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The role of the EP in shaping the EU's trade policy after the entry into force of the Treaty of Lisbon

Authors: Marika ARMANOVIČA
Roberto BENDINI

Abstract

In the few years that have passed since the Treaty of Lisbon amplified the European Parliament's authority, the institution has reshaped the EU's trade policy – a domain that has become the exclusive competence of the EU. Parliament has not, as some feared it would, compromised the Union's technical approach. Rather, it has given the EU's Common Commercial Policy (CCP) democratic legitimacy and emphasised human rights and environmental concerns. While the Treaty of Lisbon made this change possible, it did not make it inevitable; Parliament has exercised creativity in interpreting its co-legislative powers and modelling a significant role for itself. As the fifth anniversary in December 2014 of the entry of the Treaty of Lisbon approaches, Parliament is further consolidating its powers of oversight and decision. The moment is ripe to survey the lessons of the past four-and-a-half years and to buttress the institution for the challenges to come.

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AUTHORS:

Marika ARMANOVIČA and Roberto BENDINI

Directorate-General for External Policies of the Union
Policy Department
WIB 06 M 091
rue Wiertz 60
B-1047 Brussels

Editorial Assistant: Jakub PRZETACZNIK

CONTACT:

Feedback of all kinds is welcome. Please write to:
marika.armanovica@europarl.europa.eu.

To obtain a paper copy, please send a request by email to:
poldep-expo@europarl.europa.eu.

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1 Introduction

The Treaty of Lisbon offered a window of opportunity for establishing the legitimacy of the EU's trade policy.

For years after it was created, the EU's Common Commercial Policy (CCP) was largely driven by the Commission and the Council. Parliament's role in defining the EU's trade policy was very limited. The situation was changed radically by the entry into force of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community[1] in 2009. The Treaty of Lisbon entrusted policymaking in the field of trade to Parliament, aligning its co-legislative powers with those of the Council and enhancing its say on international trade agreements. In other words, the Treaty created preconditions for filling the democratic gap in the CCP that had existed for years.

These new powers were met with both expectations and concerns.

Some feared that a greater role for Parliament would compromise the 'expert' nature of trade policy.

International trade has traditionally been reserved to a realm of trade experts, and this would no longer be the case[2]. Therefore some scholars anticipated the 'politicisation' of trade policy, its dilution with 'non-trade' aspects and less efficient policymaking. There were concerns that CCP would become even less democratic, given that the increased workload would not be supported by adequate expertise or institutional memory and would therefore result in 'fast-track' approaches, i.e. approvals without thorough consideration.

The treaty changes alone did not guarantee greater accountability or coherence for the CCP. Much depended on how Parliament would interpret the Treaty and put its new powers into practice.

While many significant dossiers aimed at adapting EU trade policy to new global challenges are currently under consideration by Parliament, it is too early to predict the outcomes thereof. However, it is possible to observe certain trends for the period between 2009 and 2014. Firstly, as expected, Parliament has attached great importance to non-traditional trade-related issues such as human rights, the environment, governance and levels of development. Secondly, Parliament has been creative in interpreting its new competences, in particular by making its power to 'consent' to international agreements credible and effective. Thirdly, trade policy has been increasingly brought within the public sphere, e.g. via open debates in Parliament and through the interaction of Members of Parliament (MEPs) with their constituents and civil society. However, this interaction has taken place without modifying the rather 'technocratic' character of trade policy in general and on the basis of a restricted dissemination of the content of trade negotiations.

[1] OJ C 306, 17.12.2007, p.1.
[2] Laura Richardson, 'The Post-Lisbon Role of the European Parliament in the EU's Common Commercial Policy: Implications for Bilateral Trade Negotiations', College of Europe, Department of EU International Relations and Diplomacy Studies. Diplomacy Paper 5/2012.

2 The Treaty of Lisbon: what has changed?

The Treaty of Lisbon (ToL) changed Parliament's role in the EU's trade policy in two main ways: by enhancing Parliament's say on the bilateral and international trade agreements negotiated by the EU; and by giving Parliament fully fledged legislative power on the EU's own trade legislation, i.e., on issues such as trade preferences for developing countries, improving access to third-country markets, and protection against unfair trade practices (trade defence instruments)[3]. Furthermore, by extending the scope of the CCP (which is an exclusive EU competence) to include also foreign direct investment (FDI), the ToL also enlarged the scope of Parliament's activities to include this area. The Union's competence on foreign investment however remains at least for time being controversial, given that in the Council's interpretation the agreements on investment protection remain in the shared competence.

Adoption of 'domestic' trade law

With the entry into force of the ToL, Parliament became co-legislator on trade policy together with the Council (representing the Member States).

Article 207(2) of the Treaty on the Functioning of the European Union (TFEU[4]) lays down Parliament's function as co-legislator in the adoption of the EU's own trade policy measures and the legislation implementing the EU's international commitments, for instance regulations on safeguards accompanying bilateral trade agreements. Parliament shares this power with the Council.

However, the ToL preserved the Commission's key role in implementing technical aspects of commercial policy. For instance, scrutiny by Parliament of each detail of trade agreements would lead to bottlenecks, and Article 218(7) TFEU therefore provides for the delegation of such powers to the Commission if granted by the Council. Parliament now decides on future legislation governing trade defence instruments or TDIs (anti-dumping measures, safeguard measures, countervailing duties) that are intended to shield domestic industries from unfair trade practices. However, Article 291(2) entitles the Commission to maintain its key expert role in the implementation of such legislation, specifically in determining the extent of injury, the level of dumping and the criterion of EU interest. Together, Parliament and the Council lay down the general rules on scrutiny of the Commission's powers.

Negotiation of international agreements

The codified right to be informed may strengthen Parliament's influence on negotiations.

Under the Treaty of Lisbon, it is now specified that the Commission must inform both Parliament and the ad hoc committee of the Council (the Trade Policy Committee) on the progress of negotiations (Article 207(3) TFEU). This right not only provides information and time for considering the

[3] See Stephen Woolcock, The Treaty of Lisbon and the European Union as an actor in international trade, ECIPE Working Paper No. 01/2010
[4] OJ C 306, 17.12.2007, p. 1.

potential rejection of an agreement, but also increases the room for manoeuvre in terms of influencing the course of negotiations. The greater the capacity to monitor, the greater the power of a legislature to establish the conditions under which consent is to be granted.

The situation did not change overnight with the entry into force of the ToL. In anticipation of the constitutional treaty – which eventually did not see the light of day – Parliament had already negotiated the right to be informed on the progress made on trade agreements at all stages of preparation and negotiation. This right had already been made binding[5], and following Lisbon it is now codified in the Treaty.

The Council plays a greater role in shaping the negotiations given that it adopts the negotiating directives and assists the Commission in negotiations (Article 207(3) TFEU). However, Parliament has taken a number of steps aimed at increasing its competences; inter alia by ensuring that the Commission may grant MEPs observer status in international negotiations and in certain processes established under multilateral international agreements[6] (see section on Interpreting the Treaty).

Power of consent

Parliament's power of consent alone may not be sufficient to rebalance powers between the EP and the Member States.

Article 218(6) TFEU lays down the general conditions for Parliament's consent for concluding international agreements. Parliament's approval is needed for agreements that cover aspects to which the ordinary legislative procedure (OLP) applies. In practice, that means that almost all[7] trade agreements are subject to Parliament's approval. Under this procedure, the Council authorises the opening of negotiations and adopts negotiating directives for the Commission, which in turn negotiates the agreement. At the end of the negotiations, the Council can adopt a decision to conclude the agreement only after Parliament has given its consent by a simple majority (TFEU 208(6)). The power of consent alone may, however, not be sufficient to rebalance powers in between the EP and the Council. The potential for change lay, rather, in the ways in which Parliament would interpret and implement its new powers.

Increased workload

Although statistics do not serve as an accurate measure of workload, they do provide an indication of increases therein. During the 2004–2009 legislative period, Parliament's Committee on International Trade (INTA) dealt with only 2 codecision procedures, 21 consultation procedures and 18 assents to international agreements. To compare, between December 2009 and March 2014 INTA dealt with 53 ordinary legislative procedures

[5] Parliament-Commission interinstitutional agreement of 2004, OJ L 261. 6.8.2004., p. 4.
[6] Revised EP-Commission Framework Agreement, 20.10.2012, OEIL
[7] It can be argued that Parliament's consent would not apply to agreements which do not need to be transposed into EU law. See Krajewski, Markus, 'The Reform of the Common Commercial Policy' (30 December 2010), in Biondi, A. and Eeckhout, P. (eds.), *European Union Law after the Treaty of Lisbon*. Forthcoming. Available at: SSRN

(corresponding to the former codecision procedure) and 73 consent procedures. If one includes non-binding reports and resolutions, the number of files dealt with by INTA totalled 69 for the period 2004-2009, while in the period 2009-2014 it dealt with 200. In order to cope with the increase in workload, the INTA secretariat doubled its staff.

Relations with other EU institutions: asserting Parliament's place

Parliament has interpreted its new competences broadly.

Parliament has been rather assertive in construing both its power of consent and its right to be informed. These powers have been expanded in the implementing arrangement with the Commission, thereby creating the potential to influence both the definition of negotiating objectives and the course of negotiations.

This is represented in a binding agreement between the EP and the Commission.

The relationship between the institutions had already started to evolve during the 2004-2009 legislative term. Parliament acquired a number of new rights when it negotiated the Interinstitutional Framework Agreement between itself and the Commission[8]. These rights were renegotiated following the entry into force of the Treaty of Lisbon[9].

The Commission has to take due account of Parliament's comments throughout trade negotiations.

This Interinstitutional agreement requires the Commission to inform Parliament on all stages of negotiations, including preparatory negotiations and those on the 'definition of negotiating directives', and to 'take due account of Parliament's comments throughout negotiations' (Annex 3, point 3). It also provides that the Commission can grant observer status to MEPs in negotiations on international agreements and facilitate access as observers for 'Members of the European Parliament forming part of Union delegations to meetings of bodies set up by multilateral international agreements involving the Union' (Articles 25 and 26). Parliament already monitors multilateral platforms – notably the World Trade Organisation (WTO) – and plays a key role in enforcing their parliamentary dimension. At the same time, Parliament is committed to respect for the status of restricted and classified information. An agreement has been concluded between Parliament and the Council on the matter[10].

3 The Common Commercial Policy as part of the EU's external action

The requirement for coherence between the EU's trade and foreign policies echoes many of

A further important change brought by the ToL is the formal submission of the CCP to the general objectives of the EU's external action. The Treaty stipulates that 'the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action' (Article 207(1) TFEU). This implies that the CCP should be consistent with the principles which the EU strives to advance in the wider world:

[8] OJ C 117E. 18.5.2006, pp. 21-23
[9] OJ L 304, 20.11.2010, pp. 47-62
[10] Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information, OJ C 95, 1.4.2014, pp. 1–7.

Parliaments' prerogatives, but does not provide answers to numerous dilemmas.

democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, and the principles of equality and solidarity (Article 21 TEU). The policy objectives include support for sustainable economic, social and environmental development, the eradication of poverty and good governance.

Article 207 of the Treaty of Lisbon mandates that 'the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'. It is still not clear at this point in time what will be the real scope of this rule. However, the proposals for granting Autonomous Trade Preference to Pakistan (and lately those granting privileged market access to Ukraine) seem to indicate that the Common Commercial Policy (CCP) will increasingly be influenced by political (or in the case at stake, humanitarian and security) considerations. The post-Lisbon reshaping of EU trade policy and its links with 'the principles and objectives of the EU's external action' are of utmost importance for the future role of the European Parliament, in this area which was in the past under the exclusive remit of the Council and Commission.

EU trade policy may help meet the policy objectives of the Europe 2020 strategy and contribute to the creation of a coherent industrial policy in the EU, or else be used as an incentive for foreign external initiatives. But under the current economic conditions the CCP cannot efficiently promote all these objectives at the same time. It is part of Parliament's new powers to decide how to prioritise the use of the now residual 'soft power' that was formerly key to EU foreign policy. In the case of Pakistan the EP accepted the deal proposed by the Commission and backed by the Council, but there is no guarantee that the same will occur in future cases.

4 Using the new powers: from preference for multilateral order to the gradual acceptance of bilateralism

Parliament has always been an active advocate of multilateral solutions in the field of trade, but has now had to accept new realities.

Parliament has always strongly supported multilateral trade solutions based on the role of the WTO at the centre of the world trading system. Multilateralism, rather than a web of bilateral or regional agreements, was seen as a means to ensure a level playing field and inclusiveness. Such a view has not always been shared by all. Furthermore, the progressive transformation of the world into a multipolar trading system prompted the EU to revise its traditional approach to foreign trade.

The WTO Ministerial Conference of held in December 2013 in Bali was seen as the last chance to revive the Doha Round and hence the credibility of the multilateral trading order. MEPs used the Steering Committee[11] of the WTO Parliamentary Conference to push the 'Bali package', which included

[11] The WTO Parliamentary Conference, driven by the EP and the Interparliamentary Union, was created with the aim of making the WTO more transparent and accountable to the electorates of WTO members. Its Steering Committee represents the parliaments of different regions of the world and usually meets twice a year.

arrangements for trade facilitation and various provisions relating to agriculture and to development[12]. The deal was eventually adopted and offered some hope of resuscitating the Doha Round of WTO negotiations. However, already years before Parliament had accepted that the EU would lose if it did not catch up with its competitors, which have moved far ahead in terms of negotiating their preferential agreements[13].

Parliament's new approach to preferential agreements

The stalemate in the Doha Development Round (DDA) prompted the EU to promote a new strategy based on the launch of FTA negotiations with industrialised and emerging countries. The negotiations for an EU-South Korea Free Trade Agreement became the first test for the new EU bilateral FTA policy and the first step towards the so-called 'second generation' model of FTA[14]. The size and rapid growth of the Korean economy made the country a suitable candidate for an agreement that would serve as a blueprint for all future bilateral and plurilateral trade agreements negotiated by the EU. It was therefore of the utmost importance for Parliament to have its prerogatives included in the text of the agreement.

According to Parliament, bilateral and regional agreements were worth considering if they could improve the EU's competitiveness in strong markets, and if they were ambitious.

Previously, Parliament had held that bilateral and regional FTAs were a sub-optimal solution when compared to WTO talks, on the grounds that such agreements could lead to trade diversion, contribute to the introduction of discrimination in international trade relations, and reduce the level of engagement of participating countries in the WTO. At the same time, Parliament recognised that new bilateral or regional free trade initiatives could be an alternative, but should only be launched only where necessary so as to improve the competitive position of EU exporters on crucial foreign markets, especially in cases where other major trading powers are negotiating such agreements. Parliament had also called on the Commission to take into account the risks of excluding the weaker trading partners from the benefits of international trade, and asked for a greater emphasis on the international recognition of minimum environmental and social standards[15].

Parliament also called for greater emphasis on the international recognition of minimum environmental and social standards.

Negotiations began in Seoul in May 2007. Throughout the negotiations, Parliament was kept regularly informed of the progress of the talks via its Committee on International Trade (INTA).

Further, in its resolution of May 2007 on trade and economic relations with South Korea Parliament demanded that the FTA with Korea take into account the four so-called Singapore Issues (trade and investment, trade and competition policy, transparency in government procurement, and

Parliament has always given priority to a

[12]See European Parliament resolution of 21 November 2013 on the state of play of the Doha Development Agenda (2013/2740(RSP) - TA(2013)0511).
[13] See European Parliament resolution of 27 September 2011 on a New Trade Policy for Europe under the Europe 2020 Strategy, OJ C 56E , 26.2.2013, pp. 87–98.
[14] I.e. including trade in services, investment, intellectual property protection and a number of trade-related issues (, competition, social issues, etc.)
[15] European Parliament resolution of 22 May 2007 on Global Europe - external aspects of competitiveness (2006/2292(INI)), TA(2008)0209

multilateral approach to trade regulation.

trade facilitation). Parliament also warned the Commission that the mutually beneficial content of the agreement was far more important than a rushed timetable[16].

The agreement was initialled in Brussels on 15 October 2009, after almost two and a half years of talks. The date of the provisional application was set at 1 July 2011, i.e. only after Parliament had agreed to the FTA and the regulation of the European Parliament and of the Council implementing the bilateral safeguard clause of the EU-South Korea FTA had been put in place.

Parliament called for a greater emphasis on the international recognition of minimum environmental and social standards in FTAs.

Parliament also introduced a number of amendments to the Bilateral Safeguard Clause, which, unlike the FTA itself, was adopted under the ordinary legislative procedure. These amendments allowed Parliament, as well as industry representatives, to ask the Commission to launch an investigation. Parliament also modified the definition of products subject to the safeguard clause, paying particular attention to the automotive industry.

The agreement's provisional entry into force following Parliament's consent represented a new step for Parliament's role in the EU's trade policy. While the agreement of Parliament was not formally required for the provisional entry into force of the FTA, neither the Commission nor the Council wished to run the risk of having the deal implemented only to be rejected later by the legislative body. Requesting the green light from Parliament for the EU-Korea FTA set a clear precedent and indicated that in the field of international trade Parliament had gained substantial powers, thus altering the established balance of powers between the EU institutions.

In the FTA with South Korea, most of Parliament's requests were met. This may be partly attributable to a relatively limited number of conflicting interests between both negotiators and Parliament.

That said, it remains difficult to measure the extent of Parliament's actual role in shaping the content of the negotiations with South Korea. When the negotiations opened Parliament was not in a suitable position to adopt or reject trade deals as its role in trade policy was limited. Nevertheless, the Commission took into consideration most of its recommendations. This was due to two factors. Firstly, the aims of the Commission and Parliament largely coincided, which made it simpler to establish a blueprint for new FTAs accommodating most of Parliament's wishes. Secondly, it was relatively easy to negotiate the deal with South Korea: Seoul did not oppose the inclusion of 'non-trade' clauses, but instead pushed for a standard that had no precedent in previous EU proceedings. Under such conditions, it was easier to meet Parliament's requests. However, this also involved the risk of having high negotiating standards that were unlikely to please all trading partners (e.g. India and certain countries of the Association of Southeast Asian Nations (ASEAN)).

Another landmark case is Japan. The FTA negotiations with Japan were the first of their kind to be initiated following the entry into force of the Treaty

[16] European Parliament resolution of 13 December 2007 on trade and economic relations with Korea, T6-0629/2007 (2007/2186(INI)).

of Lisbon. Parliament had already been engaged in this process before the negotiations began, i.e. at the stage when the Commission was still exploring the feasibility and scope of the agreement.

Traditionally, Japan, like the EU, has favoured a multilateral approach to governing global trade, but it engaged in the FTA process relatively late. Pushed by a dramatic change in conditions of international competition, Japan revised its trade strategy and started to push for comprehensive deals with both the US and the EU. The reaction of the EU and European business to Tokyo's new approaches was, however, rather lukewarm. There was suspicion within several sectors regarding Japan's commitment to ensuring a level playing field, in particular as regards non-tariff measures, which are difficult to measure but easy to introduce. These concerns were later reflected in Parliament's positions.

Parliament requested that negotiations with Japan should not start until it had adopted its position.

On 25 October 2012, Parliament adopted a resolution on Japan in which it welcomed the imminent launch of negotiations, but also insisted that Japan make significant commitments to removing non-tariff barriers (including those in public procurement) before beginning negotiations. Furthermore, MEPs requested that the negotiating mandate include a compulsory review within one year of the negotiations being launched, in order to assess whether or not Japan had delivered clear results in eliminating non-tariff barriers.

Parliament's requests to review Japan's progress in eliminating non-tariff measures were taken into consideration.

The Council adopted the negotiating directives (mandate) in November 2012, after Parliament had given the green light to FTA talks. It appears that the possibility that Parliament might adopt a resolution – albeit non-binding – rejecting the launch of negotiations or containing demands that went against the actual mandate prompted the Council to wait for Parliament's views before endorsing the Commission's mandate. Parliament's biggest concerns were taken into consideration, in particular as regards the review of the negotiations one year following their launch. The aim of the review was to assess whether or not Japan had delivered clear results in eliminating non-tariff measures as agreed in the scoping exercise, in order to decide whether to continue the talks or to suspend them.

Parliament took a similar approach when adopting positions on the imminent launch of investment negotiations with China and on the trade and investment negotiations with the US (TTIP).

4.1 'Non trade' issues: human rights, social and environmental concerns

Human rights and social and environmental concerns increasingly permeate trade policies, not least owing to greater access to information

and empowerment of civil society and individuals through information technologies[17].

Parliament's action has traditionally been characterised by a strong emphasis on human rights. The EP's Sakharov Prize, established in 1988, rewards exceptional individuals who dedicate their lives to fighting intolerance, fanaticism and oppression. Parliament also has a Subcommittee on Human Rights which is responsible for monitoring and defending human rights in the world. The Charter of Fundamental Rights of the European Union, which dates from 2000, became legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009[18].

Parliament has always been an extremely active advocate of human rights.

Equally, Parliament has promoted respect for social rights and an environment-friendly approach to trade and to the economy in general.

Parliament's stance on these non-traditional trade issues was formally reinforced in the Treaty of Lisbon, which implied that trade policy must comply with the EU's founding principles. After having gained extensive powers on international trade, it was also natural that Parliament should recall that trade (and the CCP) is not an end in itself and should take into account non-traditional trade issues such as human rights, the environment and governance.

At the same time, the EP has to face a conundrum. Generally, the inclusion of human rights, social rights and environmental protection clauses in bilateral trade agreements depends on the level of development and will of the partner with whom the EU is negotiating a deal. South Korea, for instance, had no problems in agreeing on the inclusion of 'non-trade issues' in the EU-Korea FTA, but the same cannot be said of other trading partners - e.g. India, certain countries of the Association of Southeast Asian Nations (ASEAN), or China (should the EU accept to open the FTA talks proposed by Beijing).

The inclusion of human rights, social rights and environmental protection clauses faces resistance, including among important EU partners.

In other words, high negotiating standards are unlikely to please all trading partners. The view is often put forward by some ACP countries that inclusion of such clauses in international commercial treaties appears as a case of blatant EU interference in countries' domestic affairs, rather than as a genuinely disinterested effort to provide a global platform for the defence of basic rights.

The EU (and the EP) has to make a difficult choice. If it decides to uncompromisingly defend European values and principles worldwide, it may risk losing important commercial positions and lagging behind other trading powers competing on the same third-country markets.

On the other hand, the EU cannot betray its own fundamental principles,

[17] Susan Ariel Aaronson, Chapter 21: Human Rights, In: Preferential trade agreement policies for development: a handbook, Eds Chauffour, Jean-Pierre; Maur, Jean-Christophe, Washington, D.C.: World Bank, 2011

[18] The Charter that contains rights and freedoms under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice.

and has to respond to a vocal and active civil society network. The growing role of public opinion in the EU and globally has simply made it impossible to overrule or simply ignore this constant quest for a better and fairer world.

The first legislative term after the entry into force of the ToL has also marked a break with a past in which the EP had no real legislative powers and its resolutions represented a source of inspiration rather than a binding instruction for EU negotiations. Three emblematic cases illustrate Parliament's achievements in this field.

Foreign direct investment and the 'right to regulate'

Prior to the Treaty of Lisbon the EU had mixed competences in the area of foreign direct investment (FDI). Bilateral investment treaties (BITs) were concluded between individual Member States and third countries on which Parliament had virtually no say. The Treaty of Lisbon made FDI an exclusive competence of the EU (Article 207 TFEU).

The inclusion of human rights, social rights and environmental protection clauses faces resistance, including amongst important EU's partners.

On 6 April 2011, Parliament adopted a resolution establishing a comprehensive overview of the main elements of the policy. In particular, Parliament invited the Commission to include in all future agreements social and environmental standards and specific clauses on the right of parties to the agreement to regulate in areas ranging from the protection of national security to the environment and workers' rights. The resolution also requested that decisions be made on a case-by-case basis for sectors not covered by future agreements, including, for example, sensitive sectors such as culture, education, and public health. The 'right to regulate' and FDI rules (especially on investor-to- state dispute settlement) have also become one of the key public concerns in the context of the TTIP negotiations[19].

ACTA: against counterfeiting or civil liberties?

Before the establishment of its Committee on International Trade (INTA) in 2004, Parliament had little scope to deal with the protection of IPRs. The first opportunity to do so came when the EU decided to join negotiations for an Anti-Counterfeiting Trade Agreement (ACTA). The ACTA was conceived as a 'WTO-plus' deal which, building on the existing rules on trade-related aspects of intellectual property rights (TRIPS), would strengthen the international enforcement of IPRs for both material goods and goods sold on the internet. However, as negotiations started, a number of pressure groups started suggesting that the ACTA could result in a significant reduction in the area of the right to privacy and civil liberties, in particular on the internet.

Over the time before the agreement was presented to Parliament under the consent procedure, opposition to the ACTA grew steadily. Despite all efforts, the Commission was unable to convince the majority of MEPs that

[19] The issue is likely to resurface in the context of finalising and deliberating the EU-Canada Economic and Trade Agreement and the EU-Singapore FTA, both of which include investment and any future investment accords.

the new agreement was needed to further enforce IPRs, or that it in no way breached the EU's established set of rules or undermined civil liberties or the right to privacy. As a result, at the end of an extremely intense debate on 4 July 2012, Parliament declined to consent to the conclusion of the ACTA. This was the first time that Parliament had exercised the power conferred to it under the Treaty of Lisbon to reject an international trade agreement. The negative vote meant that neither the EU nor its individual Member States could accede to the agreement.

Welcomed by NGOs and civil society as representing progress in making the CCP more democratic, the rejection of the ACTA had a significant impact on the shaping of the EU's external trade policies. On the one hand, it prompted the Commission to streamline and improve access to information on international trade agreements, and it also demonstrated that Parliament's role in the EU's trade policy was not to be underestimated and that the EU could adopt a less technocratic approach to trade matters. On the other hand, legal analysis carried out by Parliament's Legal Service on the compatibility of the ACTA with the Treaties showed that most of the complaints by opponents were not entirely accurate. The analysis also pointed to the fact that the real issue was not the ratification of the agreement, which contained general provisions, but rather the way in which it would be implemented under EU law.

In the case of ACTA, Parliament did succeed in making its approval conditional on certain provisions

From this perspective, Parliament did not take the opportunity to make its approval conditional on certain provisions and then ensure that the agreement would be transposed into EU law without breaching basic rights.

Human rights in FTAs (the case of Colombia and Peru)

The stakes in negotiating a trade agreement (TA) with Colombia and Peru were different from those in negotiating FTAs with developed economies. Besides liberalising markets, the aim of negotiating a TA with the two Andean countries was also to provide an incentive for reforms in Colombia and Peru so as to integrate both countries into the global economy and enhance their economic growth, while also protecting investors' interests and intellectual property rights. In giving its consent to the agreement, Parliament adopted a rather innovative approach.

When examining the FTA with Columbia and Peru, Parliament successfully imposed its conditions for consent.

Negotiations with Colombia and Peru started in 2007, were concluded in March 2010, and were applied on a provisional basis. When the agreement was submitted to Parliament, many civil society groups drew the attention of MEPs to the existence of abuses against trade union members, in particular as regards the high rate of murders of labour activists in Colombia. Many MEPs expressed concerns over human, labour and environmental rights, so that it became likely that the majority would reject the agreement. The agreement did, in fact, include clauses on civil society and corporate social responsibility. However, the signing of an agreement in full knowledge of the fact that important rights were being violated was unacceptable to many MEPs. Eventually, the political groups reached a compromise in the form of a resolution calling on the governments of

Colombia and Peru to adopt binding and transparent roadmaps, to be implemented over time, in order to improve the situation. Subsequently, the two governments did present such plans and committed themselves to an annual human rights dialogue with the European External Action Service (with Member States as observers). These measures secured Parliament's consent. Instead of rejecting the agreement, it had made its consent conditional on commitments to human, labour and environmental rights on behalf of the governments of Colombia and Peru. This, in turn, made it possible to give consideration to the specific concerns of non-state actors without altering agreements that had already been negotiated or compromising trade objectives[20]. However, the evidence suggests that the commitments made by the partner governments are far from being fully implemented. This suggests that in the future Parliament may play a greater role in oversight of trade deals.

Furthermore, the evidence existing that the commitments made by the Colombian and Peruvian governments have not been implemented has prompted new discussions in Parliament on the issue of monitoring.

Implementation of human rights commitments remains an enormous challenge.

Voluntary Partnership Agreement between the EU and Indonesia on forest law enforcement, governance and trade in timber products into the EU

On 27 February 2014, the European Parliament adopted a resolution tabled by its Committee on International Trade reiterating its support for the conclusion of the Voluntary Partnership Agreement (VPA) between the EU and the Republic of Indonesia on forest law enforcement, governance and trade in timber products into the EU market.

5 EU development policy and international trade: EPA, GSP and market access

The EU and its Member States are among the world's largest providers of development aid. Parliament has traditionally pushed for strong EU support for development. As regards trade, it has called on the Commission to ensure that the EU's trade and development policy objectives are coherent, and has encouraged differential treatment of developing countries with particular care taken in the case of the least developed countries[21],[22].

In the 1990s the special relationship with one group of developing countries, namely in the former colonies of European countries in the

[20] See Maria-João Podgorny, The Negotiation and Adoption of Preferential Trade Agreements in the Lisbon Era: A View from the European Parliament, In: EU Preferential Trade Agreements: Commerce, Foreign Policy, and Development Aspects, Ed. David Kleimann, EUI, Italy, 2013. pp. 73-80.

[21] European Parliament resolution of 22 May 2007 on Global Europe - external aspects of competitiveness, TA (2007) 0196, OJ C 102E , 24.4.2008, pp. 128–138, P6-TA-2007-0196

[22] European Parliament resolution of 27 September 2011 on a New Trade Policy for Europe under the Europe 2020 Strategy,2010/2152(INI), TA(2011)0412, OJ C 56E, 26.2.2013, pp 87-98.,

Africa, Caribbean and Pacific region (ACP) came to be revised. The poor results of unilateral trade preferences granted to ACPs and the WTO ruling on bananas (concluding that EU preferences were not WTO-compatible) paved the way for a new approach that consisted of replacing the old system with economic partnership agreements (EPAs) – essentially, WTO-compatible trading arrangements that take into account the level of development of the ACP countries concerned.

Parliament followed the EPA negotiations closely and requested that the agreements be made less burdensome for the ACP countries.

Parliament followed the process of EPA negotiations closely, and as the deadline for establishing EPAs drew near, it called on the Commission to make the agreements less onerous for the ACP countries[23]. It also sought solutions from the WTO to avoid disruption to existing ACP exports to the EU by giving ACP negotiators sufficient time to evaluate the agreements before adopting them[24].

Despite the Commission's efforts, a number of factors delayed the conclusion of EPAs until well after the deadline. Most African states were either not ready to negotiate an EPA with the EU, or were not interested (being eligible for other schemes). The process was largely criticised by non-state actors, who perceived EPAs as a threat rather than an opportunity for the ACP countries.

As the negotiations to conclude EPAs would not be completed by the original deadline of 31 December 2007, the Commission provided an interim solution by proposing the so-called Market Access Regulation (MAR), which was adopted by the Council eleven days before the time limit. The MAR granted temporary duty-free quotas for free market access to countries that were negotiating an EPA with the EU. Four years after the adoption of the MAR, many ACP countries still had not concluded negotiations and the majority had not ratified the interim EPAs.

Parliament successfully negotiated the extension of the current privileged market access but the issue of the right approach to trade with ACP countries remains discordant.

In order to exit the stalemate and respond to criticism from other WTO members, the Commission proposed suspending trade preferences under the MAR with effect as from 1 January 2014 for those countries that had, in its view, 'still not taken the necessary steps towards ratification of an EPA'. The proposal was submitted to Parliament and the Council under the ordinary legislative procedure. The new regulation was debated at length, and Parliament, successful in its request, saw to it that the date of entry into force of the MAR be postponed to 1 October 2014.

This, however, remains a short-term solution. The issue of the EPAs continues to be divisive. The EU's traditional approach to development is difficult to reconcile with the new one supporting the development of ACP countries by means of balanced trade concessions which stimulate

[23] European Parliament resolution of 23 May 2007 on Economic Partnership Agreements , TA(2007)0204, OJ C 102E, 24.4.2008

[24] European Parliament resolution of 5 February 2009 on the development impact of Economic Partnership Agreements (EPAs), 2008/2170 (INI), TA(2009)0051, OJ C 67E, 18.3.2010, pp. 120-125

effective reforms. In both cases the ultimate policy goal is the integration of the countries concerned into the world economy and decreased dependence on external aid.

Reform of the Generalised System of Preferences (GSP)

On 10 May 2011, the Commission adopted a set of proposals to reform the EU's preferential import schemes for non-ACP developing countries. This arrangement is known as the generalised system of preferences (GSP). Sometimes GSP is seen as an alternative to EPAs because GSP recipients have largely outpaced ACP countries in terms of economic and human development. Furthermore, the income per capita of some of the countries still benefiting from the EU's preferences had reached or even exceeded that of certain EU Member States. The Commission therefore acknowledged that privileged access to the EU market via the GSP was, in many cases, no longer justified.

The reform of the GSP was characterised by good cooperation between Parliament and the Council.

Parliament welcomed most of the Commission's proposals. A major debate was dedicated to the way in which the Commission could be empowered as regards the management of the revised trade scheme. As a rule, the Commission would now be able to modify the list of recipients and decide on the implementation of the regulation by means of delegated acts, which do not per se require further scrutiny by Parliament or the Council. In return, the Commission was asked to produce a detailed impact assessment of the results obtained under the new GSP regulation.

The text adopted by Parliament at first reading, based on an agreement with the Council, made some changes to the original proposal. While the range of product groups to which the GSP is applicable was enlarged, access to enhanced trade benefits under the 'GSP plus' scheme was tightened (the scheme requires that eligible countries adopt and effectively implement a set of international conventions relating to human and social rights and environmental protection).

The new regulation also enlarged Parliament's role in decision-making. Parliament (or the Council) can now revoke a delegated act on a GSP withdrawal at any time.

The GSP reform was characterised by good cooperation between Parliament and the Council: both were to a large extent in agreement with the proposals put forward by the Commission. This facilitated the expedited adoption of the regulation.

6 Increasing transparency in Common Commercial Policy

While accepting that negotiations are a game where at least some discretion is a rule, Parliament has always favoured transparency and democracy in international trade. Unlike in the Council, most of the debates on trade are public, and in some cases (workshops) active participation of the civil society and other stakeholders is encouraged. Workshop participants may indeed take the floor in order to ask questions to both MEPs and the Commission or make short public statements.

The CCP has also been increasingly brought into the public sphere through the interaction of Members of Parliament (MEPs) with their constituencies. In addition, Parliament is also considering launching a system of public consultations similar to that already adopted by the Commission.

The ACTA was critical for reinforcing the monitoring role of the EP in international trade negotiations and in securing more open access to trade issues for civil society.

This interaction has so far been achieved without substantially altering the rather 'technocratic' nature of trade policy and the custom of some level of confidentiality of negotiations in general. At the same time, particular emphasis has been placed on the aspect of unnecessary or excessive confidentiality in international trade negotiations. In its resolution of 10 March 2010, Parliament voiced its concern that the lack of transparency in ACTA negotiations (see above) was at odds with the letter and spirit of the Treaty of Lisbon (TFEU), and stressed that unless it was fully informed on the negotiations it could consider bringing a case before the Court of Justice[25].

The rejection of ACTA was critical for reinforcing the monitoring role of the EP in international trade negotiations and in securing more open access to trade issues for civil society (see also the section on ACTA above). The Commission has apparently understood the lesson and has gradually extended the range of information available both to Parliament (via dedicated briefings) and the general public. Transparency has already become one of the key issues in the ongoing negotiations on the agreement with the US (TTIP).

[25] European Parliament Resolution of 10 March 2010 on the transparency and state of play of the Anti-Counterfeiting Trade Agreement ACTA negotiations, T7-0058/2010, OJ C 349E, 22.12.2010, pp. 46-48.

7 Trade, industrial and foreign policy interests

Parliament has not always been successful in defending its line as regards domestic trade law. Two emblematic cases illustrate the cleavages existing both between Parliament and the Council and within the Council.

Origin marking

In the past decades, certain sectors have become increasingly concerned over the increasing incidence of misleading and/or fraudulent origin marks on imported products. In 2005, the Commission proposed a system of compulsory origin marking – the so-called 'made in' scheme for imported industrial goods.

The Council's reception of the proposal was lukewarm at best. Opposed by several Member States, the proposals were de facto frozen and the dossier was never properly discussed in Council. In two resolutions, Parliament called on Member States to adopt the regulation without delay, in the interest of consumers, industry and competitiveness in the EU. The Council did not, however, modify its position. Indeed, prior to the Treaty of Lisbon there was no obligation for the Council to take Parliament's position into account.

For several years, Parliament continued to support an origin marking system which would protect consumers and producers from fraud.

On 11 November 2009, the EP adopted a new resolution calling on the Commission to resubmit its proposal to Parliament as soon as the Treaty of Lisbon entered into force. Three weeks later, Parliament became co-legislator on the issue, adopting its first reading position on 21 October 2010. However, as Member States remained divided on whether or not the mechanism constituted an improvement or a barrier to trade, the Council did not show any intention to conclude the procedure.

The Commission found a way out by withdrawing the legislative proposal on the basis of a US vs Canada case at the WTO[26]. The Commission's decision was openly criticised by Parliament. While it is true that in that case the US had violated WTO rules by imposing a disproportionate and unjustifiable burden on importers, the WTO Appellate Body did not find that a mandatory 'country of origin labelling' scheme is ipso facto a barrier to trade.

Although limited in its impact, the origin marking case could be seen as a significant setback for Parliament. Despite a large majority demonstrating support for the introduction of measures, Parliament did not succeed in convincing the Council to find a compromise, and lost an opportunity to affirm its rights and views in the post-Lisbon context. On the other hand, it is undeniable that the conditions for the application of an origin marking scheme in the EU have greatly changed over the years. The proposals had gradually lost the support of certain sections of industry. This most probably left the Commission with no other choice than to accept that the legislative proposals dating back to 2005 could not be reintroduced.

[26] 2012 US-COOL case, DS 384.

Reform of trade defence instruments

Traditionally, the EU has been a moderate user of trade defence remedies (such as anti-dumping, countervailing duties and safeguards). Such matters have usually been dealt by the Council and Commission, and Parliament did not play any substantial role therein before the entry into force of the Treaty of Lisbon. However, this did not prevent Parliament from asking the Commission to report on the management of trade defence investigations. The Commission publishes an annual report which is sent to Parliament for consideration.

The reform proposed by the Commission in 2007 entailing a shift towards a more liberal system of trade defence rapidly came under fire. It was criticised by two mutually opposed camps. When it became clear that the reform of TDIs stood no chance of being endorsed by the Council, the then trade commissioner, Peter Mandelson, decided to abandon the whole procedure.

Although no report on the reform was completed, a majority of MEPs made it clear that they intended to maintain the existing trade defence instruments and reject any possible loosening of their application.

Concerning defence against unfair trading practices, Parliament has so far taken a rather defensive and cautious approach.

Learning from past mistakes, in 2011 the new trade commissioner put forward a new proposal that was far more moderate than that of his predecessor. However, the proposal was not well received by stakeholders, many of whom considered that the proposed reform was too moderate or would even prove completely ineffective. Many commentators also contended that the Commission had waited too long before revealing its plans.

After receiving the proposal in April 2013, Parliament's Committee on International Trade agreed to adopt an urgent procedure with a view to being able to finalise its legislative report and reach a possible deal with the Council before the end of the legislative term. The urgency was, however, in vain. All but split down the middle into two divergent camps , the Council was unable to reach a common position. Parliament, however, decided to complete its first reading and the legislative proposal is, at the time of writing, awaiting consideration by the Council.

The position taken by MEPs at first reading shows that Parliament takes a more defensive and cautious approach than the Council and tends to support a line that favours an efficient trade defence system. In the context of these considerations, a final compromise with the Council does not seem to be within reach, and it may take a while before this procedure is completed and the new TDI system is fully implemented.

8 Assessment

Parliament chose to take a proactive approach.

In dealing with the changes introduced by the treaty of Lisbon, the EP chose to take a rather proactive approach from the beginning. This was facilitated by the preceding Parliament (2004-2009), which took a similar stance, anticipating the entry into force of the constitutional treaty. The objective was achieved by three main means: interpreting the Treaty broadly, e.g. when establishing binding rules on relations with the Commission; using the power of consent to influence international trade agreements; and using Parliament's newly acquired legislative powers.

Parliament has shown a moderate stance in support of trade.

Establishing clear trends as regards the making of trade policy in Parliament is difficult, especially because MEPs are not bound to follow the line of the political group to which they belong. It is, however, safe to say that Parliament has exhibited a moderate stance in support of enhancing free trade, albeit with greater caution and reservation than the Commission. Parliament has paid increasing attention to the concerns of civil society on issues such as human rights and fundamental freedoms, and sustainability, as well as to the concerns of developing countries.

Increasing attention has been paid to the concerns of civil society on issues of human rights, sustainability and development.

Furthermore, Parliament has often sought to recall the Treaty provisions that imply that trade and investment liberalisation serve various objectives, such as achieving prosperity, sustainable development, peace and fundamental rights, and that liberalisation is not a goal per se. In this sense, it can indeed be argued that Parliament has contributed to making trade policy more 'normative', i.e. serving other foreign policy goals than trade.

It can also be argued that this stance has led to a certain 'politicisation' of the CCP, although the idea that trade policy can be entirely detached from other policy objectives is incongruous[27]. Even the Agreement Establishing the WTO stipulates that the aim of cultivating trade and economic relations should also serve other objectives, such as raising standards of living, ensuring full employment and sustainable development, and respect for concerns regarding different levels of development[28]. Trade policy was already highly politicised prior to the Treaty of Lisbon – even in technical matters such as trade defence measures which, in principle, are subject to standard rules rather than political decisions. For instance, the involvement of the Council in the adoption of definitive dumping duties through its Trade Policy Committee permitted the 'politicisation' of the rules concerned. Therefore, new forms of decision-making which involve Parliament – also in defining the legislative framework for trade defence – include provision for the restoration of the technical nature of this aspect of trade.

Parliament has secured its position as a force to be reckoned with in the

[27] Markus Krajewski, The Reform of the Common Commercial Policy, in Biondi, A. and Eeckhout, P. (eds.), European Union Law after the Treaty of Lisbon. Forthcoming, 30 December 2010, Available at: SSRN.
[28] Preamble to the Agreement Establishing the WTO, 1994.

trade sphere.

ACTA remains the exception rather than the rule.

trade sphere. The rejection by Parliament of the ACTA – though an exception rather than the rule – has often been invoked as an example to prove this. Parliament's assertiveness has been further cemented in other ways, some of them rather imaginative. For example, rather than use its power to refuse consent or delay legislative processes on the grounds of 'non-trade' demands, Parliament has acted by means of negotiation or insisting on additional conditions for its consent (as in the case of the agreement with Colombia and Peru). A further step will be to find ways to ensure that the provisions Parliament has successfully fought for are put into practice.

Ways to ensure that the achievements are put into practice have yet to be found.

However, Parliament has not succeeded in achieving all of its priorities. In principle, Parliament would give its support to an international agreement such as the ACTA to fight counterfeiting at both international and EU level, but it did not succeed in dispelling all of its doubts thereon. Neither has Parliament succeeded in securing the creation of an EU-wide framework for the origin marking of imported industrial goods or in modernising the TDIs, although failure here should be attributed to disagreements in Council.

Also, in practice, there is still no full balance of powers between EP and the Council, as the Council reads the Treaty provisions in a much more restrictive way than does Parliament.

In order to gain credibility as a major actor in the legislative process and to secure its prerogatives, Parliament and its services need to build up expertise, establish best practices and seek to apply common basic principles to similar issues. Gaining credibility also means finding a common denominator for diverging and sometimes opposed interests and visions which stem from different national, industrial and ideological interests.

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