New Functions and New Powers for the European Parliament: Assessing the Changes of the Common Commercial Policy from the Perspective of Democratic Legitimacy

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Introduction

The Lisbon Treaty's reforms of the constitutional basis of the common commercial policy fundamentally changed the institutional balance in this policy area. One of the most important shifts as far as democratic legitimacy is concerned is the greater role of the European Parliament (EP). The increased significance of the parliament has even been called the most important change in the Lisbon Treaty.[1] The present contribution examines the new responsibilities and functions of the EP in detail, with the central question being whether and to what extent these reforms have led to an improvement in the democratic legitimacy of the common commercial policy and a reduction in the democracy deficit. The shift in institutional balance when it comes to common commercial policy may be interesting in its own right from an interdisciplinary social science perspective. However, the results of the EU reform process reached by the Lisbon Treaty, must be primarily assessed according to whether they have contributed towards an improvement in the transparency, efficiency and democratic legitimation of the Union. These aims which were set down

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[1] Woolcock, The potential impact of the Lisbon Treaty on European Union External Trade Policy, Swedish Institute for European Policy Studies (Sieps), European Policy Analysis 8-2008. Available at: http://www.sieps.se, page 5; Equally postive is Brok, Die neue Macht des Europäischen Parlaments nach "Lissabon" in Bereichen der gemeinsamen Handelspolitik, Integration 33 (2010) 3, p. 209.

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by the European Council in the Laeken[2] Declaration are the "raison d'être" of the Lisbon Treaty.

This paper commences with a brief illustration of the basic challenges and problems of the democratic legitimation of foreign-political trade and international regulation. The changes in the role of the European Parliament are not only be assessed against the background of the general aims of the reform process; additionally they are compared with the traditional parliamentary tasks and competencies in respect of foreign relations on a national state level. Democratic legitimation can always only be assessed relatively and not in accordance with absolute standards. Following on from the theoretical remarks in respect of the Parliament, the most important changes in the competencies and tasks of the European Parliament will be outlined. Next the resulting consequences for both the intra- and inter-institutional structure will be examined, and finally, the essay discusses if there have been or will be any commercial policy effects following the changes to this structure, and what these effects are.

Parliamentary Control and Democratic Legitimation of Foreign Affairs

The theory and practice of foreign policy is characterised by a dominance of the executive. In European political philosophy this tradition can be traced back to John Locke who wrote already in 1690:

> The [external] power is much less capable to be directed by (...) positive laws than the executive and so must be necessarily left to the prudence and wisdom of those whose hands it is in.[3]

The quotation expresses two aspects: firstly it confirms that foreign policy must be driven by the executive, and secondly strictly binding foreign policy to the rule of law is considered to be detrimental. Both the lesser importance of the parliament and the diminished obligation to be bound by the rule of law characterise the constitutional reality of the Member States of the European Union to this day.

For example, the German Federal Constitutional Court emphasises repeatedly that the German Basic Law provides the federal government with considerable room for manoeuvre of their own determination when it comes to the regulation of foreign affairs.[4] This has been the justification for consistently denying a greater parliamentary involvement in the organisation of foreign relations where this would go beyond the right to consent to international treaties pursuant to Art. 59 (2) of the

[2] European Council, Declaration of Laeken on the future of the European Union from 15th December 2001, on the internet: http://european-convention.eu.int/pdf/lknde.pdf.

[3] Locke, *Two Treatises of Civil Government*, 1690, Book II, Chapter XII, para. 146-147.

[4] See e.g. the Federal Constitutional, 2 BvE 5/07 (*Military deployment at the G8 summit in Heiligendamm*), BVerfGE 126, 55-77.

German Basic Law.[5] The fact that there is little parliamentary involvement and legal control is therefore rightly termed a *Lockean dilemma* by Ernst-Ulrich Petersmann in European constitutional teaching and practice.[6]

The minimal parliamentary involvement in foreign relations and the respective constitutional provisions lead to a situation whereby the democratic legitimation of international treaties is essentially lower than that of domestic legislation.[7] This is first of all due to the fact that the parliamentary legislator has no right to initiate legislation in respect of international treaties.[8] Contrary to law-making at the domestic level, the parliament is unable to actively propose the negotiation of a treaty or the accession to an existing treaty. Equally as important is the fact that the parliaments have no formal possibility to influence the content of international treaties. They have no formal right to propose amendments during negotiations, nor do they have the possibility to only consent to the signing of the treaty subject to modifications, restrictions or conditions. Instead the signed treaty is regularly presented to parliaments as a "fait accompli".[9] This applies particularly in the area of trade policy.[10]

The little formal influence is reinforced by the difficulty of parliaments in practice to obtain the necessary information which would enable a continual accompaniment and scrutiny of the government during treaty negotiations. Added to this is a lack of foreign economic-political interest on the part of the parliamentarians, as little significance for elections is attached to this subject matter. It can also be seen that in parliamentary systems of government the rejection of an international treaty which has been negotiated by the government leads to prohibitively high opportunity costs as a rejection effectively amounts to a vote of no confidence in the government which in turn has the support of the parliamentary majority. For this reason, in political practice in parliamentary systems of government, the rejection of an international treaty can practically be ruled out. This finding is relevant to the extent that the relationship between the parliament and the executive at the EU level is essentially different than in the parliamentary systems of government on a member-state level.[11]

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[5] Federal Constitutional Court, 2 BvE 1/03, (*AWACS deployment*), NJW 2008, 2018 (2021) = BVerfGE 121, 135; cf. also Fastenrath, *Kompetenzverteilung im Bereich der auswärtigen Gewalt*, 1986, p. 24 et seq.

[6] Petersmann, National Constitutions, Foreign Trade Policy and European Community Law, EJIL 3 (1992) 1, p. 1 et seq.

[7] Krajewski Democratic Legitimacy and Constitutional Perspectives of WTO Law, Journal of World Trade 35 (2001) 1, p. 167 et seq.

[8] Treviranus, *Außenpolitik im demokratischen Rechtsstaat*, 1966, page 36 et seq.

[9] Tomuschat/Schmidt (eds.), *Der Verfassungsstaat im Geflecht der internationalen Beziehungen*, VVDStRL 36 (1978), page 28; Zampetti, Democratic legitimacy in the World Trade Organization: the justice dimension, Journal of World Trade 37 (2003) 1, 105 (105).

[10] Howse, How to Begin to Think About the "Democratic Deficit" at the WTO, in: Griller (ed.), *International Economic Governance and Non-economic concerns*, 2003, page 79 et seq. (84).

[11] On this see "Evaluation from the perspective of democracy theory" below.

Parliamentarisation of the Adoption of Autonomous Trade Policy Instruments Through the Introduction of the Ordinary Legislative Procedure

In order to more precisely define the role of the European Parliament in common commercial policy and the consequences which result from this in respect of the question of democratic legitimation, it makes sense to differentiate between the adoption of autonomous instruments and the negotiation and conclusion of international agreements.[12] Until the Lisbon Treaty came into force, regulation in the area of autonomous commercial policy was based on an institutional model which has hardly been changed since the Treaties of Rome. Pursuant to Art. 133 (2) EC Treaty (Nice) the Commission made suggestions to the Council on how the common commercial policy could be carried out. The regulation process did not provide for any parliamentary participation. As such the common commercial policy belonged to one of the increasingly rare areas in which the European Parliament formally had no competencies.

The Lisbon Treaty puts an end to this anachronism and introduced the ordinary legislative procedure for autonomous commercial policy pursuant to Art. 295 TFEU. This means that the Parliament has become a co-legislator. From a European legislative perspective, the parliamentarisation of this policy area is at the same time a normalisation, as at the latest since the Lisbon Treaty the ordinary legislative procedure is to be seen as the standard procedure for European legislation.

Since the Lisbon Treaty, regulation in the area of commercial policy therefore corresponds to the standard legislative procedure in the EU. This has not remained without consequences for the practical work of the parliament: the Committee on International Trade (INTA) which (once again) has existed as an independent committee since 2004[13] now has the function of a legislative committee and is involved in a number of legislative procedures. This raises the question whether the committee of currently 31 members should not perhaps be enlarged in the next term, also in order that a sufficiently large number of rapporteurs are available for the numerous legislative procedures.[14]

Looking at the wording of Art. 207 (2) TFEU it is questionable what meaning is given to the formulation that the ordinary legislative procedure should only be applicable to "measures defining the framework for implementing the common commercial policy".[15] It appears to be undisputed that this cannot mean the passing

[12] Herrmann/Michl, Grundzüge des europäischen Außenwirtschaftsrechts, ZEuS 11 (2008) 1, page 81 et seq. (93).

[13] Between 1999 and 2004 foreign trade came under the remit of the Committee for Industry, External Trade, Research and Energy.

[14] I am grateful to Dr. Andreas Maurer from the Secretariat of the Committee on International Trade for his comments on this point.

[15] Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, page 12.

of individual commercial policy measures, even if these are passed in the form of a Regulation, as would be the case with trade defence instruments. Not the form but the function of the measures is decisive. Without question the basic regulations for the autonomous commercial policy, i.e. the import and export regulations as well as the framework regulations for the trade defence instruments fall within the scope of application of Art. 207 (2) TFEU.[16] It is, however, unclear whether "specific" regimes, for example for the export of goods of cultural heritage[17] or the trading of goods which can be used as instruments of torture[18] are also covered by this. A further question concerns the form and the procedure for individual measures and legislative acts. Depending on whether or not these can continue to be passed in an individual case on the basis of Art. 207 (2) TFEU, the question is whether this amounts to delegated legislative acts pursuant to Art. 290 TFEU or implementing acts pursuant to Art. 291 (2) TFEU.[19] The influence of the parliament on the respective legislative act depends on the form of the measure and in what procedure it was passed.

Parliamentarisation of International Trade Agreements Through Reporting Obligations and Rights of Approval

Besides the strengthening of the parliament as a co-legislator in the area of autonomous commercial policy, the growth of power concerning the negotiation and conclusion of international trade agreements is of considerable importance. According to the relevant provisions of articles 133 and 300 EC Treaty (Nice), in the area of commercial policy the European Parliament did not even have the typical parliamentary right of consenting to or rejecting international treaties. International agreements were negotiated by the Commission on the basis of a mandate issued by the Council in consultation with a special committee of the Council (the so-called "133 committee"). The agreement was accepted by the Council on the advice of the Commission. Art. 133 EC Treaty did not provide for any right of involvement of the parliament, but referred instead to Art. 300 EC Treaty, the general provision on the conclusion of international treaties, according

[16] Müller-Ibold, Art. 207 TFEU, in: Lenz/Borchardt (ed.), *EU-Verträge: Kommentar nach dem Vertrag von Lissabon*, 5th Edition, 2010, paragraph.

[17] Regulation (EC) No. 116/2009 of the Council from 18th December 2008 on the export of goods of cultural heritage.

[18] Regulation (EC) No. 1236/2005 of the Council from 27th June 2005 concerning the trading of certain goods which could be used to carry out the death penalty, for torture, or other gruesome, inhuman or degrading treatment or punishment.

[19] On this see the suggestion of the Commission for a regulation defining the general rules and principles according to which the Member States control the of exercising of implementing powers by the Commission, KOM(2010) 83 finally and the corresponding report of the European Parliament from 6.12.2010, A7-0355/2010 (Rapporteur József Szájer).

to which the consent of the European Parliament was only envisaged for a small number of treaties, amongst others such treaties which would have led to the creation of a new institutional framework.[20] Moreover, the parliament did not formally participate in the negotiations; it merely had certain rights to information on the basis of an inter-institutional agreement.

The Lisbon Treaty led to a parliamentarisation and a normalisation of the negotiation and conclusion of international trade agreements while the over-all structure remains largely untouched, with the Commission having the sole right to propose and conduct negotiations and with the Council's authorisation to conduct negotiations and its competence to conclude them.[21] However, the procedure has been changed in two significant aspects to the benefit of the parliament.

Reporting in Accordance with Art. 207 (3) TFEU

On a primary law level, Art. 207 (3) 3 TFEU now provides that the Commission must report on international negotiations to both the special committee (since the Lisbon Treaty: the Trade Policy Committee) and the European Parliament. Both the wording and the purpose of this provision illustrate that the Parliament and the Commission must be treated equally in this respect. No justification for the unequal treatment when it comes to the providing of information can be found in Art. 207 (3) TFEU. The Commission has also promised to the European Parliament that it will apply equal treatment accordingly.[22] This is also provided for in the framework agreement between the Commission and the European Parliament of 20 October 2010.[23]

The right to receive reports goes beyond the mere indication of the status of the negotiations. Indeed Art. 207 (3) 3 TFEU covers all forms of information, in particular the forwarding of documents unless the Commission does not wish to forward these at all for strategic reasons relating to the negotiations or for other reasons which fall under its political discretion.

Political discretion which amounts to discrimination between the Council and the Parliament does not exist, however. In fact any differentiation between the two organs in respect of reporting would be an infringement of the TFEU. Annex 2 of

[20] The consent of the European Parliament to the Agreement Establishing the World Trade Organisation occurred on this basis.

[21] Woolcock, The potential impact of the Lisbon Treaty on European Union External Trade Policy, Swedish Institute for European Policy Studies (Sieps), European Policy Analysis 8-2008. Available at: http://www.sieps.se, page 5; Brok, Die neue Macht des Europäischen Parlaments nach "Lissabon" in Bereichen der gemeinsamen Handelspolitik, Integration 33 (2010) 3, p. 209 (217).

[22] Letter from de Gucht, Member of the European Commission, to Professor Vital Moreira, MEP, from 26th October 2010.

[23] Framework agreement on the relationship between the European Parliament and the European Commission, paragraph 23 et seq, OJ 2010, L 304/47.

the new framework agreement contains adequate provisions concerning information that the Commission wishes to treat confidentially. Also the practice of the Commission of informing the Committee on International Trade about the status of negotiations in a non-public session is appropriate to prevent certain effects of publication.

The basic equal treatment of the Parliament and the Trade Policy Committee in respect of reporting has a significant effect on parliamentary practice.[24] Whilst the Committee on International Trade (INTA) of the Parliament meets on average once a month for a day and a half, the meetings of the Trade Policy Committee generally take place weekly. In addition, it has further topic-specific working groups, for example in the areas of services and investments. As such the Trade Policy Committee can acquire and process an unequally large amount of information. In contrast, the absorption capacity of the European Parliament needs to be further improved. The INTA committee will therefore also have to develop a new practice in this regard and possibly meet more often. Besides more regular meetings also the creation of sub-committees in accordance with Art. 190 Rules of Procedure of the European Parliament could be considered, for example in the areas in which the Trade Policy Committee also has working groups[25] or for the purpose of negotiating bilateral trade agreements.

In view of this, Art. 207 (3) 3 TFEU goes further than constitutionalising the previously existing information practice. Up until now it was neither ensured, nor generally recognised that the Parliament and the Trade Policy Committee were placed on equal terms by the Commission in respect of the information. The Parliament could not be sure that it had the same knowledge as the Trade Policy Committee. The inequality of power between the Parliament and the Trade Policy Committee connected with the (at least potential) asymmetry of information is levelled out by the Lisbon Treaty. As soon as and to the extent that the Parliament can as closely as possible match its ability to acquire and process information to that of the Trade Policy Committee, this effectively amounts to equality with the committee in this respect and also means an increase in influence over it.

It must be noted, however, that the Lisbon Treaty does not provide for equality in respect of a further involvement in the negotiations. The obligation of the Commission to carry out negotiations pursuant to Art. 207 (3) 3 TFEU "in consultation" with the Trade Policy Committee was deliberately not extended to the Parliament.[26]

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[24] Woolcock, The potential impact of the Lisbon Treaty on European Union External Trade Policy, Swedish Institute for European Policy Studies (Sieps), European Policy Analysis 8-2008. Available at: http://www.sieps.se, page 5.

[25] Working groups of the Trade Policy Committee exist for the areas of steel, textiles and other industry sectors, services and investments and mutual recognition. See Council of the European Union, List of Council preparatory bodies, 12319/10, 20th July 2010, page 3.

[26] Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, p. 12, considers this limitation to be practically irrelevant as the Parliament would gain "significant" rights of approval. However, whether this assessment turns out to be correct remains to be seen.

The "masters of the treaties" intended to strengthen the Parliament in the common commercial policy but did not want to reach complete equality between the Council and the Parliament. As such, in the course of negotiations the Commission is only responsible to the Council in the form of the commercial policy commission and only obliged vis-a-vis the Council to consider its positions. The Parliament will only encounter this privilege of the Council, provided for by primary law, in the political sphere. The newly introduced obligation to consent to trade agreements offers leverage to this end.

Consent to International Agreements Pursuant to Art. 218 (6) TFEU

Since Art. 207 TFEU does not contain specific provisions for the involvement of the European Parliament in the conclusion of international agreements, pursuant to Art. 207 (3) 1 TFEU the general provisions of Art. 218 TFEU apply. In paragraph 6 this article provides for two forms of participation of the European Parliament in the conclusion of international agreements. The consent of the Parliament is required for a number of agreements or types of agreements expressly stipulated in Art. 218 (6) 2 a TFEU. The Lisbon Treaty partly continues the existing practice in this regard. For all types of agreements which are not expressly mentioned, the Parliament only needs to be consulted (Art. 218 (6) 2 b TFEU). In practice the most important case concerns agreements in areas in which the ordinary legislative procedure applies (Art. 218 (6) 2 a(v) TFEU). As mentioned above, the ordinary legislative procedure applies to measures which define the framework for implementing the common commercial policy. Therefore, the consent requirement also applies to international agreements in this area.

Extent of the Consent Requirement

It is not yet clear how far the consent requirement goes in the common commercial policy as it is limited to the area in which the ordinary legislative procedure applies.[27] In particular it is open to question whether also such agreements are included, which do not require implementation or transformation into law within the Union.[28] At least according to a strict interpretation, the ordinary legislative procedure cannot be applied to areas of common commercial policy which

[27] The Federal Constitutional Court refers to this as well in its Lisbon judgment, 2 BvE 2/08 et al., BVerfG, NJW 2009, 2267 (2290), paragraph 373 = BVerfGE 123, 267.

[28] Wouters/Coppens/De Meester, External Relations after the Lisbon Treaty, in: Griller/Ziller (eds.), *The Lisbon Treaty – EU Constitutionalism without a Constitutional Treaty*?, 2008, p. 143 et seq. (185).

exclusively concern the intergovernmental level, as these do not concern internal regulation within the Union. Accordingly, international agreements which do not need to be transformed are not covered by the consent requirement. This could become relevant in practice if, for example, a reform of the WTO Dispute Settlement Understanding (DSU) takes place not as part of a comprehensive agreement for the completion of multilateral trade negotiations, but instead in the form of a separate international treaty. Since the procedural rules of the DSU only apply on an intergovernmental level and do not require implementation in domestic or EU internal law, it could concern an area in which the ordinary legislative procedure does not apply.

However, this narrow interpretation of the term "area" probably does not correspond to the meaning and purpose of the standard. The extension of the parliamentary right of approval was one of the key aims of the reform process. It cannot be assumed that the provision of Art. 218 (6) 2 a(v) TFEU was intended to have a restrictive effect so that parliamentary approval should only be required when there is a strict parallelism of areas of international and EU internal regulation. Indeed the term "area" is to be understood to refer to a specific EU policy. As such it must be assumed that the entire "area" of the common commercial policy is to be considered. The ordinary legislative procedure applies to this, which means that corresponding international treaties require the consent of the parliament.

Evaluation from the Perspective of Democracy Theory

For the evaluation of the new consent requirement from a democracy theory perspective it must first of all be noted that the granting of a right of approval for international agreements in the context of the common commercial policy closes a gap in the democratic legitimation of commercial policy which has existed in Europe for several decades. It can, however, also be seen that the European Parliament has merely been granted the traditional parliamentary right to participate in international agreements, namely the right to consent to or reject them after the conclusion of the treaty. As stated above this does not involve any formal influence when it comes to the contents of the agreement. The possibilities open to the Parliament in the course of the ordinary legislative procedure for EU internal regulation do not exist for international agreements of the Union.

The constitutional context of the consent requirement provides the European Parliament with significantly greater room for manoeuvre than the parliaments of the Member States, which are all part of a parliamentary system of government. The relationship between the Commission and the Parliament is inherently different to the relationship between the government and the parliament in a parliamentary system of government. Despite the election of the Commission's president and the endorsement of the Commission by the Parliament (Art. 17 (7) EU Treaty), the commission is not reliant on a specific political majority in the Parliament. Conversely the majority of the Parliament does not view the Commission as "its" government. The European Parliament is therefore politically "freer" than the

parliaments of the Member States in exercising the right of approval. The threat of refusal to consent to an international agreement is therefore also not implausible. In fact the European Parliament has in the past on several occasions temporarily made use of its right to refuse consent, in particular in the case of association agreements, thereby being able to at least delay the entry into force of international agreements.[29] In respect of international agreements this constellation leads to the European Parliament being similar to United States Congress rather than the parliaments of the Member States.[30] Awareness of this is of considerable significance for the democratic legitimation of the common commercial policy. In practice when it comes to the parliamentary control over commercial policy it has been seen that only the US Congress can exercise practical and political control over the commercial policy of a member of the WTO.[31] This is due not least to the right of approval of international agreements, which can be exercised without the political restraints of government accountability.

First Practical Experience

Up until mid-2012 the EU concluded one international agreement in the area of commercial policy in which the parliamentary consent was necessary. Others will follow soon.[32]

Free Trade Agreements with Korea

The first international trade agreement ratified by the EU on the basis of the new provisions of the TFEU was the Free Trade Agreement with South Korea.[33] The EU-Korea FTA was initialled by both sides on 15 October 2009. The Council approved the FTA on 16 September 2010 and the Agreement was officially signed on 6 October 2010. The European Parliament gave its consent to the FTA on 17 February 2011 which has been provisionally applied since 1 July 2011. Prior to the signing of the agreement, the Parliament made it clear that it still desired changes

[29] Tomuschat, Art. 300 EC Treaty Rn. 40, in: von der Groeben/Schwarze (eds.), *Kommentar zum EU-/EG-Vertrag*, 6th Edition, 2003 with examples.

[30] Similarly Brok, Die neue Macht des Europäischen Parlaments nach "Lissabon" in Bereichen der gemeinsamen Handelspolitik, Integration 33 (2010) 3, p. 209 (218).

[31] On the role of the US congress see Shaffer, Parliamentary Oversight of WTO-Rule Making, JIEL 7 (2004) 3, page 629 et seq (635 et seq). See also the contributions in Jackson/Sykes (eds.), *Implementing the Uruguay Round*, 1997.

[32] European Commission, Overview of FTA and Other Negotiations, 25 July 2012, available at: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

[33] For an overview of the agreement see The EU-Korea Free Trade Agreement in practice, available at: http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc_148303.pdf.

to be made to the supporting measures for the use of trade defence instruments within the framework of the agreement. During the first reading in 2010, the parliament had, amongst other things, requested that the proposal for a regulation on the implementation of the bilateral safeguard clause of the free trade agreement should be extended to provide the Parliament with its own right to apply for the commencement of proceedings to impose defence measures.[34] A compromise was reached in February 2011 which requires the Commission to carefully consider any request from the EP for the commencement of such proceedings.[35]

Free Trade Agreement with Colombia and Peru

The next commercial policy agreement which the EP has to consent to is the Free Trade Agreement with Columbia and Peru. The negotiations on this were completed in May 2010 and the agreement was initialled in March 2011. On the 26th of June of 2012 the Agreement was signed.[36] In the meantime the parliamentary consent procedure commenced and on 30 May 2012 the Rapporteur Mário David recommended to his colleagues to consent to the agreement.[37] In this context it is noteworthy that the agreement includes provision on a human rights which are of great importance to the EP.[38]

Negotiations with the ASEAN Countries

Even before the entry into force of the Lisbon Treaty, but in anticipation of the resulting increased parliamentary rights, the European Parliament commented in part on on-going negotiations, at the same time implicitly referring to its right to (refuse) consent. Notable in this context is in particular the conditional declaration of support by the European Parliament for the free trade agreement between the EU and the ASEAN countries. In its resolution of 8th May 2008 the Parliament declared its support in principle for such an agreement, but at the same time put

[34] Proposal for a Regulation of the European Parliament and the Council for the implementation of the bilateral protection clause in the free trade agreement between the EU and Korea (KOM(2010) 0049 – C7-0025/2010 – 2010/0032(COD)), First reading of the Parliament on 7th September 2010, P7_TA(2010)0301.

[35] Bilateral safeguard clause in the EU-Korea Free Trade Agreement, OJ 2011, C 188 E/93.

[36] European Commission, Overview of FTA and Other Negotiations, 25 July 2012, available at: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

[37] Draft Recommendation on the proposal for a Council decision on the conclusion of the Trade Agreement between the European Union and Colombia and Peru (COM(2011)0569 – C7-0000/2012 – 2011/0249(NLE)).

[38] See Brok, Die neue Macht des Europäischen Parlaments nach "Lissabon" in Bereichen der gemeinsamen Handelspolitik, Integration 33 (2010) 3, p. 209 (221).

up a list of demands pertaining to the content of the agreement.[39] The European Parliament demanded that the agreement contains provisions for the ratification of the core ILO labour standards and measures for the protection of the rainforest. In its declaration, which was issued prior to the entry into force of the Lisbon Treaty, the European Parliament pointed to the parliamentary consent requirement. In doing so the Parliament established a clear connection between its political demands and its right of approval, even without explicitly threating to reject the agreement.

Meanwhile the negotiations with ASEAN as a group have been suspended. Since the end of 2009 the EU has only been negotiating with Singapore and since 2010 additionally with Malaysia on a bilateral level.[40] As such, several of the European Parliament's demands, in particular where these concern Myanmar, are unlikely to be of relevance currently. Nevertheless, the resolution of the Parliament on the negotiations with ASEAN is a good example of how the Parliament can attempt to already assert influence on the content of a potential agreement during the negotiations.

This example illustrates two things. Firstly, it can be assumed that the Commission will at the very least bring up the Parliament's demands during the negotiations. This is likely to be the case if only because a widening of demands from within the EU will increase the Commission's scope for negotiation. Apart from this the Commission will not want to run the risk of jeopardising the approval process just by rejecting the Parliament's demands outright. Secondly, presumably the pressure on Parliament to approve a potential treaty will grow the more of its demands are met. Politically it will at least be very difficult to reject an agreement for reasons which do not relate to demands the parliament made in a conditional declaration of support. Basically, the rejection of an agreement in which the Parliament has actively participated at the negotiations stage is most unlikely. If the political circumstances change considerably, in particular in the partner countries, it cannot, however, be ruled out that the Parliament will reconsider its consent or at least delay it.

Consequences for the Inter- and Intra-institutional Structure

The changes presented have an effect on both inter-institutional relations and relations between the various parliamentary institutions. It is undisputed that the poles in the triangular relationship between the Parliament, the Council and the

[39] Resolution of the European Parliament from 8th May 2008 on commercial and economic relations with the Association of Southeast Asian Nations (ASEAN) (2007/2265(INI)), Abl. 2009, C 271 E/38.

[40] European Commission, Overview of FTA and Other Negotiations, 25 July 2012, available at: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

Commission are shifting, whereby the Parliament's increase in competencies occurs almost certainly first and foremost to the detriment of the Council. The Commission did not lose any commercial policy responsibilities as a result of the Lisbon Treaty, but its position is weakened by the fact that it must share both domestic and external legislative power with the European Parliament. Just like in other fields, in this situation the Commission can attempt to form ad hoc strategic alliances with the Parliament, thereby further reducing the options open to the Council. This is, however, unlikely to be very noticeable in international negotiations as there the influence of the Council is in any case not as great as in the EU internal legislative procedure.

The treaty amendments also lead to an increase in importance of the Committee on International Trade (INTA). It is now a committee which is to be involved in legislative procedures. As already stated above, we will have to wait and see how the committee will react to the new challenges which go hand in hand with this. It is also likely that the European Parliament as a whole, and possibly in particular the INTA committee will gain significance on an international level. Comparisons with the US Congress lead to the presumption that the partner states of the EU will react to the increased significance of the Parliament and will possibly also directly contact individual MEPs on the INTA committee. In the same way it is conceivable that the committee will itself contact representatives of the partner states of the EU so as to contribute towards the policy-making process in the Parliament. In December 2010, for example, the committee met with the Chinese Ambassador to the EU for an informal exchange of views.[41]

Effects on the Common Commercial Policy

Against the background of the changes in the role and function of the European Parliament in the area of common commercial policy presented here, it is now possible to assess the effects of these changes.

Transparency

An initial aspect concerns the question of whether the parliamentarisation of the common commercial policy has also led to an increase in its transparency. In contrast to the Trade Policy Committee of the Council, the Committee on International Trade of the European Parliament meets in public—just as the plenary sessions of the Parliament are also public. In this way it becomes clear what

[41] Committee on International Trade, Minutes, Meeting of 1 and 2 December 2010, Agenda Item 30, INTA_PV(2010)1201_1.

positions the Parliament and the individual MEPs take on specific questions. As the committee is generally concerned with all commercial policy topics, even those which do not imply legislative measures, in this way an element of policy-making becomes apparent in the area of foreign trade. The result of this is an improved transparency of the common commercial policy. However, it is also apparent that the parliamentarisation does not lead to a situation where aspects which are kept secret by the other organs, in particular the Commission, become public through the discussions in the committee. Instead the Commission presents its report on the current status of the negotiations, which also contains political assessments of the negotiations, during so-called "in-camera sessions" of the committee to which the public have no access. The confidentiality provisions of the new inter-institutional framework agreement between the Commission and the Parliament already mentioned above are also intended to ensure this confidentiality. It is therefore hardly to be expected that the parliamentarisation of the commercial policy would, for example, lead to the publication of internal Commission documents. In fact the Parliament and the INTA committee have a considerable interest in maintaining the classification of information, as the Commission will otherwise not be very forthcoming with such information. As such it cannot be assumed that the parliamentarisation will contribute towards a general increase in the transparency of the common commercial policy.[42]

Democratic Legitimation

So as to assess the democratic legitimation of the common commercial policy it must first be appreciated that the introduction of the right of approval of the EP is to be viewed as "catch-up" parliamentarisation when compared with the competences of national parliaments. The Lisbon Treaty provided the European Parliament with the traditional parliamentary right of participation in the implementation of an international treaty that the parliaments of the Member States have had in part for centuries.[43] Against this background one could hold the view that the new rights of the European Parliament in the area of common commercial policy have not contributed significantly towards the democratisation of this policy area.

This view is strengthened by the fact that the broadening of the scope of the common commercial policy by the Lisbon Treaty will lead to a disempowerment

[42] Brok, Die neue Macht des Europäischen Parlaments nach "Lissabon" in Bereichen der gemeinsamen Handelspolitik, Integration 33 (2010) 3, p. 209 /219 et seq.) obviously sees this differently, treating democratic control and transparency as the same.

[43] Insofar as Brok, Die neue Macht des Europäischen Parlaments nach "Lissabon" in Bereichen der gemeinsamen Handelspolitik, Integration 33 (2010) 3, p. 209 (218), maintains that the Bundestag never possessed comparable rights, this is only correct in respect of the right to information pursuant to Art. 207 (3) TFEU and for the period of time since the common commercial policy falls exclusively within the responsibility of the EC/EU.

of the national parliaments. Whereas due to the separation of responsibilities in certain areas of trade in services these were still involved in the common commercial property, at least insofar as they corresponding agreements were concluded as mixed agreements under the Nice Treaty, all international trade agreements fall solely within the remit of the Union unless the contain non-trade provisions such as the EU-Peru/Colombia Agreement. As the German Federal Constitutional Court determined in its judgment on the Lisbon Treaty looking at Art. 59 (2) German Basic Law, this loss of competencies in the Member States leads to a removal of the active participation of the parliaments of the Member States.[44] This loss is not just of a formal nature,[45] but instead leads in practice to lesser parliamentary control over multilateral commercial agreements. Whether the remaining rights the German Bundestag has to obtain information through the federal government will alleviate this loss from a democratic perspective is doubtful.[46]

However, it must also be seen that with the right of approval the Lisbon Treaty has closed a significant gap in parliamentary participation and thereby removed a considerable deficit in the democratic legitimation of the common commercial policy. At the latest since the ECJ's Opinion 1/75[47] it has been recognised that the common commercial policy falls exclusively within the remit of the Community or the Union respectively. As such it was not only removed from the area of competence of the Member States; indeed the national parliaments could no longer vote on agreements which were exclusively within the scope of the common commercial policy.[48] The national parliaments were only involved in the conclusion of mixed agreements for which the Community/Union and the Member States were jointly responsible. The common commercial policy was no longer subject to the control of the national parliaments. The transfer of competence for commercial policy to the EC/EU did not, however, mean parliamentary participation and control on an EC/EU level. The Europeanisation of the common commercial policy instead resulted in its de-parliamentarisation and therefore also to a loss of democracy in this area. This erosion of competence and democratic legitimation has now

[44] BVerfG, 2 BvE 2/08 et al., BVerfG, NJW 2009, 2267 (2290), paragraph 374 = BVerfGE 123, 267. Cf. also Krajewski, External trade law and the Constitution Treaty: towards a federal and more democratic common commercial policy? CML Rev. 42 (2005) 1, page 91 et seq (126) and Bungenberg, Außenbeziehungen und Außenhandelspolitik, EuR 2009 Supplement 1, page 195 fet seq (211).

[45] However Woolcock, The potential impact of the Lisbon Treaty on European Union External Trade Policy, Swedish Institute for European Policy Studies (Sieps), European Policy Analysis 8-2008, available at: http://www.sieps.se, page 5, states "On paper this looks like a loss of parliamentary control".

[46] The Federal Constitutional Court attributes considerable importance to this right to information. BVerfG, 2 BvE 2/08 et al., NJW 2009, 2267 (2290), paragraph 375 = BVerfGE 123, 267, does not, however, comment on the practical-political effects of this right.

[47] ECJ, Opinion 1/75, *Local Costs*, [1975] ECR, 1355.

[48] Against this background it is also surprising that the Federal Court of Justice has dealt with the common commercial policy at all, this was an area in which the Bundestag and the Federal Council has comparatively little influence in any case.

been eliminated: the entire area of multilateral commercial policy is exclusively the competence of the EU, which, as shown, has led to a complete withdrawal of the national parliaments from this area. However, at the same time the common commercial policy is subject to the control and the right of approval of the European Parliament.

Further it can be seen that the European Parliament's right of approval is exercised against a different political-parliamentary background than the right of approval of a member state's parliament. Since all EU Member States have parliamentary systems of government, rejections of international treaties on the member state level can practically be ruled out. The rejection of an agreement which has been negotiated by a government would amount to a vote of no confidence. The European Parliament does not find itself in this "straitjacket", which is why its right of approval is probably practically more significant than the rights of approval of the national parliaments. Finally we must remember that not only the right of approval but also the right to information was granted to the Parliament in Art. 207 (3) TFEU.[49] Comparable rights are seldom found in the constitutional frameworks of the Member States.[50]

If we compare the loss of the parliamentary participation of the national parliaments to the European Parliament's acquisition of greater possibilities to assert its influence, it is difficult to come to a conclusive result. At least in the area of common commercial policy the Lisbon Treaty has not on the whole led to a further de-parliamentarisation of this area. Due to the structurally different political context in which the European Parliament exercises its participation rights, it can instead be assumed that the common commercial policy will see a greater parliamentarisation as a result of the Lisbon Treaty.

The development of the level of parliamentarisation is illustrated—greatly simplified—in Fig. 1.[51] The illustration shows on the one hand that overall the parliamentarisation of the common commercial policy has increased, but that in this policy area the participation of the national parliaments and the European Parliament respectively exists to a different extent and can, or could therefore contribute to a different extent towards parliamentarisation. In future the precise extent of parliamentarisation of the common commercial policy will, however, decisively depend on how the Parliament utilizes the new rights in political discourse with the Commission and the Council.

[49] On this see "Reporting in accordance with Art. 207 (3) TFEU" above.

[50] On parliamentary rights of participaton from a comparative law perspective, see Abbott/Riesenfeld (eds.), *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study*, 1994.

[51] In the diagram 1993/1994 is taken as a turning point because the Maastricht Treaty granted the European Parliament a right of approval for certain agreements, and because with the extension of multilateral commercial policy to the areas of services and intellectual property upon completion of the Uruguay Round central areas of commercial policy fell within the shared competence enabling Member States to ratify multilateral and regional trade agreements which covered services and intellectual property.

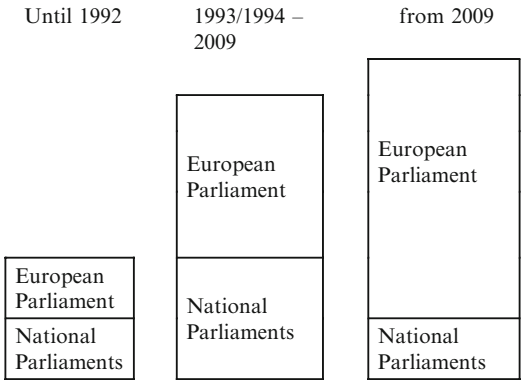

Fig. 1 Development of the parliamentarisation of European commercial policy

Politicisation

The last-mentioned considerations lead on to the question of whether the parliamentarisation of the common commercial policy can also contribute towards its politicisation.[52] We must first of all remember that belonging to the Union's foreign policy, in accordance with Art. 205 TFEU the common commercial policy is subject to the general objectives of Art. 21 EU Treaty and is as such no longer "merely" oriented towards the aims of liberalisation of trade and investments.[53] This objective, which amongst other things includes the protection of human rights, sustainable development and environmental protection, corresponds to demands made of the common commercial policy over and over again in the past (also) in the European Parliament. It can therefore be assumed that the Parliament will utilise the new normative orientation of the common commercial policy and will formulate demands which deviate from traditional, rather trade-liberalising expectations.[54] The Committee on International Trade has been dealing for some time with the possibility of entrenching corporate social responsibility (CSR) in international trade agreements and also with the question of incorporating human rights and social and environmental standards in such agreements.[55] It can be presumed that

[52] Similarly Brok, Die neue Macht des Europäischen Parlaments nach "Lissabon" in Bereichen der gemeinsamen Handelspolitik, Integration 33 (2010) 3, p. 209 (211).

[53] On this see the contribution by Vedder, Linkage of the Common Commercial Policy to the General Objectives for the Union's external Action, in this volume. See also Krajewski, The Reform of the Common Commercial Policy: coherent and democratic?, in: Biondi/Eeckhout/Ripley (eds.), *EU Law after Lisbon*, 2012, p. 292-311.

[54] Similarly Bungenberg, Außenbeziehungen und Außenhandelspolitik, EuR 2009 Supplement 1, page 195 fet seq (213).

[55] Committee of International Trade, draft of a report on the social responsibility of companies in international commercial agreements (2009/2201(INI)), 14.9.2010, Rapporteur: Harlem Désir, as well as a draft of a report on human rights, social and environmental norms in international commercial agreements (2009/2219(INI)), Rapporteur: Tokia Saïfi, 9.9.2010.

by doing so the intention is to develop parliamentary standards for future European commercial policy.

The increase in the competence of the European Parliament in the legislative area of the common commercial policy does, however, also mean that the day-to-day work of the Parliament and in particular its Committee on International Trade will be characterised more than ever before by its dealing with the core commercial policy topics of import and export policy and trade defence measures. In addition, the work of the committee will also be increasingly subjected to votes on various legislative measures.

Finally, it can be assumed that in future, besides general political issues, the European Parliament will more strongly articulate industry policy and partly even protectionist interests. In the above-mentioned declaration on the Free Trade Agreement between the EU and Korea, the Parliament particularly had an eye on the car industry and requested that the Commission monitors this sector as there was a danger that it was subject to strong competition.[56] It cannot be ruled out that potentially protectionist intentions are the underlying reason for this request. Against this background the Parliament and the INTA Committee are likely to increasingly be the target of lobbyist activities.[57]

Summary: Three Theses on Common Commercial Policy Following Lisbon

The result of what has been reflected on here can be summed up in three theses:

1. The Lisbon Treaty has led to a politicisation and plurality of goals of the common commercial policy. As the "most political" organ of the European Union, the European Parliament will use this change and strengthen it further. This politicisation can also lead to a better visibility of the common commercial policy in general European political discourse.
2. The common commercial policy has not on the whole become more transparent through the Lisbon Treaty. The shaping of political opinion in the European Parliament does for the most part take place in a transparent way, but the extending of the European Parliament's rights has not led to the policy making in the departments of the Council and the Commission being better understandable publicly.
3. The Lisbon Treaty has resulted in a considerable expansion of the rights of the European Parliament whilst at the same time marginalising the national parliaments. The European Parliament's new rights reach the constitutional

[56] Press release No. 20100621IPR76426 from 23.6.2010, "Green light from Trade Committee for safeguard clause in EU-South Korea trade accord".

[57] Brok, Die neue Macht des Europäischen Parlaments nach "Lissabon" in Bereichen der gemeinsamen Handelspolitik, Integration 33 (2010) 3, p. 209 (221).

level of parliamentary participation in international agreements and national regulation that can be considered to be the standard for parliamentary-democratic systems. The participation rights of the European Parliament do not, however, go beyond this standard. Nevertheless the European Parliament can exercise its rights in a different political context, which is not possible in the nation states. It can therefore be concluded that the Lisbon Treaty will on the whole lead to a greater parliamentarisation of the common commercial policy, thereby also reducing the democracy deficit in this policy area.

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