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Taking Stock: EU Common Commercial Policy in the Lisbon Era

David Kleimann*

The first 16 months of the EU's common commercial policy (CCP) in the post-Lisbon period provide indicative insights into how the European Parliament, the European Commission and the Council of Ministers interpret their respective roles under the new legal framework introduced by the Lisbon Treaty. This paper analyses the amendments, the institutional capacities to respond to the reform challenges and the evolving institutional balance applying to Lisbon-era common commercial policy. Against this backdrop, the paper gives an overview of the changing dynamics of EU trade and investment policy in a context of enhanced politicization resulting from the European Parliament's involvement in the decision-making process. Particular importance is given to the question whether enhanced EP involvement in decision-making has the potential to lead to a scenario resembling the policy process in the United States, where congressional responsibility for trade and investment policy has resulted in the capture of the policy agenda by special interest groups and snail-paced policy progress (if any) in recent years. Accordingly, the paper scrutinizes the political preferences that the European Parliament is introducing into current European trade policy debates as well as the framework legislation and trade agreements. Finally, it is argued that parliamentary involvement in making common commercial policy has the potential to narrow the gap between European public political preferences and perceptions, on the one hand, and actual EU trade policies on the other, and to place EU trade and investment policies on a foundation of renewed public political support. In the author's view, however, it is imperative that such an achievement is based on well-informed, responsible, sustainable and clearly communicated policy proposals from the MEPs, who respond to and seek to balance the multiplicity of interests of CCP stakeholders in European civil society and respect the Union's international obligations.

JEL Codes: F13
Keywords: Common commercial policy, European Union, European Parliament, Lisbon Treaty, Trade, Investment and external action

Introduction

With the coming into force of the Treaty of Lisbon on 1 December 2009, the EU's common commercial policy (CCP) entered a new era. The Treaty of Lisbon amended every single treaty provision applying to the CCP. In

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partial response to the call for "more democracy, transparency and efficiency" voiced in the 2001 Laeken Declaration on the Future of the European Union, the reform treaty significantly rebalances CCP institutional responsibilities at the EU level and competences between the EU and member state level of governance. Moreover, it mandates the reform of CCP implementation through a revision of the EU comitology procedures and formalizes the longstanding *de facto* integration of CCP under the umbrella of EU external action. The Lisbon Treaty thereby not only puts an end to five decades of well-rehearsed political processes applying to the CCP, but is, with the introduction of new political actors and political constituencies, and the resulting politicization of the CCP, certain to place EU external trade and investment policy-making on novel normative foundations.

Four main CCP reforms will shape, to varying degrees, the character of post-Lisbon EU trade and investment policy formulation and implementation. First, the Treaty on the Functioning of the European Union (TFEU) has significantly elevated the European Parliament's role in the trade policy-making process vis-à-vis the European Commission and the European Council of Ministers – particularly by giving the European Parliament final and credible authority to approve or reject all trade and investment agreements and co-decision power in adopting framework legislation. Second, the TFEU mandates the revision of the comitology rules, which are particularly important for the implementation of the CCP. Third, the treaty expands and consolidates exclusive EU external commercial competences by bringing foreign direct investment, trade in services and trade-related intellectual property rights under the umbrella of the European Union. Fourth, the Lisbon Treaty codifies the integration of trade and investment policy into the field of EU external action and formally renders the CCP subject to its principles, such as sustainable economic development, sustainable management of global resources, progressive improvement of the environment and good global governance.

At the time of the preparation of this paper, a considerable amount of commentary has already been devoted to the *de jure* reform of the polity of the CCP and division of competences, i.e. the analysis of the relevant provisions in the TFEU and the Treaty on European Union (TEU) and how they compare with the TFEU's predecessor, the Treaty Establishing the European Community (EC Treaty) and the pre-Lisbon TEU.[1] Following 16 months of practical application of the Lisbon amendments, it is now time to make a

1 See, for instance: Leas-Arcas (2010), Woolcock (2008), and Krajewski (2010).

first pragmatic assessment of the inter-institutional dynamics of post-Lisbon EU trade and investment policy-making and the evolving new normative directions of EU common commercial policy in the Lisbon era.

Despite the notable constitutional differences between EU and US political structures applicable to trade and investment policy-making, it is conceivable, to say the least, that the mandated politicization of EU CCP, through the strengthened role of the Parliament, will lead to trade policy dynamics similar to those currently underway in the United States. In the latter, congressional responsibility for trade and investment policy has, to varying degrees in recent decades, opened the door for and indeed resulted in highly populist debates, the capture of the policy process through special interest groups and snail-pace policy progress. As such, the quality of US congressional and executive debates surrounding, for instance, the ratification of free trade agreements (FTAs) with South Korea, Colombia and Panama have the potential to become, in the worst-case scenario, a *déjà vu* for MEPs, the Commission and the Council. Undoubtedly, such a development would jeopardize the continuity and credibility of a highly successful area of EU policy-making.

It is for this reason that this paper pays particular attention to the role of the European Parliament in the process of Lisbon-era CCP policy-making and sheds light on the Parliament's institutional capacities and political preferences vis-à-vis its institutional competitors. On an optimistic note, the paper argues that parliamentary involvement in the CCP has the potential to narrow the gap between European public political preferences and perceptions, on the one hand, and actual EU trade policies on the other, and to thereby place the EU CCP on a foundation of renewed public political support. It is imperative, however, that such an achievement is based on well-informed, responsible, sustainable and clearly communicated policy proposals from MEPs, who are responding, in compliance with the Union's international obligations, to broader European interests, rather than to the rent-seeking behaviour of special interest groups.

In the following, a review of the former legal framework and the Lisbon reforms applying to the CCP, as outlined in sections 1 and 2, will serve as a backdrop of an account of the institutional and political dynamics of the first 16 months of Lisbon-era CCP. Section 3 assesses the respective institutional capacities of the European Parliament, the Commission and the Council to translate political preferences into credible negotiation positions, as well as their institutional ability to adapt to the challenges associated

with the Lisbon reforms. Section 4 scrutinizes the European Parliament's political preferences on trade and investment issues. It further provides available evidence for how parliamentary political preferences have been manifested in tangible policy results. A final section 5 offers conclusions.

1 The pre-Lisbon polity of EU common commercial policy

In essence, common commercial policy under the EC Treaty has traditionally been shaped by the relationship between two key players, namely the Commission and the Council.

Under the provisions of Art. 133 of the EC Treaty, the Commission proposed framework legislation necessary for the implementation of the CCP to the Council. Framework legislation applies to the regulation of, for instance, the employment of trade defence instruments, tariffs and quotas, as well as non-reciprocal trade preferences, and is necessary to give effect to international trade agreements domestically. The Council then amended and adopted the proposed regulation with qualified majority where the Community held exclusive competence, and unanimously where it shared competences with the member states.[2]

With regard to negotiations of bilateral or multilateral trade agreements, Art. 133 (3) provided that "the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations." The Commission negotiated the agreement on the basis of the negotiation directive as amended and approved by the Council. The Council authorized the conclusion and the signature of the respective agreement following the proposal from the Commission. In cases of so-called 'mixed agreements', i.e. where the agreement contained provisions falling within the realm of competences shared between the Community and member states (e.g. services, foreign direct investment and commercial aspects of intellectual property rights, which only became the EU's exclusive competence under the Lisbon Treaty), member state parliaments had to additionally ratify the respective part of the agreement.

In line with its legal obligations under the Treaty, the Commission regularly consulted the so-called 'Art. 133 Committee' on the status of negotia-

2 Art. 133 (2) and (4) EC Treaty.

tions.[3] The member states' economic affairs attachés commented, endorsed and criticized the direction that negotiations were taking "in order to assist the Commission in this task"[4] and, most importantly, traced red lines that the Commission should not overstep if it sought final approval for the respective accord from the Council. The Art. 133 Committee (now called the 'Trade Policy Committee') holds one full-day session per week behind closed doors in the Council building in Brussels. Essentially, member state government officials receive technical updates from individual DG TRADE officials on a large variety of trade negotiation dossiers and provide the technocrats with frank and unambiguous political responses from their capitals.

In many respects, the 133 Committee sessions epitomized the 'black box' nature of the pre-Lisbon era trade policy-making process, which was arguably characterized by a lack of democratic legitimacy, scrutiny and transparency, but at the same time benefited from technocratic efficiency. In sum, the pre-Lisbon polity structure "left trade policy largely in the purview of the generally free-trade oriented career officials in the Commission, with only attenuated connections to voters or constituencies or political concerns, and the economic affairs ministries of member states, through their collective participation in the Council."[5]

To be sure, the European Parliament had little or no role in key areas of trade policy-making – the crafting of framework legislation and the conduct of trade negotiations. However, with the entry into force of the Lisbon Treaty, the black box power duopoly over trade policy has been rendered part of EU history – and with it, the technocratic efficiency of EU CCP policy-making. It remains questionable, to say the least, whether enhanced democratic legitimacy of CCP formulation, through the participation of the European Parliament, will be beneficial for the quality of policy outcomes, or whether the politicisation of EU CCP will open the floodgates for rent-seeking special interest lobby groups and pave the way for the capture of the policy agenda.

3 Art. 133 (3) EC Treaty.
4 Art. 133 (3) EC Treaty.
5 Hillman and Kleimann (2010).

2 A revised legal framework for EU common commercial policy

2.1 The empowerment of the European Parliament

The empowerment of the European Parliament is by far the most momentous CCP reform that the Lisbon Treaty has brought about. Parliament has gained decision-making powers in two main areas, namely co-decision powers applying to domestic framework legislation and the right to consent to or reject trade and investment agreements that the Commission negotiates with third countries.

2.1.1 Domestic Framework Legislation – Eye-to-Eye with the Council

The Lisbon Treaty broadly expands Parliament's role in adopting framework legislation in a wide range of policy areas, such as external trade and investment, monetary policy, energy, agriculture and fisheries, personal data protection, intellectual property rights, public health and immigration. Most importantly for the purposes of this paper, Art. 207 (2) TFEU grants co-decision powers to Parliament in the area of framework legislation laying down the Union's external trade and investment policy. The Treaty provides that legislation to implement Europe's Common Commercial Policy will now be conducted under the ordinary legislative procedure (OLP), which is the new term for the EU's co-decision procedure.

The OLP is codified in Art. 294 TFEU. Under the OLP rules, the Council and Parliament need to jointly agree on and adopt regulations proposed to them by the Commission. The OLP preserves the Commission's exclusive right to legislative initiative[6] and is, at every stage of the proceedings, requested to provide its opinion on amendments made by Parliament and the Council. If the Council and Parliament do not agree on a common position after receiving the amendments of the other party during the first two legislative readings, a Conciliation Committee is formed, in which the Commission formally serves as a mediator between the two institutions.[7] In any case, a regulation is only adopted if agreed and voted upon by both institutions following one of a maximum of three readings.[8]

6 Art. 294 (2) TFEU.
7 Art. 294 (10) TFEU.
8 Art. 294 (13) TFEU.

Within the area of the CCP, all trade barrier regulations, trade defence instruments, trade preferences programs, as well as future regulations laying down EU foreign direct investment policy, are subject to the OLP rules. With the entry into force of the Lisbon Treaty, Parliament's International Trade Committee (INTA) has been granted the same procedural powers to weigh in on commercial framework legislation as held by member state governments represented in the Council. Moreover, the INTA Committee holds significant intra-parliamentary powers in shaping the framework legislation necessary to implement the EU's CCP, as it only presents the final legislative proposal to the plenary for adoption through simple majority voting. A plenary vote that contradicts the vote of the special committee responsible for the respective dossier remains extremely rare.

The inclusion of the EP in the legislative procedure of trade and investment law also implies a much longer and more complex process than in the past. If the Council and the Parliament do not see eye-to-eye initially and the process requires a full 'three-readings' co-decision procedure, the legislative process will last for more than a year. Apart from the lengthy formal process itself, the obligatory translation of Commission proposals submitted to Parliament into all 22 official EU languages can easily last up to three months. It is at least conceivable, therefore, that the length of the procedure may sometimes endanger the associated commercial value of trade legislation.

The TFEU does not formally provide for negotiations between the institutions during the legislative process, which would likely speed up the process. It merely provides for a formal submission of positions and justifications to the respective other institution. It has become common practice, however, to conduct so-called informal 'trilogue negotiations', in which Commission, Parliament and Council representatives seek to strike a deal on contentious provisions of the proposed legislative act early on in order to expedite the formal procedure. In these trilogue negotiations, the Council is represented by the member state holding the rotating EU Presidency. Parliament is represented by the rapporteur responsible for any given dossier.

Informal trilogue negotiations will have a critical role in future OLPs applying to CCP framework legislation. They will be particularly important (and potentially useful) where the enforcement of trade agreements depends on the speedy adoption of implementing legislation necessary to give

the agreement domestic effect.[9] It is arguable, however, that this is precisely so because they circumvent the OLP treaty provisions, thereby depriving the legislative process of its legitimacy, to the advantage of procedural efficiency. Art. 295 TFEU, however, may justify the institutions' recourse to informal cooperation mechanisms as it gives the three institutions broad discretion to "consult each other and by common agreement make arrangements for their cooperation".

2.1.2 Implementation of EU common commercial policy – The new comitology

While the legislative powers conferred upon Parliament by the Lisbon Treaty are far-reaching, the treaty falls short of granting Parliament implementation powers. To the contrary, the TFEU provides for the delegation of non-legislative acts (Art. 290 TFEU) and implementing acts (Art. 291 TFEU) to the Commission, whereby it mandates the reform of the pre-Lisbon system of comitology. However, parliamentary powers of scrutiny and delegation of such acts have increased considerably, positioning Parliament on a par with the Council. The parliamentary elevation with regard to the delegation of implementation powers and rights to amend and supplement non-essential parts of legislative acts stands in stark contrast to the pre-Lisbon period, when it was the Council alone that could delegate such rights to the Commission in accordance with Article 202 EC Treaty.[10] The reform has been praised as "the most significant reform there has been in terms of legal basis, procedure, institutional balance and implications for stakeholders working with the system".[11]

As mandated by Articles 290 and 291 TFEU, the Lisbon Treaty replaces the 'old' comitology with a hybrid system of delegated acts and implementing acts. First, Article 290 TFEU grants lawmakers the right "to delegate", through a provision in a legislative act, "to the Commission the power to adopt non-legislative acts of general application t*o supplement or amend certain non-essential elements* of the legislative act." The system of delegated acts has been created to replace the former 'regulatory procedure with scru-

9 This is notwithstanding the potential provisional application of trade agreements with third countries in advance of an OLP agreement on implementing legislation, which, as shall be explained below, has been fiercely opposed by Parliament.

10 CCP implementation has traditionally been conducted under the rules set out by the comitology procedures (Art. 202 EC Treaty), which have been detailed in Council Decision 1999/468/EC and its 2006 amendment.

11 European Institute of Public Administration (EIPA) (2011).

tiny', which similarly dealt with the delegation of powers to amend and supplement non-essential elements of EU basic acts to the Commission. While Article 290 does not specify the legislative procedure applicable to the delegation of non-legislative acts, the delegation of such powers will always be conducted jointly by the Council and Parliament with respect to CCP, as Article 207 TFEU requires CCP legislation to be adopted in accordance with OLP rules. Article 290 further provides that the legislative act must lay down and define the content, scope, objectives and duration of the delegation of powers. As a matter of control, Parliament and the Council also have equal rights to object to a delegated act drafted by the Commission or revoke the delegation altogether *ex post* on any grounds they deem fit.

Secondly, the rules applying to the delegation and scrutiny of implementation powers to the Commission have been renegotiated by Parliament and the Council throughout 2010 as mandated by 291 TFEU. On December 16th of the same year, Parliament adopted a respective regulation after first reading,[12] followed by the adoption by the Council in February 2011.[13] The regulation creates two procedures for the delegation of implementing powers, namely the advisory precedure and the examination procedure. The latter is stipulated to apply to implementing acts in the areas of the CCP, the CAP and fisheries, environment and safety and protection of health and safety, as well as taxation. The delegation of implementing powers to the Commission must be provided for in a respective legislative act, which will be adopted under the OLP rules in the case of CCP.[14] The procedure retains the previous committee control system, in which member states reject or adopt implementing acts proposed by the Commission by qualified majority voting. The Council and Parliament have equal rights of scrutiny regarding the consistency of an implementing act with the mandating provision of the respective legislative act.

The new comitology system therefore represents one more area of decision-making applying to CCP where member states represented in the Council have lost ground vis-à-vis its institutional competitors. As demonstrated below, the same is true with regard to the procedure applying to the adoption of negotiation directives and, finally, the adoption of trade accords.

12 European Parliament (2010d).

13 Regulation No 182/2011 of the European Parliament and of the Council of February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

14 A detailed comparison of the 'old' and 'new' comitology system can be found in: European Institute of Public Administration (EIPA) (2011), op. cit.

The overall result is a significantly altered balance between the institutions involved in CCP formulation.

2.1.3 Negotiation of trade agreements – Gearing up institutional competition

The second major elevation of Parliament occurs with respect to the negotiation process and the adoption of trade agreements. On political rather than legal grounds, Parliament has traditionally been requested to assent to all trade accords. This was so despite the fact that the EC Treaty only required parliamentary assent to Association Agreements, agreements with budgetary implications and agreements establishing new institutions. Pure trade accords were explicitly exempted from the assent procedure by virtue of Art. 300 EC Treaty.

In any case, parliamentary rejection of a trade accord has never been a credible political option: Parliament lacked any involvement in the negotiations, had no authority to pass legislation implementing the agreement domestically, was the very last in a chain of institutions to provide its final opinion on a completed and signed accord and, moreover, lacked the technical expertise and capacity necessary to deal with the legal and economic intricacies of the subject matters. In other words, EU parliamentary dissent in the pre-Lisbon era has only been a theoretical scenario.

This is certain to change for several reasons. First and foremost, Art. 218 (6) TFEU *per se* requires EU parliamentary consent to all external agreements "to which either the ordinary legislative procedure, or the special legislative procedure applies". This, in line with Art. 207 (2), applies to any kind of trade accord.

Nevertheless, the TFEU falls short of granting Parliament a formal role in setting up the mandate or prescribing objectives of trade negotiations, nor does it provide for parliamentary participation in negotiations. The Commission, by proposal, and the Council, by amendment and adoption of negotiation directives, retain this prerogative at least formally. Art. 207 (3) now obliges the Commission "to regularly report to the European Parliament on the progress of negotiations". Moreover, Art. 218 (10) provides that "the European Parliament shall be immediately and fully informed at all stages of the procedure" applying to the negotiation and conclusion of

agreements with third states and international organizations as laid down in Art. 218.

Nevertheless, the mere right to be informed, even if fully and immediately and at all stages, does not match the Council's Trade Policy Committee's prerogative "to assist the Commission in" the task of negotiating trade agreements in consultation with the Commission, as mandated by Art. 207 (3) TFEU. The Council, in other words, retains the exclusive formal right to inform the Commission's conduct of negotiations, additional to its exclusive role in amending and adopting proposed negotiation directives in the first place.

But Parliament should be expected to compensate for its missing formal role by leveraging other procedural rights and resulting powers. The INTA Committee, on behalf of the Parliament, has various means to voice its political preferences and flag red lines and preconditions for its final consent early on, including the use of non-binding parliamentary resolutions, hearings, opinions, Commission reports on progress in negotiations and questions to the Commission. In this spirit, Parliament has, on several occasions, called "on the Commission (…) to take due account of Parliament's preconditions for giving its consent to the conclusion of trade agreements."[15] In this context, parliamentary information rights vis-à-vis the Commission have an important political value: legally guaranteed full and immediate information on the procedure applying to the proposal and adoption of negotiation directives and adoption of agreements, as well as regular Commission reports on progress in negotiations, enable Parliament to fully employ its opportunities to influence the content of directives and the direction of bilateral and multilateral trade negotiations. Hence, the critically important modus operandi for the submission of (confidential) information by the Commission has been made subject to the rules of a Framework Agreement on the relations between Parliament and the Commission, the negotiation and content of which is dealt with in section 4 of this paper.

Furthermore, as outlined above, Parliament has a key role in the process of adopting framework legislation necessary for the domestic implementation of trade agreements. Parliamentary powers to block the framework legislation necessary to implement provisions of a trade accord provides additional political clout to tame the Council's or the Commission's potential ambitions to exclude the new institutional competitor from taking part in

15 European Parliament (2010e).

the political deliberation process applying to the scope and objectives of negotiations.

In light of these multiple levers on both framework legislation and the adoption of trade agreements, Parliament cannot be ignored when the Commission and the Council determine negotiating objectives and the course of negotiations. With the coming into force of the Lisbon Treaty, the threat of parliamentary dissent has become a credible one and the need to take into account the views of the Parliament from the very beginning of a trade negotiation has become an imperative.

2.2 The consolidation of EU common commercial policy competences

Another groundbreaking innovation of the Lisbon Treaty is the consolidation of exclusive EU CCP competences. While the system of shared competences between the EU level of governance and member states has given rise to a flurry of legal disputes in the past,[16] the Lisbon reforms have now allocated essentially all relevant substantive legislative and external representation responsibilities for CCP formulation to the EU institutions.

Art. 133 (1) EC Treaty listed all areas of the Community's exclusive competences in common commercial policy-making, to which qualified majority voting by the Council applied. It provided that "the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies."

The Lisbon Treaty has now formally transferred the remaining key external commercial policy competences under the umbrella of EU governance. Art. 207 of the TFEU added the terms 'services', 'commercial aspects of intellectual property' and 'foreign direct investment' to the text of former Art. 133 of the EC Treaty, thereby expanding and consolidating the EU's areas of exclusive competences in the field of CCP.[17]

16 See, for instance, the following topical opinions on EC vs. member state competences issued by the European Court of Justice upon the request of the Commission: Opinion 1/94, [1994] ECR I-5267; and Opinion 1/08 [2009] ECR I-11129.

17 Former Art. 113 of the 1957 Treaty of Rome made no mention of investment, services and intellectual property rights whatsoever. The 1994 conclusion of the GATT Uruguay Round and its agreements on trade in services (GATS) and intellectual property rights (TRIPS) as part of the 'Single Undertaking', however,

The most important expansion of EU exclusive competence arguably occurs in the area of foreign direct investment (FDI). At the same time, the inclusion of FDI in article 207 (1) has given birth to many legal questions regarding the scope of the Union's competence in this policy area. While the respective issues cannot be comprehensively addressed at this point due to the limited scope of this paper, it is worth noting that it remains somewhat unclear whether the Union's competence will be limited to investment liberalisation or, additionally, include FDI protection. Moreover, it is conceivable that the transfer of FDI competence from member states to the EU institutions renders the more than 1,000 bilateral investment treaties (BITs) inconsistent with the TFEU and thereby results in immense legal uncertainty for member states and their external BIT partner countries.

The Council and Parliament, in response to a proposed solution from the side of the Commission, will therefore have to find common ground on how to deal with the high number of existing BITs. In July 2010, the Commission tabled a proposal that provides for a transition solution to the transfer of FDI competence. Notably, it proposes to authorize member states to leave their BITs in force, in order to ensure legal certainty, while obliging member states to bring their BITs into conformity with the regulation where necessary. The proposed regulation also authorizes member states, under certain conditions, to negotiate individual BITs and envisages the formulation of a comprehensive EU investment policy in the future. The regulation is currently subject to the OLP and awaits parliamentary and Council approval.[18] At the same time, the Commission has brought forward a Communication, in which it cautiously outlines essential elements of a comprehensive future EU investment policy. The document, in implicit acknowledgement that the details of policy formulation will be subject to intense negotiations

then resulted in a Commission dispute with member states over the latter's rights of representation (negotiation and conclusion of the final agreement at WTO level) and participation (member state ratification). The dispute was resolved by ECJ Opinion 1/94, in which the Court in essence clarified that, in contrast to trade in goods and other areas of EC exclusive CCP competences, the EC and the member states held shared competences in services and intellectual property rights, which called for a joint conclusion and member state ratification of the Uruguay Round accord. The impracticality of joint EC and member state negotiation and conclusion of services and intellectual property agreements with third parties prompted governments to insert, as part of the reforms mandated by the 1997 Treaty of Amsterdam, para. 5 into Art. 113. Para. 5 enabled the Council, acting by unanimity, to mandate the Commission to negotiate services and intellectual property agreements on behalf of the Community. The 2001 Treaty of Nice substantially redrafted para. 5 of Art. 113 successor Art. 133 and specified, in a new para. 6, services areas, in which the EC and member states explicitly shared competences – notably audiovisual, cultural, social, educational and health services. ECJ Opinion 1/08 affirmed member states' rights of participation and external representation with regard to agreements with third countries that contain provisions governing these services. The Lisbon reforms subsequently did away with shared competences in services altogether, but retained the exceptional provision for Council unanimity to do justice to the sensitivity of the above-mentioned sectors for many member states.

18 European Commission (2010d).

with the Council and Parliament, primarily provides for a basis for discussion without prejudging its outcome.[19]

Services- and trade-related intellectual property rights (IPRs) – the two other areas that are now part of the realm of EU exclusive competences – have been negotiated by the Commission since the coming into force of the 1997 Treaty of Amsterdam on the basis of para. 5 of Art. 133. Nevertheless, the clarification and consolidation of EU exclusivity of competence in these areas, by means of their inclusion in the first paragraph of the CCP provisions, have important ramifications for member state involvement in the decision-making procedure. First, the formal allocation of the two areas as EU exclusive competences by means of Art. 207 (1) results in the circumstance that member state governments can no longer invoke a right to unanimous decision-making in the Council. Secondly, member state parliamentary participation in ratifying agreements covering services- and trade-related IPRs is per se precluded.

However, paragraph 4 of Art. 207 TFEU provides for certain exceptions applying to specific politically sensitive services sectors. These are cultural and audiovisual services as well as social, health and education services. If trade in these services becomes part of the substance of EU trade accords, the unanimity principle in the Council will still apply. Nevertheless, in comparison to Art. 133 EC Treaty, Art. 207 (4) TFEU has shifted such services from the area of shared competences to EU exclusivity. This fact essentially cuts member state parliaments out of the ratification procedure and does away with the practice of mixed agreements in these fields.

2.3 EU common commercial policy under the umbrella of external action

In the context of political developments in Brussels, several legal provisions in the TFEU and the TEU have led to much debate and confusion over the formal relationship between EU CCP and EU external action and the role of the Union's High Representative for Common Foreign and Security Policy. The debate concerns essentially whether the traditional relative legislative and administrative independence of CCP formulation from the realm of EU foreign policy-making is likely to prevail in the Lisbon era, or whether the treaty amendments will result in a full integration of the CCP

19 European Commission (2010c).

into the realm of EU external action. The following considerations seek to provide some indicative answers to this query.

First, the Lisbon Treaty incorporates the CCP provisions under Part V, entitled "External Action of the Union", which establishes the legal basis of the relations of the Union with third states. Art. 207 (1) requires that "the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."

The principles of the Union's external action are listed in Art. 21 (1) of the Treaty on European Union and entail the following: "democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect for the principles of the United Nations Charter and international law." The objectives of EU external action are listed in the following paragraph and entail "sustainable economic, social and environmental development of developing countries", "the integration of all countries into the world economy", "sustainable management of global natural resources", as well as "multilateral cooperation and good global governance". The inclusion of the CCP under the umbrella of the EU's common external action raises several legal and practical questions.

The fact that the CCP is subject to the broad and vague principles and objectives of EU external action demands an answer as to whether the CCP has not been subject to political principles and objectives in the past, but, on the contrary, exclusively reflected the pursuit of commercial interests on behalf of the Community. The experience of past CCP content, however, strongly suggests a positive answer to the first and a negative answer to the second question.

Among the EU trade policies that were clearly motivated by non-commercial objectives are, inter alia: the EU's Everything but Arms (EBA) initiative, which allows all imports except armaments from least developed countries to enter the EU duty- and quota-free; the GSP programme, providing reduced duties for imports from 176 developing countries; its GSP+ scheme, which provides even greater tariff reductions for goods from developing countries while setting commercial incentives for the ratification and implementation of international conventions promoting sustainable development and good governance; the negotiation of association agreements, entailing free trade agreements, with a whole range of developing countries with a view to promote regional political stability as well as economic and

regulatory development; the trade preferences granted to former European colonies/territories in African, Caribbean and Pacific (ACP) countries under the EU-ACP Cotonou agreement; as well as the negotiation of economic partnership agreements (EPA) succeeding the unilateral, and WTO-inconsistent, Cotonou preferences. In conclusion, the mere magnitude and extent of the Community policies conducted under the CCP legal framework that pursue the objectives listed in Art. 21 (2) TEU further suggests that, first, the listed political objectives have informed a core part of the Community's CCP formulation and that, secondly, Art. 207 TFEU, read in the context of Art. 21 TEU, merely codifies what has been common Commission and Council practice in recent decades.

Furthermore, the inclusion of the CCP under the heading of EU external action raises the important question of whether the CCP will now fall, fully or partially, within the realm of responsibilities of the Union's High Representative for Common Foreign Affairs and Security Policy (who chairs the Union's Foreign Affairs Council and is Vice President of the Commission) and the bureaucratic institution assisting her in her tasks, notably the Union's External Action Service (EAS). Both the High Representative and the EAS are institutional innovations mandated by Art. 27 TEU.

However, the Treaty makes unambiguous distinctions between the area of responsibilities of the High Representative on the one hand and EU CCP on the other. For instance, Art. 218 TFEU on the negotiation of international agreements provides that "the Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorizing the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team." It follows that it is the Commission that will submit recommendations where the envisaged agreement *does not* exclusively or principally relate to CFSP. Furthermore, paragraph 1 of Art. 218 renders Art. 207 *lex specialis* with regard to the negotiation of trade agreements. Art. 207 (3), in turn, preserves the Commission's exclusive right to make recommendations to the Council to adopt negotiation directives and specifies the Commission as the sole negotiator of the respective agreements. Art. 207 does not mention a single word about the High Representative or the External Action Service. A claim of responsibility for EU CCP would therefore lack any legal basis.

Another potential avenue that the High Representative could take to exert influence over CCP formulation, if only partially, is to give full effect to paragraph 3 of Art. 21 TEU, which stipulates that "the Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect." Areas of the Union's external action are the common commercial policy, development cooperation, humanitarian aid and common security and defence policy. The provision clearly subordinates the High Representative to the Council and the Commission in the process of ensuring consistency between different EU external action policy areas (oddly enough, Parliament is not mentioned here). She is, to be sure, by no means exclusively responsible, or has a leading role, in ensuring External Action policy consistency. In the specific area of Common Foreign and Security Policy (CFSP), in contrast, the treaty equips the High Representative with the power, equally shared with the Council, to "ensure the unity, consistency and effectiveness of action by the Union" and stipulates expressly that CFSP "shall be put into effect by the High Representative and the Member States".[20]

While the treaty language clearly suggests, by inference, that the Union's CFSP is a policy area by itself, whereas 'External Action' incorporates several policy areas distinct from CFSP, the lex specialis status of the provisions applying to CCP may have served the Commission, and with it DG TRADE, well in defending its responsibilities against attempts of the High Representative to expand her turf. While the High Representative has been reported to sometimes move beyond her constitutionally limited responsibilities by making political statements on trade matters vis-à-vis foreign commercial partners, the Commission's prerogatives with regard to CCP formulation and administration have never seriously been questioned. The Commission was less successful, however, in defending its responsibilities applying to development cooperation (Art. 208, 209 TFEU). The policy responsibility for development cooperation will be, on grounds of dubious legal reasoning and following months of inter-institutional turf wars, shared with the High Representative and her EAS in terms of both legislative initiative (though only informally) and policy administration.[21]

20 Art. 26 (3) TEU.
21 Duke and Blockmans (2010).

In sum, the High Representative has not been endowed with any formal responsibilities for CCP formulation and administration, apart from assisting the Council and the Commission in ensuring the consistency of External Action policies with each other and with other policies of the Union. It remains to be seen, however, whether and how the High Representative will seek to further expand her responsibilities politically beyond those codified in the treaties.

3 Institutional realities in the early days of Lisbon-era EU CCP

The *de jure* reallocation of procedural responsibilities among EU institutions and substantive competences between the EU- and member state-level of governance presents observers of CCP formulation with only the necessary condition for the *de facto* reform of EU institutional balance and substantive changes in CCP content. A more comprehensive understanding of the new constitutional reality and changing normative directions of CCP that the treaty changes may result in can only be acquired by taking into account the individual institutional capacities at the date of entry into force of the Lisbon Treaty.

'Institutional capacity', in this context, shall be understood as the institutional ability to incorporate political preferences in framework legislation and international agreements with external trade and investment partners. Moreover, it shall be understood as the institutional ability to market political preferences aiming at the acquisition of maximum public political support in order to endow such political preferences with legitimacy vis-à-vis its institutional competitors.

Such abilities greatly depend on two major factors: the institutional ability to gain access to the information needed, particularly confidential documents, and the capacity to process and transform this information into credible political positions, which can be negotiated with competing institutions and marketed in the public realm. In other words, the constitutional reality of CCP formulation in the Lisbon era depends (much more than the rules set out in the Lisbon Treaty itself) on the institutional abilities to employ these rules in order to advance political preferences. The following elaborations shall therefore outline the institutional capacities of the European Parliament, the Commission and the Council in the run-up to the Lisbon Treaty's entering into force in December 2009.

3.1 The European Parliament

Despite its legal empowerment, the European Parliament has *a priori* entered the political arena as the weakest of the three institutional players. Parliament lacks the institutional memory of CCP formulation, working relations with its institutional competitors on CCP issues, technical expertise on the intricacies of trade and investment law and economics, and staff capacity. Also, it is a politically extremely fragmented institution.

First, given its negligible role in CCP formulation under the EC Treaty, Parliament had no experience whatsoever in the conduct of trade and investment policy-making. The INTA Committee itself is one of the most junior committees and it has only come into existence as recently as 2004 in view of the prospect of the looming empowerment on trade and investment policy matters.

Therefore, secondly, INTA has not had the opportunity to build working relations with the Commission's DG TRADE and the member states' economic affairs attachés. To the contrary, as reported to the author in personal interviews, both the European Commission and the European Council have been keen to avoid INTA Committee involvement in order to prevent a politicization of the CCP for as long as possible. On the other hand, the current working relationships between the Commission and the Council benefit much from several decades of well-rehearsed cooperation in 133 Committee meetings and elsewhere under the rules of the EC Treaty. Without access to the institutional memory of the internal and external workings of CCP formulation, and given the technical complexity of legal and economic intricacies of trade and investment policy-making, the members of the INTA have had very little time to develop the knowledge and technical expertise necessary to translate political preferences into credible and well-informed negotiation positions vis-à-vis its institutional competitors.

The current Parliament's term commenced in July 2009. Ten months after the treaty reform, INTA already found itself involved in no less than nine co-decision procedures and five consent procedures.[22] Any given dossier is assigned to one MEP 'rapporteur' (and one 'shadow rapporteur') who writes reports, coordinates the legislative process, collects amendments to legislative proposals and informs the Committee about developments on the dossier. It is noteworthy, in this context, that each MEP usually does not em-

22 European Commission, DG TRADE (2010b).

ploy more than two assistants and one policy advisor, all of whom tend to be relatively junior professionals. The Committees' secretariats are equally constrained in terms of staff capacity. Thus, the INTA Committee must have been expected to face severe capacity constraints in dealing with the vast amount of documentation associated with a wide range of highly technical dossiers.

Furthermore, the current Parliament, and with it the INTA Committee, is a politically highly fragmented institution. The INTA is a comparatively small committee with 29 members, many of whom are serving their first term in the Parliament. All seven political party groups are represented in INTA, while INTA MEPs originate from no less than 14 countries.[23] The picture becomes even more puzzling in light of the distinct nature of MEPs' constituencies. While German MEPs, for instance, are directly elected in their respective electoral district, Italian citizens elect MEP candidates from national party lists. In other words, while the political fate of MEPs from some countries depends greatly on their popular support in small constituencies in their home countries, others are affiliated with the national constituency of their country of origin and need to be more concerned about their standing within their national party in order to improve their chances for re-election.

In this context it is worth noting that many aspects of trade policy that overlap and are interlinked with other policy areas, such as agriculture, fisheries, development, environment, human rights, as well as consumer health and food safety, will be dealt with under the leadership, or with the participation, of parliamentary committees other than the INTA Committee. Committees holding substantive responsibilities that potentially overlap with trade policy issues are the Committee on Human Rights (DROI), Development (DEVE), Environment, Public Health and Food Safety (ENVI), Industry, Research, and Energy (ITRE), Internal Market and Consumer Protection (IMCO), Agriculture (AGRI), Fisheries (PECH) and Economic and Monetary Affairs (ECON).

23 Party groups represented in the INTA Committee are the European People's Party (10 MEPs), the Alliance of Socialists and Democrats (7), the Alliance of Liberals and Democrats (3), the Europe of Freedom and Democracy Group (2), the European Conservatives and Reformists (2), the Green Group (2), the European United Left (2), and one member without party association. INTA MEPs originate from France (5 MEPs), the United Kingdom (5), Germany (4), Italy (3), Spain (2), Romania (2), as well as Portugal, Poland, Lithuania, Sweden, Ireland, Bulgaria, Slovakia, and the Czech Republic. For the International Trade - INTA members, see: http://www.europarl.europa.eu/activities/committees/membersCom.do;jsessionid=735B49123B79B76004C6EF2701B1DF1C.node2?language=EN&body=INTA (as of January 10, 2011).

Given the significant political value of the CCP relative to other policy areas of the Union, MEPs in these committees have high incentives to pursue leadership or seek to exert influence on such 'trade and' dossiers. While parliamentary procedure allows any other 'interested' committee to contribute to another committee's internal deliberations on a given agenda item by submitting an opinion, the original allocation of a dossier to a certain committee largely remains a political decision taken by the leadership of the European Parliament. In light of the enormous intra-parliamentary power that a mandated committee exerts with respect to both the management of legislative procedures and substantive legislative contributions, INTA members will frequently find themselves in inter-committee competition for substantive and procedural leadership on 'trade and' issues.

In sum, the dangers of the institutional weaknesses outlined above are easily identified. Firstly, an overburdened, uninformed and misinformed or even sidelined, INTA Committee is likely to play an unpredictable and least constructive role in the legislative process applying to highly consequential trade and investment accords and framework legislation. Secondly, in a scenario of political disorientation with an INTA Committee in search of negotiable positions that could result in the acquisition of political capital, INTA MEPs will be highly vulnerable to the siren calls of special-interest lobbying groups that are willing to provide 'counsel' and 'technical expertise' at the high cost of placing protectionist items on MEPs' agendas. Third, the political fragmentation of the European Parliament may dilute trade policy objectives, not least because INTA will face strong intra-parliamentary competition for procedural and substantive leadership on many 'trade and' dossiers, as MEPs from other committees will seek to satisfy their constituencies by inserting non-trade concerns and interests into legislative proposals.

3.2 The European Commission and its Directorate-General for Trade

The capacity of the Commission's bureaucratic machinery, embodied by the Directorate-General for Trade (DG TRADE), to master the challenges of post-Lisbon institutional adjustments, stands in stark contrast to the constraints that the Parliament faced in December 2009. DG TRADE benefits from the institutional memory of past decades. It employs about 600 hierarchically organized experts who are well versed and specialized in particular subfields of trade and investment matters; maintains functional working relationships with member states represented in the Council as well as trading partners' governments; and is directed by relatively uniform policy

preferences guided by the Commissioner for External Trade, Karel De Gucht, who started in March 2010 after serving for 14 years as an MEP and five years as Belgium's Minister of Foreign Affairs.

DG TRADE officials commenced first preparations for Lisbon-era scenarios as early as 2007, when the then Director General David O'Sullivan set up a working group, among others, titled 'The Politics of Future EU Trade Policy'. The working group was mandated to brainstorm the implications of parliamentary involvement and increasing institutional competition in the post-Lisbon era, with its final report being presented to the Director General.

However, in light of its deficiencies with regard to transparency, democratic legitimacy and its missing link to voters and constituencies, the Lisbon era presented the Commission with challenges of a different quality than the Parliament, quite unrelated to the Commission's organizational capacity. It is, to a significant extent, the effective marketing of policy proposals vis-à-vis European civil society that will be critical for the success of the Commission's policy initiatives, as public policy debates naturally constitute an important influence on MEPs. Thus, if the Commission wished to retain its leadership in formulating CCP, it would have to focus its efforts on those areas where it was perceived to be weakest in the past decades, namely in gaining public political support, and thereby legitimacy for its proposed policy solutions and the conduct of negotiations. In other words, it behoved DG TRADE and the Commissioner to expand its public relations efforts in order to penetrate, inform and shape public debates on trade and investment issues.

On an optimistic note, and viewed in light of eroding public political support for commercial policies that are solely justified by reference to overly simplistic notions of neoclassical welfare economics, the closure of the CCP's legitimacy gap by means of parliamentary involvement arrives just in time. The Lisbon reforms provide a catalyst for European civil society and their representatives to seize the opportunity created by the inclusion of the Parliament in the policy process to place European 21st century trade policy on a foundation of broadened and renewed public political support. Given that European trade policy of the past has been conducted in the more rarefied air of the Council's Art. 133 Committee's closed-door sessions with the Commission, the inclusion of Parliament now provides a 'bully pulpit' to speak directly to the people of Europe and to engage in the debate over the best and the worst that comes from an open trade and investment policy and how to shape that policy.

In anticipation of the new realities, DG TRADE has undertaken to significantly expand its public relations efforts, increasingly seeking civil society views on trade and investment matters and informing the interested public on policy initiatives and progress in negotiations as well as relations with commercial partners. In 2010, DG TRADE conducted nine civil society consultations on specific policy initiatives – by far the most since its foundation. In 2009, it conducted 37 civil society meetings on all aspects of EU trade policy, compared to 16 meetings in 2001. In 2010, it organized an external seminar in Prague and a large-scale multi-stakeholder conference on a particularly contentious policy field, notably the Commission's sometimes harshly criticized trade policy affecting small and vulnerable economies of the global south. Moreover, DG TRADE now sends out six different e-mail newsletters, which are available in seven languages.

The Commission's public relations efforts have culminated in a recent civil society consultation on The Future of EU Trade Policy, to which it received submissions from 301 organisations and institutions,[24] as well as a special Eurobarometer survey on international trade,[25] requesting more than 23,000 citizens from the EU27 countries to provide their views on trade issues. The results of both exercises have been utilized to inform the recent publication of a prominent trade strategy Communication on behalf of External Trade Commissioner De Gucht, entitled "Trade, Growth, and World Affairs".[26] To summarize, with the entry into force of the Lisbon Treaty, the Commission has clearly discovered civil society and the general public as both a constituency to which it has to hold itself accountable, and as a vehicle to legitimize its policy initiatives and negotiation conduct vis-à-vis Parliament and the Council.

As reported to the author in personal interviews, the Commission has been equally proactive in the establishment of direct inter-institutional relations with the INTA Committee. DG TRADE has welcomed the Committee's capacity constraints as an opportunity to provide technical assistance, shape the discourse among committee members, their assistants and policy advisors, and has thereby initiated the establishment of working relations on a constructive note in its well-understood own interest. DG TRADE has implemented its 'charm offensive' strategy through, for instance, informal technical briefings provided to MEPs' assistants and policy advisors, an unrestrictive information and participation policy vis-à-vis Parliament (a matter

24 European Commission, Directorate General of Trade (2010a).
25 European Commission, Directorate General of Trade (2010b).
26 European Commission, Directorate General of Trade (2010c).

that will be discussed in section 4.1 below), and high-level official representation in INTA sessions. Moreover, DG TRADE officials and the Commissioner himself have wasted no opportunity to make public appearances to pay due respect to the newly acquired parliamentary powers and the importance of parliamentary involvement.[27]

To be sure, the Commission's generosity in facilitating the INTA Committee's operations in the early days of the Lisbon era is unlikely to be of purely philanthropic nature. The better the relationships between the Commission and the Parliament with regard to CCP matters, the better the Commission will be able to crowd out the Council's sphere of influence and counter civil society interest groups' attempts to capture the INTA Committee's agenda. A weak INTA Committee, short of expertise and capacity, must be deemed to be most detrimental to the Commission's interest in a credible, predictable and open trade and investment policy. Moreover, the Commission's attempt to strengthen the INTA Committee's capacity to transform legal endowments and available information into credible and well informed negotiation positions is rendered less painful by one important fact: it occurs largely at the expense of the Council's sphere of political influence.

3.3 The European Council of Ministers

In comparison, the Council has shown relatively little flexibility in adapting to Lisbon-era realities, and has, as the SWIFT episode illustrates, entered the institutional competition with Parliament on the worst possible note. The reasons are, as discussed below, to be found in structural factors.

Only weeks after being granted the procedural power to consent to international agreements, Parliament voted down the SWIFT Agreement (Society for Worldwide Interbank Financial Telecommunications) between the EU and the United States, which would have governed the exchange of bank data between the two regions with the aim of tracking down sources of terrorist financing. Having directly experienced Council interactions with Parliament on the SWIFT Agreement as the rapporteur responsible for the file, Dutch MEP Jeanine Hennis-Plasschaert commented: "It's clear that the way the Council, but also the United States authorities, have been treating the European Parliament is just unacceptable."[28] In light of significant

27 See, for instance: De Gucht (2010).
28 EurActiv.com (2010a).

media interest and coverage, the incident has informed many observers' views on the inter-institutional relations between Parliament and the Council, the latter of which, as reported to the author in interviews, has simply ignored, in this particular instance, parliamentary positions and requests for information prior to the plenary vote. As INTA Committee Chairman Professor Vital Moreira recently confirmed, the early days of Lisbon-era relations between the Council and Parliament can safely be characterized as a 'suboptimal' point of departure.[29]

Member states represented in the Council benefit from massive institutional capacity, embodied by extensive dossiers prepared by national ministries of economic affairs and expert staff employed in member states' permanent representations to the EU. Moreover, member states hold decades of institutional memory and established working relations with the Commission. Nonetheless, the Council will naturally have much more difficulty in establishing inter-institutional relations with Parliament and is ill-suited to publicly market its political preferences in order to affect public opinion (and thereby MEPs) for three reasons.

Firstly, the Council is, by definition, a politically fragmented institution. Member states frequently form varying alliances on the basis of on national interests with regard to specific dossiers. This circumstance impedes the development of a unified Council approach to dealing with its new institutional competitor in many policy areas. By and large, it is left up to individual member states to develop relations with key MEPs to lobby for support for governments' political positions. Secondly, and by the same token, member state governments have limited ability to influence public debates on trade and investment policies beyond their own nation state, not least because their efforts are frequently interpreted as exclusively aimed at advancing of national in contrast to common European interests. Finally, it must not be forgotten that the Lisbon reforms applying to CCP have placed the Council in a defensive position. Most importantly, the Council's influence on the legislative process applicable to trade and investment issues has been significantly constrained, compared with the pre-Lisbon scenario. Additionally, the adoption of international agreements now eventually depends on parliamentary consent. Finally, the reformed comitology further decreases member states' ability to control the implementation of trade and investment policy by the Commission.

29 European Parliament (2010c).

As the SWIFT episode indicates, member states may have initially sought to defend parts of their pre-Lisbon prerogatives through a mixture of ostrich tactics and parliamentary containment rather than engagement. As regards the Trade Policy Committee, it has been reported that then Director General of DG TRADE, David O'Sullivan, repeatedly urged the member states in his committee appearances to face the legal and political realities of the Lisbon era of trade and investment policy formulation.

However, as remarked to the author in personal interviews, ministries of economic affairs and commerce are starting to discover Parliament as a host of unexploited opportunities – particularly with a view to promoting national interests through MEPs of their own national origin – and are increasingly seeking to develop relationships with the offices of key MEPs in order to promote their political positions.

4 Power consolidation, protectionism and European values: Parliamentary political preferences and ambitions in the area of EU common commercial policy

The political fragmentation of Parliament (and the INTA Committee), the influence of utterly diverse stakeholders on INTA members' political preferences and, finally, MEPs' constrained capacity to translate political preferences into credible negotiation positions vis-à-vis the Commission and the Council, render the consequences of parliamentary involvement for the content of future EU commercial policies highly uncertain. Nevertheless, a few pragmatic considerations and recent observations provide some first indications for what can be expected from Parliament in the field of European trade and investment policy in the future.

As with all politicians facing election cycles that are much shorter than the time frame over which open trade and investment policies can deliver measurable benefits, MEPs are likely to be reluctant to spend much time promoting broad, open and long-term commercial policies.[30] They are more likely to target their interventions at three categories of issues, notably: the consolidation and defence of their unique responsibilities; the promotion of immediate and short-term welfare concerns of their constituencies and political supporters; and advocacy for the incorporation of broader European political values in CCP legislation and trade agreements that are anchored

30 Hillman and Kleimann (2010), op. cit., pp. 9.

in and respond to shared moral convictions held among citizens across Europe. The following sections elaborate on each one of these three categories, providing anecdotal evidence drawn from the first 16 months of Lisbon-era CCP formulation.

4.1 Parliamentary power consolidation: The framework agreement between the European Parliament and the European Commission

In the early days of the Lisbon era, INTA members have, across party groups and nationalities, aligned behind the objective of consolidating, defending and expanding its newly acquired responsibilities and have sought to give full effect to the provisions granting the respective powers. This has been made clear in various parliamentary resolutions,[31] MEP statements,[32] as well as by the circumstances and rhetoric surrounding the SWIFT episode.

In order to enable itself to fully participate in the political deliberation process applying to the adoption of negotiation mandates, directions of negotiation conduct and co-decision legislation, the INTA Committee has demanded that the Commission gives full effect to the TFEU provisions governing the submission of (confidential) information as well as reporting requirements by means of equal and indiscriminate treatment of INTA and the Council. Additionally, it has sought to acquire the right to attend negotiations of trade accords conducted by DG TRADE, as well as meetings between Commission officials and national experts mandated by Arts 290 and 291 TFEU.[33]

A formal letter, as reported to the author in a personal interview, was sent by INTA Chairman Vital Moreira to Commissioner De Gucht in early 2010, aimed at incorporating these demands into the Framework Agreement on Relations between the European Parliament and the European Commission. Framework agreements are negotiated at the beginning of each of Parliament's terms. Art. 295 TFEU serves as the legal basis for such agreements by providing that "the European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, *conclude interinstitutional agreements which may be of a binding*

31 European Parliament (2009).
32 German Marshall Fund of United States (2010).
33 Ibid.

nature." A parliamentary resolution called for a "guarantee that the Commission will apply the basic principle of equal treatment for Parliament and the Council, especially as regards access to meetings and the provision of contributions or other information". Moreover, the resolution seeks "a commitment by the Commission for reinforced association with Parliament through the provision of immediate and full information to Parliament at all stages of negotiations on international agreements (including the definition of the negotiation directives), *in particular on trade matters and other negotiations involving the consent procedure,* in such a way as to give full effect to Art. 218 TFEU, while respecting each institution's role".[34]

In this context it is worth recalling that the treaty language of Art. 207 (3) TFEU – read in the context of Art. 218 – makes a distinction between the role of the Council and the Parliament in the course of negotiations, quite separate from the fact that Parliament has no formal role whatsoever in the determination or adoption of negotiation mandates. While the Commission "shall conduct these negotiations *in consultation with a special committee appointed by the Council to assist the Commission in this task"*, the Commission shall only "report regularly (…) to the European Parliament on the progress of negotiations." Without further inquiry into the qualitative difference of the terms "in consultation" and "to assist" on the one hand and "report to", on the other, the obvious semantic distinction appears to justify a different treatment of the Council vis-à-vis the Parliament as regards the submission of confidential documents on the conduct of negotiations and the attendance of negotiation sessions and preparatory meetings.

The signature of the framework agreement by the President of the European Commission and the President of the European Parliament on 20 October 2010 represents an important political victory of Parliament vis-à-vis the Council and evidence of the Commission's appeasement strategy, granting Parliament unprecedented rights of information and access to meetings of the Commission.[35] The agreement, moreover, seems to severely test the scope of the provisions of the TFEU.

First, paragraphs 1 and 10 of the Framework Agreement announces a "new special partnership" between the Commission and the Council. Paragraph 9, furthermore, provides that "Commission guarantees that it will apply the basic principle of equal treatment for Parliament and the Council, especi-

34 European Parliament (2010i).
35 European Commission (2010b).

ally as regards access to meetings and the provision of contributions or other information (…)." Paragraph 25, on international negotiations, grants MEPs conditional access to negotiations and "all relevant meetings under its (the Commission's) responsibility before and after negotiation sessions". Paragraph 3 of Annex 3 of the agreement further obliges the Commission to "take due account of Parliament's comments throughout the negotiations", while paragraph 4 requires the Commission to "explain whether and how Parliament's comments were incorporated in the texts under negotiation and if not why." Finally, paragraph 5 demands that the Commission "shall provide to Parliament during the negotiation process all relevant information that it also provides to the Council (…)."

Not surprisingly, member state governments strongly opposed the agreement's content. In a letter sent to both the President of the Commission and to the Parliament, the President of the General Affairs Council complained that "the Framework Agreement *has the effect of modifying the balance established by the Treaties between the Institutions, according powers to the Parliament not conferred by the Treaties* and limiting the autonomy of the Commission and its President. The Council is *particularly concerned by the provisions on international agreements,* infringement proceedings against member states and *transmission of classified information to the European Parliament."* The President of the Council, moreover, attached the opinion of the Council's legal service,[36] subject to the warning that "the Council will submit to the Court of Justice any act or action of the European Parliament or of the Commission performed in application of the provisions of the Framework Agreement that would have an effect contrary to the interests of the Council and the prerogatives conferred upon it by the Treaties."[37]

36 In its legal opinion, the Council's legal service particularly noted that the Framework Agreement "involves the obligations imposed on the Commission by Annex 3 to take due account of the Parliament's comments in the entire process of negotiation and to provide it with a whole series of documents (in particular the draft negotiating directives, draft amendments to negotiating directives, draft negotiating texts or any relevant documents received from third parties, subject to the originator's consent) relating to international negotiations. Such obligations, combined with the obligation on the Commission to take account of the European Parliament's views and inform it of the way it has incorporated them in the texts negotiated, are not provided for by the Treaty." Moreover, Point 21 of the draft Agreement provides in particular that the Commission will facilitate the participation of Members of the European Parliament as observers in all relevant meetings under its responsibility before and after international negotiation sessions. This provision would mean participation by the European Parliament in the Union's internal coordination meetings, thereby modifying the procedure laid down in Art. 218(4) TFEU, whereby "The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted". According to this Article, the Council is the only Institution competent to decide which committee will be consulted and who will participate. Application of the present provision of the draft Agreement would directly undermine the Council's prerogatives. See: Council of the European Union (2010).

37 Council of the European Union (2010).

In any case, the agreement embodies an important milestone for Parliament with regard to the pursuit of the consolidation of the powers that it acquired under the Lisbon Treaty. The INTA Committee has been particularly assertive in this regard. The Commission, on the other hand, has taken the treaty changes very seriously and is implementing a strategy of appeasement rather than containment – very much to the dismay of member states represented in the Council.

4.2 Protectionism and consumer protection

The promotion of immediate and short-term economic welfare concerns, such as job security, protection of domestic production and consumer protection, as brought to MEPs' attention by their constituencies, political supporters, business associations, labour unions and others, represents both immense pressures and opportunities for INTA Committee members to gain the domestic political capital necessary to ensure their re-election. Therefore, whenever defensive economic welfare interests, as typically reflected by economic adjustment costs associated with trade liberalization, come before the INTA Committee, MEPs should be expected to side with their domestic constituency and interest groups – irrespective of their party group affiliations and the broader benefits of the proposed policies. For MEPs, committing 'treason' on the welfare concerns of their domestic constituency would resemble political suicide.

4.2.1 The EU-Korea FTA precedent

The claim outlined above is supported by the experience of the political dynamics surrounding the first trade agreement submitted to Parliament in the Lisbon era that requires both implementing legislation through the OLP as well as parliamentary consent. The EU-Korea FTA negotiation mandate dates back to April 2007 and negotiations started in May of the same year. However, negotiations were only finalized in early 2010, i.e. late enough for the adoption of the accord and necessary implementing legislation to fall under the Lisbon rules. The EU-Korea FTA is deemed to have the second largest commercial value compared to other FTAs and regional trade agreements – trumped only by NAFTA – and is estimated to result in gains of up to €19 billion for EU traders.[38]

38 See, for instance Erixon and Lee-Makiyama (2010).

The draft agreement negotiated by the Commission, however, has led to massive opposition from European small-car manufacturers (particularly of German and Italian origin) and the European Automobile Manufacturers' Association (ECEA), who fear that Europe will be flooded with imports of Kia and Hyundai cars once the 10% import duty is eliminated. Moreover, they are concerned that the agreement's allowance for the Korean duty drawback scheme, which commits the Korean government to refund duties paid by Korean producers on car parts originating from outside Korea, would create an unacceptable competitive edge for Korean car exporters.

Hence, once it became clear that the accord would be subject to parliamentary consent and implementing legislation through co-decision under Lisbon rules, the auto industry commenced strong efforts to lobby MEPs to turn down the agreement, or, as a second-best solution, to incorporate specific amendments in the implementing legislation applicable to the agreements safeguard mechanism. Such amendments would aim at the application of MFN (most-favoured nation) tariffs to Korean cars in the event that any kind of foreseeable competitive disadvantage is suffered as a result of Korean car exports.

In February 2010, the Commission submitted a proposed regulation for a safeguard mechanism to Parliament and the Council.[39] The text proposes a standard safeguard, allowing for the application of MFN tariff rates in the event of 'serious injury' or 'threat of serious injury' to EU industry, caused as a result of the elimination of the MFN rate. As usual, safeguard investigations may be initiated by the Commission on request of a member state, or on its own initiative.

In the course of the first legislative reading of the proposed regulation, the INTA Committee preliminarily adopted no less than 54 amendments.[40] The amendments broadly and exclusively reflect nothing less than a strong protectionist agenda and the capture of the INTA Committee by German and Italian small-car manufacturers and labour unions. This claim is supported by the fact that the overwhelming share of the amendments was proposed by the German and Italian INTA members, irrespective of party group affiliation.[41]

39 European Commission (2010c).
40 European Parliament (2010b).
41 See European Parliament, Committee on International Trade (2010b).

To summarize: INTA demanded a massive expansion of potential causes for 'serious injury', i.e. including Korean non-compliance with social and environmental clauses of the agreement (Amendment 3), non-compliance with the agreement's non-tariff barriers (A4), competitive effects of the duty drawback exemption (A11), and the non-compliance of third countries production of Korean product parts with ILO and UN standards applying to social and working conditions and environmental standards (A13). Moreover, amendments 22 and 24 envisage a regional application of the safeguard, i.e. the possibility to exclusively reinstall the MFN tariff rate for individual EU member states (such as Italy or Germany) under certain circumstances. Furthermore, the European Parliament or any legal personality acting on behalf of more than 25% of EU industry are demanded to have the right to request the initiation of safeguard investigations, additional to member states and the Commission (A27). The INTA amendments also contain strong language on transparency and reporting requirements on behalf of the Commission, applicable to the functioning of the safeguard and the performance of Korean export produce in European markets. Finally, INTA members demanded that, in the case of a finding "that the safeguard measures are insufficient, the Commission should submit a comprehensive proposal for more far-reaching safeguard measures, such as limits on quantities, quotas, import authorization arrangements or other corrective measures" (A6).

To be sure, the INTA amendments, designed to circumvent EU obligations under the FTA and to protect the domestic industry from any competitive effect arising from the agreement, have put the working relationship between Parliament and Commission as well as with the Council to its first serious test. Informal trilogue negotiations between the INTA Committee and the Council showed strong disagreement over the strength and application of the agreement's safeguard clause. Exemplifying the controversy, German MEP Bernd Lange from the group of social democrats stated: "the Council now finally has to move, so that we will have sufficient safeguards for the Free Trade Agreement with South Korea to protect European industries and employees from dumping." His colleague from the German liberal party, Michael Theurer concurred saying: "we require an effective safeguard clause which covers regional distortions and social and environmental norms which allow us to avoid the inherent duty drawback risks."[42]

42 Euractiv.com (2010b).

However, it seems that Parliament has already started to develop a pragmatic, moderate and responsible *modus operandi* for its institutional competition with the Council. Once it became clear that agreement with the Council was possible but still required further informal negotiations, INTA postponed an internal vote on its position in order, as INTA special rapporteur Pablo Zalba Bidegain stated, "not to close the door" for a first-reading agreement with the Council.[43] The decision to postpone the vote sends an important signal, as observers and stakeholders have been widely concerned about the potentially long duration of legislative procedures due to parliamentary involvement.

At this point it is important to note that INTA had also established procedural demands applying to the consolidation of its powers under the Lisbon rules in the context of the EU-Korea FTA: INTA requested that a provisional application of the agreement would occur no earlier than following the adoption of necessary implementing legislation and the provision of its consent to the agreement. The fact that the agreement will have to be applied provisionally for some time stems from the fact that 27 member state parliaments have to ratify a protocol of the agreement, which is still under shared competence. INTA's insistence on provisional application only after Parliament had its say was aimed at ensuring that INTA retains the political leverage to shape the content of the agreement and implementing legislation, as derived from its procedural powers.

On a different note, the agreement was further jeopardized in early September 2010 by the Italian Foreign Minister, who threatened to veto the Council's authorization to sign the entire agreement if the agreement's application was not postponed for another year. Many Italian MEPs colluded with the Foreign Minister, whose position was heavily influenced by Italy's recently underperforming small-car maker Fiat. The signing by the President of the Council was planned to occur on October 5th at the ASEAN summit in Brussels – a circumstance that placed the Commission and the Council's Presidency under heavy time pressure to come to an agreement.[44] In an interview with the author, the interlocutor characterized the political solution as follows: The provisional application of the EU-Korea FTA will be postponed for another six months and will commence no earlier than on 1 July 2011. However, there will be no provisional application whatsoever without having received parliamentary consent and without adoption of a

43 Ibid.
44 Ibid.

regulation governing the agreement's safeguard mechanism. Hence, the Korea agreement was signed as planned on October 5th.

The 'Italian standoff' was quickly followed by an agreement among the parties to the informal trilogue negotiations on the safeguard regulation in October 2010, in which INTA retreated from many of its protectionist demands after the Commission and member states had conceded ground on the matter of parliamentary involvement prior to provisional application of the Korea agreement. In any case, the parliamentary resolution, as adopted by INTA on 26 January 2011, presents a remarkable political compromise.[45]

The safeguard regulation does not provide for the possibility of a regional application of the safeguard, the possibility of the initiation of investigations upon request of Parliament, nor does the regulation render the application of the safeguard subject to legally binding provisions on the Korean duty drawback scheme or social and environmental standards. However, many of INTA's demands applying to duty drawback and social and environmental issues have, albeit in a significantly toned-down version, found their way into the preamble of the regulation and an attached declaration by the Commission. On the other hand, the major concession on behalf of the Council and the Commission is reflected in several provisions on the Commission's monitoring, reporting and surveillance duties with regard to Korean imports, none of which, however, oblige the Commission to initiate safeguard investigations or apply safeguard duties after all. What the regulation does, nevertheless, is to provide Parliament with additional information and transparency instruments that can be employed to mount political pressure on the Commission's decision-making process.

Parliament's plenary eventually adopted the first significant piece of CCP legislation in its history on 17 February 2011. At the same time, Parliament gave its consent to the entire Korea agreement.[46] The Korea episode gives important indications for both the policy preferences of INTA members as well as the modalities of institutional cooperation and competition between Parliament, the Council and the Commission. While INTA has, not surprisingly, proven to establish a protectionist force vis-à-vis the Commission and the Council, it has similarly become clear that it is willing to negotiate its demands and retreat from positions that are clearly unacceptable for the Commission and the Council – if only after receiving face-saving concessions. In

45 European Parliament, Committee on International Trade (2010a).
46 European Parliament, Committee for International Trade (2011a).

fact, the relatively smooth sailing of the EU-Korea FTA, despite the troubled waters, has led DG TRADE Deputy Head of Unit for Policy Coordination to congratulate Parliament for "the very positive and responsible role of the EP in the Korea file."[47] Without doubt, the agreement's passage through the reformed institutional cooperation framework in the Lisbon era has marked an important milestone for the future conduct of EU CCP formulation.

4.2.2 Consumer protection and agricultural protectionism

MEPs will, moreover, likely position themselves as guardians of consumer protection. One way of capitalizing on European consumers' aversion to unforeseeable effects of certain products will be the broadest possible interpretation of the 'precautionary principle'. In the name of precaution, European policy-makers aim at justifying the protection of consumers and the environment from the presumed adverse effects of imported products containing genetically modified organisms (GMO),[48] the so-called 'novel foods' – e.g. products derived from the offspring of cloned livestock, hormone-treated beef and chlorine-rinsed poultry.

Given the enhanced parliamentary scrutiny, EU institutions are now even less likely to pass legislation that will allow for the unrestricted import of such or similar products. As some scholars point out, "members of the European Parliament may acquire more influence on the scope and application of food safety and SPS control measures, the development of EU agricultural product quality standards and the elaboration of labelling requirements. Given the strong role of consumer opinion (possibly encouraged by agricultural lobby) in driving ever higher formal and private sector SPS standards, the more central involvement of Parliamentarians in standard setting could result in an even more rapid escalation."[49]

In a recent episode, OLP conciliation regarding the EU's new novel foods regulation, as initially proposed by the Commission in January 2008, collapsed in March 2011 over the issue of the appropriate treatment of the production and import of food obtained from naturally conceived offspring of cloned animals. While Parliament had proposed a labelling requirement for all imports of such products, the Council only reluctantly accepted the

47 European Commission, Directorate General of Trade (2010d).
48 European Parliament (2011c).
49 Stevens and Goodison (2006).

labelling of one type of product, namely fresh beef, pointing at the infeasibility of all-encompassing labelling practices. As the result of the second failure of an OLP conciliation in EU history, novel foods marketed after 1997 will remain unregulated (and, for that matter, unlabeled) for the years to come.[50]

Commenting on the failure of the conciliation procedure, Parliament's rapporteur on the dossier, Dutch MEP Kartika Liotard from the Committee on Environment, Health and Food Safety stated: "It is deeply frustrating that the Council would not listen to public opinion and support urgently needed measures to protect consumer and animal welfare interests." Finnish Green MEP Satu Hassi added that "the European Commission has played an inglorious role in these negotiations, proactively pushing EU member states to resist any ban on cloned food. It is highly regrettable that the Commission is more concerned with the interests of its trading partners in third countries and their niche industry than the will of the majority of EU citizens". The US in particular has high stakes in the EU's novel food regulation, given the importance of the sector in the US and the high additional costs that an all-encompassing labelling requirement would introduce for its exporters.[51]

It remains difficult to determine whether MEPs' insistence on labelling food derived from cloned livestock offspring was predominantly motivated by agricultural protectionist interests of certain lobbying groups, consumer health concerns or the general aversion on the part of the broader European public to the use of cloning for food production. What the example demonstrates, however, is that, with the increasing involvement of the European Parliament in domestic regulatory and international trade matters, EU institutions will have to fight many battles in which powerful trade interests will clash with alleged European consumer values and preferences with regard to food quality and food production methods. In this context, political actors are well advised to give particular importance to the proportionality of the measures chosen to defend the interests of European citizens. While it is imperative to adhere to international obligations, e.g. to base SPS measures and risk assessments on scientific evidence, Parliament needs to be particularly concerned about the practical feasibility and credibility of its policy proposals. An all-encompassing labelling requirement for products derived from cloned livestock offspring, for instance, resembles a *de facto* ban of such products, given the technical difficulty to implement such requirements.

50 European Parliament (2011d).
51 Euractiv.com (2011).

Another area of trade policy that will be subject to increasing parliamentary influence and scrutiny is trade in agricultural products. The TFEU provides that not only trade and investment but also the EU's common agricultural policy (CAP) is now co-decided upon by the Council and the Parliament, including the EU's domestic supply management schemes and subsidies for a variety of sensitive agricultural products. Parliamentary responsibility for agricultural policy, held by the Committee on Agriculture, has resulted in strong MEP interest for the implications of currently negotiated trade agreements for domestic agricultural production and the welfare of farmers. For instance, members of the Agriculture Committee have made it clear that they will very closely follow the Commission's free trade negotiations with MERCOSUR countries (Argentina, Brazil, Paraguay and Uruguay). The negotiations resumed in early 2010, and have voiced strong concerns over the implications of potentially increasing imports of MERCOSUR produce for EU agriculture.[52]

4.3 Sustainable EU trade policy and policy coherence for development

Finally, mirroring the shared political preferences of the European public, parliamentarians from various committees have, under the banner of 'policy coherence for development' (PCD), demonstrated great interest in linkages between trade and development policy and in sustainability issues more generally. These nexus issues include negotiations over the economic partnership agreements (EPAs) with the African, Caribbean and Pacific (ACP) countries,[53] the upcoming revision of the GSP, GSP+ and EBA schemes,[54] EU agricultural exports to developing countries, patent restrictions that affect access to medicines in poor countries, environmental, social and human rights standards embedded in FTAs, as well as animal welfare concerns.

In its May 2010 resolution on EU Policy Coherence for Development, which lists more than 20 proposals for more sustainable trade, Parliament "(r)eiterates the importance of coherence between trade and development policies and stresses that the implementation of the Sustainable Development Chapters in the trade agreements should serve as an opportunity for the European Commission to promote good governance and the application of fundamental European values."[55] The resolution demonstrates that Parlia-

52 European Parliament (2010a).
53 European Parliament (2010g).
54 European Parliament (2010h).
55 European Parliament (2010e).

ment is aiming, at least notionally, for nothing less than the export of the European value system through its trade policy. And in fact, as the informal trilogue negotiations on the EU-Korea FTA safeguard have demonstrated, such parliamentary ambitions do not only serve as a fig leaf vis-à-vis the European constituency, but have found their way onto the negotiation table.

In this context, it appears, at first sight, that in its role as a political actor endowed with democratic legitimacy, Parliament could become an active promoter of the consistency of the CCP content with the principles and objectives of EU External Action. This would suggest that EU CCP could be – much more than is currently the case – employed as a tool for the achievement of political objectives abroad. CCP would therefore have to be increasingly embedded into, and adjusted to, broader EU external action strategies.

Notwithstanding the questionable desirability of further politicization of the CCP, this notion disregards parliamentary political realities which render Parliament an inappropriate candidate for the role of guardian of the consistency of the CCP with EU external action principles. MEPs, as noted above, are naturally dependent on political support from their constituencies and thereby doomed to promote short-term interests in order to increase the likelihood of their re-election. In the context of the nexus of CCP and its consistency with external action principles, this claim is supported by a recent and prominent example.

In September 2010, External Trade Commissioner De Gucht proposed granting duty-free market access to a list of 13 Pakistani textile export products for a short period of time, in order to assist Pakistan in rebuilding its economy and to stabilize the country after being hit hard by disastrous floods in June 2010. The proposal gained the support of the EU High Representative, Catherine Ashton. However, siding with their respective home governments, the proposal was strongly criticized by MEPs originating from textile-producing member states, including Spain, France, Portugal and Italy – while Swedish, German and British MEPs supported the concessions.[56] As a result of opposing protectionist interests, the proposal was significantly watered down and subjected to a WTO waiver application (in order to prevent other countries from benefiting, which would not be possible in the case of a temporary MFN rate reduction), which will lead to months of delay until the concessions can be implemented. As a result, several parties

56 BBC Democracy Live (2010).

on the receiving end have questioned the commercial value of the Parliament-proof concessions.[57]

This episode indicates that little can be expected from MEPs in cases where shared values clash with local or national economic interests. Parliament therefore appears to be ill-suited to promote the consistency of EU trade and investment policy with EU external action principles or other EU policies, as what is at stake is nothing less than the credibility of EU external action and reputation abroad.

5 Conclusions

On the basis of available evidence, this paper suggests that the first 16 months of the Lisbon era offer some indicative insights into how the European Parliament, the Commission and the Council interpret their roles under the new rules. It has been argued that the Commission has strategically embraced the involvement of the European Parliament in CCP formulation in order to ensure the predictability, credibility and continuity of EU trade and investment policy in a context of enhanced politicization. The Council, on the other hand, appears to have had significant difficulties in meeting the adaptation challenges resulting from increasing institutional competition mandated by the Lisbon reforms. Moreover, first experiences indicate that the Council's sphere of political influence is decreasing beyond what is required by the treaty rules. The European Parliament, in contrast, has taken an assertive but fairly responsible stance, aiming at, in this order of priority, the consolidation and expansion of its newly acquired powers, the protection of special economic interests of its various constituencies and the promotion of political values shared across Europe. Finally, the paper has conducted a first assessment of the changing CCP content resulting from the reform of its legal basis.

Given the quality and extent the reforms introduced by the Lisbon Treaty, the European Parliament, the Commission and the Council are currently climbing the steepest part of the learning curve. The reforms have presented the institutions with adaptation challenges that require a strong increase in inter-institutional communication, negotiation and cooperation as well as the development of a thorough understanding of each other's capacities, working methods, constituencies and political 'red lines'. CCP formulation

57 Bridges Weekly Trade News Digest (2010).

and decision-making has become more complex, cumbersome, as well as time- and resource-consuming. At the same time, with the politicization of the CCP, the reforms have made European trade and investment policy subject to public debate and scrutiny and have obliged all EU institutions involved in the political deliberation process to hold themselves accountable to the stakeholders of EU CCP, notably European civil society.

While the reforms have presented the respective institutions with various adaptation challenges, with potentially adverse effects on the continuity and predictability of a highly successful policy area of the Union, they may offer certain opportunities at the same time. As HILLMAN and KLEIMANN (2010) have pointed out, public support for progressive trade liberalisation in the Western hemisphere has in recent years, to varying extents, increasingly suffered from the elevation of short-term protectionist interests vis-à-vis broad open trade policy agendas. Public concerns over economic adjustment costs resulting from further market opening have been "exacerbated by the experience of the economic meltdown and fears of increasingly fierce international economic competition. In times when fast-paced economic adjustment is felt much more directly and immediately than the broader, long-term and almost abstract welfare benefits of international trade agreements, policy-makers need to move beyond the traditional free trade narrative of the past in order to justify open trade policies. The necessity to win parliamentary and public support in the post-Lisbon era provides the Commission and EU member states with the opportunity to narrow this gap between public political preferences and perceptions, on the one hand, and actual EU trade policies on the other."[58] However, the great challenge will be to do so without allowing protectionist special interests to capture the policy agenda, as they do not reflect and are indeed detrimental to the broader welfare interests of the peoples of the European Union as a whole.

Indeed, the INTA Committee is a natural target for rent-seeking special interest groups and is currently particularly vulnerable to capture given its institutional weaknesses in terms of technical expertise, institutional memory and staff capacity. Future institutional reforms may need to address the potentially resulting governance failures, depending on MEPs' political will to proactively contribute to the success of EU CCP by means of well-informed proposals for responsible and sustainable policy solutions that, while remaining consistent with the EU's international obligations, mirror the well-understood interest of the European peoples as a whole in con-

58 HILLMAN and KLEIMANN (2010), op. cit.

trast to the blatantly obvious pursuit of narrow constituencies' interests without consideration for the greater common good.

Against this backdrop, CCP formulation in the early days of the Lisbon era has fared reasonably well. While the Commission has proactively embraced the reforms and parliamentary involvement, the European Parliament is now in the process of learning and accepting that at the end of negotiations you cannot always get what you want. As the Korea FTA episode indicates, it has so far done so rather responsibly – at least without jeopardizing the credibility of EU trade policy and reputation abroad. The consolidation of its newly acquired responsibilities may have helped INTA to give up on many of its utterly protectionist demands. However, the real test will come with the adoption of new negotiation mandates, where Parliament has the opportunity to experiment with its political leverage to shape the content of negotiation directives and influence the direction of negotiations – with friendly support granted by the Commission's suspiciously generous information policy.

While INTA's biggest challenge remains to become well versed in highly technical and complex dossiers and to master a massively increasing workload, member states represented in the Council are now slowly beginning to realize that its institutional dominance ended in December 2009, and that MEPs may serve as important partners in advancing national agendas in the future. The Council had many structural disadvantages in adapting to the outlined challenges. However, member states should be expected to find innovative ways and means to advance their national interests in the long run. The Commission, on the other hand, has not only proven its leadership in implementing the Lisbon reforms, but has, moreover, started to develop a first Lisbon-era trade and investment policy strategy that can survive public political scrutiny, as it appears to take into account and to balance the diverse concerns and interests of the many stakeholders of EU CCP in European civil society.

The Lisbon reforms have brought to an end the Commission's and the Council's black box power duopoly over the EU's highly successful common commercial policy – and with it, the technocratic efficiency of EU CCP policy-making. The participation of the European Parliament now fills the democratic legitimacy gap that characterized EU CCP since its inception. However, only time will tell how the evolving new institutional balance and division of competences will change the normative foundations of CCP formulation in the Lisbon era and whether or not enhanced democratic legit-

imacy through parliamentary involvement will result in improved policy outcomes. Much will depend on the quality of the current learning experiences gained by the three institutions, which will partly determine the form and direction of future inter-institutional cooperation and competition for best policy solutions in the field of European trade and investment.

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This paper looks at variation across Russian regions in terms of perceived constraints to doing business using the Business Environment and Enterprise Performance Survey of Russian firms. The analysis identifies a number of region-specific business environment components that businesses perceive as significantly more binding constraints to their operations compared with other regions. For several business environment components, however, including corruption and access to finance, inter-regional differences in their perception as constraints are insignificant. This is consistent with the view that large observed differences in actual financial deepening across Russian regions are primarily demand-driven.

Die Studie untersucht die Wahrnehmung von Einschränkungen des Unternehmertums in verschiedenen Regionen Russlands. Grundlage hierfür ist die von der EBRD und Weltbank durchgeführte Umfrage «Business Environment and Enterprise Performance», an welcher russische Firmen teilgenommen haben. Die Analyse verdeutlicht, dass Firmen je nach Region eine stärkere Einschränkung ihrer Geschäftstätigkeiten registrieren, welche durch regionale Unterschiede im Geschäftsklima bedingt ist. Allerdings sind die regionalen Unterschiede in der Wahrnehmung von Einschränkungen des Unternehmertums für einige wirtschaflichte Faktoren, wie zum Beispiel Korruption oder Zugang zu Finanzierung, statistisch unerheblich. Das Ergebnis unterstreicht die Ansicht, dass die großen überregionalen Unterschiede der tatsächlichen Kapitalbildung in Russland vornehmlich bedarfsgesteuert sind.

The first 16 months of the EU's common commercial policy (CCP) in the post-Lisbon period provide indicative insights into how the European Parliament, the European Commission and the Council of Ministers interpret their respective roles under the new legal framework introduced by the Lisbon Treaty. This paper analyses the amendments, the institutional capacities to respond to the reform challenges and the evolving institutional balance applying to Lisbon-era common commercial policy. Against this backdrop, the paper gives an overview of the changing dynamics of EU trade and investment policy in a context of enhanced politicization resulting from the European Parliament's involvement in the decision-making process. Particular importance is given to the question whether enhanced EP involvement in decision-making has the potential to lead to a scenario resembling the policy

process in the United States, where congressional responsibility for trade and investment policy has resulted in the capture of the policy agenda by special interest groups and snail-paced policy progress (if any) in recent years. Accordingly, the paper scrutinizes the political preferences that the European Parliament is introducing into current European trade policy debates as well as the framework legislation and trade agreements. Finally, it is argued that parliamentary involvement in making common commercial policy has the potential to narrow the gap between European public political preferences and perceptions, on the one hand, and actual EU trade policies on the other, and to place EU trade and investment policies on a foundation of renewed public political support. In the author's view, however, it is imperative that such an achievement is based on well-informed, responsible, sustainable and clearly communicated policy proposals from the MEPs, who respond to and seek to balance the multiplicity of interests of CCP stakeholders in European civil society and respect the Union's international obligations.

Der Vertrag von Lissabon hat die institutionelle Machtverteilung hinsichtlich der Ausübung der Gemeinsamen Europäischen Handelspolitik radikal reformiert, die EU-Kompetenzen in diesem Politikbereich substantiell konsolidiert, und damit eine neue Ära der EU-Handelspolitik eingeläutet. Der vorliegende Artikel nimmt eine eingehende Analyse der vertraglichen Veränderungen vor und untersucht auf dieser Basis die individuellen Kapazitäten der EU-Institutionen um ihren neu definierten Rollen und Verantwortlichkeiten gerecht zu werden. Hierbei wird dem sich nun entwickelnden neuen inter-institutionellen Gleichgewicht besondere Aufmerksamkeit zuteil. Im Zentrum des Interesses steht jedoch die Frage, inwiefern sich die Beteiligung des Europäischen Parlaments am Gesetzgebungsverfahren sowie der parlamentarische Einfluss auf die Verhandlung von Handelsabkommen mit Drittländern – und die damit einhergehende Politisierung des Entscheidungsprozesses – auf die Inhalte Europäischer Handelspolitik auswirkt. Vor diesem Hintergrund werden die politischen Präferenzen untersucht, die von Europaparlamentariern in laufende Entscheidungsprozesse und politische Debatten eingebracht werden. Dabei dient das US-amerikanische Szenario, in dem die institutionelle Stellung des US-Kongresses zur Vereinnahmung des Entscheidungsprozesses durch protektionistische Partikularinteressen und zu einer Lähmung des politischen Prozesses geführt hat, als Referenz. Es gilt die Annahme, dass die Einbindung des Europaparlaments in das Gesetzgebungsverfahren die Chance birgt, die Lücke zwischen den politischen Präferenzen und Wahrnehmungen der europäischen Öffentlichkeit auf der einen Seite und tatsächlicher Politikinhalte auf der anderen zu schließen oder zu verkleinern. Dies muss jedoch, so die Auffassung des Autors, auf der Basis von nachhaltigen und wohl informierten Politikvorschlägen von Seiten der Europaparlamentarier geschehen, die darauf abzielen die vielseitigen Interessen der Europäischen Zivilgesellschaft zu repräsentieren und gleichzeitig die internationalen Verpflichtungen der Europäischen Union zu respektieren.

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