed its work.

In a world characterised by supply-chain disruptions, strategic competition and economic security concerns, the ability to move quickly matters.

And this is why constitutional design matters so much in 2026.

Trade policy is no longer simply an economic policy. It has become an instrument of geopolitical strategy.

Europe's efforts to de-risk supply chains, respond to economic coercion, strengthen strategic partnerships and shape global standards all pass through the same constitutional framework. The more an agreement can be kept within the Union's exclusive competence, the faster Europe can act. The more it moves into areas of shared competence, the more complex—and often slower—the process becomes.

Let me illustrate this through three relationships: India, China and Mercosur.

India

With India, negotiations relaunched in 2022 and have steadily gained momentum.

One striking feature of the negotiations is the effort to structure the trade agreement so that it remains, as far as possible, within the EU's exclusive competence. Investment protection, precisely the type of issue that risks moving an agreement into mixed territory, has largely been treated separately.

The objective is clear. By keeping the core trade agreement within Article 207, the EU can deliver market access, regulatory cooperation and economic integration more rapidly, avoiding the uncertainty associated with twenty-seven separate ratification processes.

For businesses on both sides, this translates into greater predictability and a faster policy signal.

Constitutional design, in other words, is shaping economic strategy.

China

China presents a very different picture.

There is no free trade agreement between the EU and China. Instead, the relationship has centred on investment, market access and economic rebalancing.

The Comprehensive Agreement on Investment reached an agreement in principle in 2020, but remains politically stalled.

Here again, competence matters. Since the Lisbon Treaty, foreign direct investment falls within Article 207. However, the Court has also clarified that certain forms of investment protection and dispute settlement extend beyond the Union's exclusive competence.

Combined with today's geopolitical climate, this helps explain why the EU's approach to China has increasingly relied on instruments that sit firmly within exclusive Union competence: trade-defence measures, anti-subsidy investigations and targeted regulatory tools.

Those instruments can be deployed quickly because they do not require the complex ratification processes associated with mixed agreements.

The constitutional framework does not merely constrain policy choices; it actively channels them.

Mercosur

Mercosur provides perhaps the clearest example of constitutional adaptation.

The EU has structured the arrangement as a broader partnership package that includes an interim trade agreement. The logic is straightforward: separate those elements that clearly fall within EU competence from those that may require Member State ratification.

This allows the EU-competence chapters to be signed and, where appropriate, provisionally applied under Article 218 while domestic ratification processes continue.

What we are seeing is a distinctly post-Lisbon and post-case-law approach to treaty design.

The objective is not simply to negotiate agreements. It is to design them in ways that maximise the Union's capacity to act.

For Mercosur's partners, this means earlier movement on market access and trade rules. For the EU, it means reducing the political risks associated with lengthy domestic approval procedures.

The Role of the Court of Justice

None of this constitutional architecture can be understood without considering the role of the Court of Justice of the European Union.

Two opinions, in particular, have shaped the contemporary landscape.

The first is Opinion 2/15 on the EU-Singapore Free Trade Agreement, delivered in 2017.

The Court concluded that the overwhelming majority of a modern trade agreement—including services, public procurement and commercial intellectual property—falls within the Union's exclusive trade competence. It also confirmed that foreign direct investment belongs within that competence.

At the same time, the Court drew important limits. Portfolio investment and certain investor-state dispute settlement mechanisms were not considered part of the EU-only sphere.

The practical consequence was profound. It encouraged a new generation of agreements in which trade provisions are separated from investment-protection provisions. Trade agreements can therefore proceed quickly as EU-only instruments, while investment protection follows a slower and more politically demanding route.

The second key decision is Opinion 1/17 on CETA's Investment Court System, delivered in 2019.

Here the Court confirmed that such mechanisms can be compatible with EU law, provided that the autonomy of the EU legal order is preserved and judicial safeguards remain intact.

The significance of Opinion 1/17 was not that it transformed investment protection into an EU-only competence. Rather, it clarified how such systems can be lawfully designed within the constitutional framework established by the Treaties.

Together, these two opinions have become foundational to contemporary EU treaty-making.

Conclusion

Let me conclude by returning to the broader theme of this conference.

The American Founders understood that constitutional design shapes political power.

The same insight applies to the European Union today.

Europe's external economic power is structured by its constitutional settlement: by the distinction between exclusive and shared competence, by the relationship between the Union and its Member States, and by mechanisms such as provisional application that bridge the two.

Understanding that framework is not legal pedantry.

It is strategic literacy.

It explains why Europe can move relatively quickly with India, why it manages economic risk with China through Union-level instruments, and how it seeks to make Mercosur operational without becoming hostage to every domestic parliamentary timetable.

For a multidisciplinary audience, the lesson is simple.

If you want to understand Europe's external economic statecraft, do not look only at the macroeconomic indicators or the geopolitical headlines.

Look also at Article 207, Article 218, and the Court's Opinions 2/15 and 1/17.

They are the constitutional foundations upon which Europe's trade policy is built—and they increasingly shape the way Europe engages with the world.

Thank you.

Mariana Tavares

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