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THE 'POLITICIZIATION' OF THE EU'S COMMON COMMERCIAL POLICY – APPROACHING THE 'POST-LOCKEAN' ERA

Peter Hilpold*

1. Introduction

The coming into force of the Lisbon Treaty is generally considered to be an important step in the further development of EU law. It is praised for bringing about greater efficiency, greater democracy and for bringing the Union closer to the Union's citizens. The quest for a more democratic EU, in particular, has been a pivotal goal. In the perennial need to win over majorities for further integration, the promise of granting broader participatory rights has regularly been the bait. The manner of achieving this end was subject to intense discussion, but the overall consensus was that broader democratization should mainly be achieved by strengthening the role of the European Parliament (EP). With the Treaty of Lisbon the EP's affirmation process, which started in 1957 at a very low-key level,[1] has come full circle. In this process, through which the EP managed to attract ever greater powers, the Common Commercial Policy (CCP), long held to be immune from any EU parliamentarian interference, also came within the Parliament's orbit. The consequence of this reform is slowly seeping into public awareness. The democratization of the common commercial policy is equivalent to an enormous leap forward in the politicization of this field. As a consequence, a concept to which Ernst-Ulrich Petersmann has paid so much attention during his academic career[2] is called to mind: the so-called Lockean dilemma. According to this position, the executive function is subject to insufficient parliamentary control and, as a consequence, loopholes in the democratic system arise. Does the Lisbon Treaty finally solve the "Lockean dilemma"? This contribution shall provide evidence that there is no easy answer to that question. It is argued here, contrary to many positions taken in literature, that it is far from certain whether these reforms undertaken by the Treaty of Lisbon will have the desired effect. While the position as such, taken in favour or against stricter democratic control, is, of course, primarily of a subjective or a political nature, it may be interesting to inquire into the

* Professor of International Law, European Law & Comparative Public Law, Innsbruck University.

1 As will be explained below, in 1957 this body did not even exist under that name. It was rather called the "General Assembly".

2 See E.-U. Petersmann, *The GATT/WTO dispute settlement system: international law, international organizations and dispute settlement*, (London, Kluwer Law International 1997), p. 22.

reasons and forces that have brought about such a result. It shall be shown that the whole discussion is based on many concepts which are far from neutral or uncontested. It seems that the European Union is entering into uncharted waters in this field. The further politicization of the EU commercial policy may have consequences that are unaccounted for by most and that are undesired by many. It is not certain whether the dangers associated with these developments can really be countered, but in order to attain this goal the respective risks should first of all be made evident.

2. The "Lockean Dilemma"

As is known, in 1690, the great English Philosopher John Locke made the following important point in his "Two Treaties of Government":

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

The background to this observation was an evolving government system in England where the division of powers had become a reality. At the same time, an incongruity appeared: how was it possible that this division applied only at the internal level while externally the government had full powers? John Locke emphasized the political nature of these acts that made them less suitable for abstract and definite regulation. At first glance, this seems to be convincing: in international relations governments are no longer in a situation of supremacy, at least as long as they treat each other as members of the international society endowed with international subjectivity. It may be true that initially such a treatment was awarded only to a closer club of nations, often known as "civilized" states, but this group grew ever larger and there was a clear tendency, finally ending up in UN law, for all nations to be considered "civilized"[4] and "equal".

At the international level governments are required to observe international rules – rules the creation and evolution of which they may influence only to a rather limited extent, if at all. Their actions are strictly regulated by the rules of reciprocity.[5] Each measure taken at the international level must take into

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[3] Locke, John, *Two Treaties of Civil Government* (London, Churchill 1690), Book II, Chapter XII, paras. 146–147.

[4] As is known, Gerrit Gong has denounced the qualification as "civilized" as purely circular: the fact that a nation was integrated in the (mainly) Western society of nations qualified it as "civilized". *See* G. Gong, *The Standard of "Civilization" in International Society* (Oxford, Clarendon Press 1984).

[5] With regard to the principle of reciprocity *see* B. Simma, *Das Reziprozitätsprinzip beim Zustandekommen völkerrechtlicher Verträge* (Berlin, Duncker & Humblot 1972).

consideration possible counter-reactions by other nations. While national law, therefore, comes into being in a strictly hierarchical setting, international rules are the outcome of a multipolar interrelation which, not just by coincidence, is called a "law of coordination".[6]

This was even more so the case in Locke's day than it is today. According to this vision, all international relations passed through the interface of the prince[7] and, in fact, private transborder intercourse was, at that time, very limited.

According to a generally held position which can be seen as a direct result of the Lockean dictum, governments must remain flexible in their international actions. They have to be able to react spontaneously in cases of need and they should not be hindered in that by national laws that are notoriously difficult to change. If an extreme position is taken it could even be argued that the executive power is inherently unsuited to any form of democratic predetermination, control or supervision.

This thinking can be traced back even to Jean-Jacques Rousseau,[8] and it was made even more explicit by Alexis de Tocqueville in "On democracy in America" where he voiced the opinion that the conduct of foreign affairs had next to no relationship with democracy.[9] Such a position may come very close to Lockean thinking, but it is evident that nowadays we cannot accept such a stance. In fact, it was once thought that many national areas of regulation would not be really suited to being governed by democratic principles, while in the meantime this assumption has proved plainly wrong. At the same time, however, we should not draw the analogy between national law and the international level too far. Many specifics of international acting, as described above, still hold true. The primary challenge lies, therefore, in finding the right balance between a possible and desirable amount of democratization of foreign policy and the maintaining of the flexibility necessary to defend national interests externally in the best possible way. In what follows we shall try to sort out whether the Treaty of Lisbon has struck an unacceptable balance in this field.

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6 *See* on this concept and on its possible further evolution W. Friedmann, *The Changing Structures of International Law* (London 1964). For elements hinting at the development of an international law of solidarity *see* K. Wellens, 'Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations', in: R.St.J. Macdonald/D.M. Johnston (eds.), *Towards World Constitutionalism* (Leiden, Martinus Nijhoff 2005), pp. 775–807; P. Hilpold, 'Solidarität als Rechtsprinzip – völkerrechtliche, europarechtliche und staatsrechtliche Betrachtungen', 55 *Jahrbuch des öffentlichen Rechts* 2007, pp. 195–214 and R. Wolfrum,/C. Kojima (eds.), *Solidarity – A structural principle of International Law* (Heidelberg, Springer 2010).

7 *See* in this sense S. Krauss, *Parlamentarisierung der europäischen Außenpolitik – Das Europäische Parlament und die Vertragspolitik der Europäischen Union* (Opladen, Leske + Budrich 2000), p. 28.

8 Rousseau expressed himself in this sense in his "Lettres écrites de la Montagne". *See* Krauss, *supra* note 7, p. 28.

9 Ibid., p. 29.

3. Democratizing EU (EEC/EC) Law: A Perennial Challenge

While parliamentarianism is often said to be generally in crisis[10] or in a downward spiral, this does not seem to be true with regard to the EU which in recent decades has been further strengthened with nearly every step towards closer integration.[11] As is known, a parliamentarian institution was originally not even provided for when European integration began.[12] Only at the very last moment was a "Consultative Assembly" added by Jean Monnet to the framework of the European Coal and Steel Community.[13] As is usual with parliamentary bodies in international institutions its members were delegates from national parliaments and its functions were, as its name implied, of a merely consultative nature.[14] Seen from a present-day perspective, this Assembly, which changed its name first to "European Parliamentary Assembly" in 1958 (when it became the common Assembly for all three newly established communities) and to "European Parliament" in 1962, bore little resemblance, in its structure or in its powers, to the representative organ of these days.[15] Nonetheless, the whole development process of this parliamentary body was characterized by unabated optimism, which translated into a progressive strengthening of the parliamentarian element in the context of the formation of European norms. The factual, albeit limited, participation in the decision-making process gradually evolved into a legally defined co-decision power. This power started again very humbly with the Single European Act of 1987 to become a full-blown right, the Ordinary Legislative Procedure (OLP), with the Treaty of Lisbon. The individual steps leading to Lisbon were characterized not only by the procedural strengthening and widening of this power but also by a gradual and steady enlargement of the material subjects on which the EP was to have a say.

Different reasons can be given for this slow but nonetheless straightforward process leading to an unparalleled form of international parliamentarianism:

- According to a strictly pragmatic vision, the role of the EP grew more or less in proportion to the EU's factual power, both on the general political level and with regard

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[10] Ibid., p. 14 who refers to the often heard refrain of the "decay of parliaments".

[11] *See* A. É. Gfeller, W. Loth & M. Schulz, 'Democratizing Europe, Reaching out to the Citizens?', 17 *JEIH* 2011, pp. 5–12.

[12] In fact, this body is not even mentioned in the Schuman Declaration of 1950.

[13] *See* E. Stein, 'Reflections on Democracy in the European Union', in: M. Bronckers, R. Quick (eds.), *New Directions in International Economic Law* (The Hague, Kluwer Law International 2000), pp. 3–12 (8).

[14] Ibid.

[15] As Jörn Sack writes, the designation as a "European Parliament" was, until 1987, tantamount to "institutional hubris" ("institutionelle Anmaßung"). *See* J. Sack, *Die EU als Demokratie – Plädoyer für eine europäische Streitkultur*, *ZEuS* 2007, pp. 457–489 (472).

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to the financial resources it had to administer.[16] In this sense, the strengthening of the EP can be seen as a democratic necessity, a corollary of the integration process. However, it may be that the previous assumption explains too much as it appears to be tautological and of an ex post nature. It might rather be the case that the strengthening of the EP had a legitimatory role. It was the fig leaf in a process that transferred ever more competences from the national sphere to the European and which thereby raised the question of democratic legitimacy. The hard-won parliamentary powers could not be easily given away. There should have been at least some semblance of democratic continuity even though it was not clear how that continuity was to be structured and achieved.

In fact, on the supra-national level, parliaments operate under quite different conditions. It is not clear what characteristics these bodies have to display in order for the democratic entitlements achieved to be maintained in this transfer of powers. It can be said more generally that the understanding about what makes a democracy varies enormously depending on time and place.[17]

The integration dynamics were primarily dictated by considerations of economic efficiency and monetary gains. The profound constitutional resetting that resulted from this process had to be counter-balanced by a series of provisions that inferred continuity, at least at the formal level. Nonetheless, a considerable amount of uneasiness could be noted among the builders of Europe (and among the academic commentators on this process) when the aspect of democratic legitimacy was addressed. How was it possible to have a body to represent the European people if no such people existed?[18] With time, however, this problem lost some of its urgency, in particular as a consequence of the national parties' growing tendency to form a European identity and as a result of the introduction of European citizenship.[19]

It is considered to be essential for a democracy to allow for political conflicts to be sorted out in an orderly manner so that no structural minorities come into being and a consulting process for the common good takes place.[20] From this perspective, the EP is the only EU organ to have the potential to attain these goals.[21]

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[16] *See* A.É. Gfeller, et al., *supra* note 11, p. 8.

[17] *See* Stein, *supra* note 13, p. 10 and R. Bieber, 'Demokratisierung der Europäischen Union', *SZIER* 2011, pp. 99–113 (105 ss.).

[18] As is known, extensive studies in this field were undertaken by Joseph Weiler. *See*, for example, J.H.H. Weiler, "To be a European Citizen – Eros and Civilization", *Working Paper Series in European Studies* (1998).

[19] *See* Stein, *supra* note 13, p. 10.

[20] *See* A. Fisahn, R. Viotto, 'Anforderungen an eine demokratische Europäische Union', *ZRP* 2007, pp. 198–201 (200).

[21] Ibid., where reference is also made to proposals for further restructuring the European political institutions in this sense, for example the proposal made by Roman Herzog to transform the Council into a second chamber of the EP.

4. The Role of the EP in the Field of the Common Commercial Policy – Development up to the Treaty of Lisbon

If there was a steady process of democratization in the sense of a continuous enlargement of EP powers, the EC common commercial policy long remained largely untouched by it. The Lockean principle referred to above there found its greatest stronghold. One reason for this can be found in the fact that the common commercial policy was already fully developed at a very early stage. Since 1970, when the CCP became operative, its exclusivity was confirmed by the ECJ in *Opinion 1/75*[22] (for the negotiation and the conclusion of international agreements) and in *Donckerwolcke*[23] (for so-called autonomous measures).[24]

According to the implied powers doctrine this competence seemed furthermore to adapt flexibly to new needs on the international scene. On the basis of the so-called *AETR* principle the competence to conclude international agreements may flow "implicitly from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions".[25] And on the basis of *Opinion 1/76* these implied powers seemed to reach even beyond mere parallelism. The ECJ in *Opinion 1/03* summarized what it had previously stated:

> [W]henever Community law created for those institutions powers within its internal system for the purpose of attaining a specific objective, the Community law created for those institutions powers within its internal system for the purpose of attaining a specific objective, the Community had authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect.[26]

On this basis it seemed that the CCP was an area of very extensive EC competences which would flexibly adapt to new needs. It appeared that no further consent by other institutions, in particular by the EP, was needed for this development to take place. Accordingly, the EP's demand when asking for more powers in this field was a very weak one. It is not that the EP had been content with this situation. In fact, as early as in the 1960s it voiced claims for more consultative rights with regard to the negotiation and conclusion of trade agreements.[27] Concessions

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[22] Opinion 1/75 (OECD Understanding) [1975] ECR 1355.

[23] Case 41/76 (*Criel, née Donckerwolcke* et al *v Procureur de la Republique*) [1976] ECR 1921.

[24] *See* also M. Cremona, 'External Relations and External Competence of the European Union: The Emergence of an Integrated Policy', in P. Craig/G. de Búrca, *The Evolution of EU Law* (Oxford University Press, 2011), pp. 217–268 (246). As is known, the exclusiveness of this competence was explicitly confirmed in the treaties only by the Treaty of Lisbon (see Art. 3(1)(e) TFEU).

[25] Case 22/70 *Commission v Concil* (*AETR/ERTA*) [1971] ECR 263, para. 16 as summarized in Opinion 1/03, (Lugano Convention) [2006] ECR I-1145, para. 114 s.

[26] Ibid., with reference to Opinion 1/76, para. 3 and Opinion 2/91, para. 7.

[27] *See* S. Krauss, *supra* note 7, p. 54, referring to the so-called "Furler Report", *OJ* 12 July 1963.

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in this regard were made, however, only as regards the Association Agreements in relation to which the EP was to be kept informed throughout the whole negotiation process.[28] There was no actual need to make broader concessions to the EP in this area as a quid pro quo for further rights and powers. From the very beginning there was a strong consensus within the EC, and in particular within the Commission, that that institution should act boldly and promptly on the international scene with the help of the CCP, and for a long time this position was underpinned by the ECJ.

Starting with *Opinion 1/94,*[29] however, the ECJ was no longer prepared to continue with this policy, and the Court started restrictively to interpret the implied powers in the field of the CCP, with regard to both the principle of parallelism and in relation to the "necessity principle" (*Opinion 1/76*).[30]

From that moment on, a window of opportunity was opened for the EP also to assert its powers in this area. This opportunity emerged also because the main traditional stakeholders in the field of the CCP, the Member States, the national parliaments, the Commission and the Council, no longer spoke with one voice. The CCP, also as a consequence of the conclusion of the GATT Uruguay Round, had gained enormous economic and political weight, and several players were of the opinion that the time had come to return to the negotiating table in order to re-delimit the various participatory rights.

As is known, at first it seemed that the Commission, pretending to an all-encompassing EC competence in this field, appeared to be the losing party. But the victory of all the other parties came at a high price with respect to the actual ability of the EC to implement the CCP effectively at the practical level. In fact, it soon became clear that *Opinion 1/94* had considerably weakened the EC as an unitary actor in international trade negotiations.[31] In the Treaty of Amsterdam the EU Member States made a first attempt to overcome this *impasse,* but the power, stipulated in Art. 133 ECT[32] and attributed to the Council (and associated with an obligation to consult the EP), to extend the scope of that article to international negotiations and agreements on services and intellectual property rights where they were not already covered by the CCP remained unutilized.[33] The Member States became more daring with the next reform step, carried out in the Treaty of

[28] Ibid.
[29] Opinion 1/94 (WTO Agreement) [1994], ECR I-5267.
[30] *See* extensively P. Hilpold, *Die EU im GATT/WTO-System* (Baden-Baden, Nomos, 2010).
[31] As will be shown below, the consequences of this erosion of the EC's powers (or, more precisely, the EC Commission's powers) can also be judged differently. In fact, according to some, the Commission might have welcomed this difficult situation "at home" as a justification for being restrictive in respect to negotiating partners. See *infra* note 63 and accompanying text.
[32] This was the renumbered Art. 113 ECT.
[33] *See* P. Hilpold, *supra* note 30, p. 238 ss.

Nice. The Member States, however, keen as ever to defend their prerogatives, managed to insert so many exceptions, special rules and claw-back clauses that the whole of Art. 133 became almost unreadable.[34] In the end, this solution also proved to be unworkable.

Only when work began on a "Constitutional Treaty" within the EU was the political consensus found for a bold, but necessary step to give a totally new design to the CCP, which was luckily carried over into the Lisbon Treaty. This design, at least at first sight, very much resembled the approach taken by the European Commission in the procedure leading to *Opinion 1/94*.

And in fact, on 1 December 2009, the CCP again became omnicomprehensive, in the sense that it covered both the subjects at that time falling under GATT/WTO law and those which would potentially and *pro futuro* come under the purview of that law once the Doha Round was successfully concluded. In a certain sense, therefore, a development had come full circle and there was a return to the past. There was, however, one major difference with respect to the pre-1994 days: The EP had become a major player in this setting; from now on it was on an equal footing with the Council.

With regard to the conclusion of international agreements pre-Lisbon, further concessions were made to the EP. In fact, for the conclusion of association agreements, of agreements establishing a specific institutional framework by organizing cooperation procedures and of agreements with important budgetary implications for the EC, the consent of the EP was required. On the practical level, however, the EP was not in a position to exercise any meaningful control on this basis as it was regularly confronted with a *fait accompli* which it did not dare to call into question (and often was not even technically able to examine in detail).[35]

Therefore, summarizing the developments up to the entry into force of the Lisbon Treaty, we can say that in the field of the CCP for a very long time one could apply the picture that Ernst Wolgast in 1923 famously used for characterizing the external relations of governments. As is known, he said that "the state is a house with only one door".[36] And he further stated that the State has a "divided nature",[37] by which he meant that foreign affairs, as opposed to internal matters, have an eminently political character where the governments have to remain free from internal fetters.[38]

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[34] *See* C. Herrmann, 'Common commercial policy after Nice: Sisyphus would have done a better job', 39 *CML Rev.* 2002, pp. 7–29 and P. Hilpold, *supra* note 30, p. 241 ss.

[35] *See* in this sense B. Fairbrother, G. Quisthoudt-Rowohl, *Europäische Handelspolitik: Von Rom bis Lissabon*, (Berlin, Konrad Adenauer-Stiftung 2009), p. 10.

[36] "Ein Haus mit einer einzigen Tür". *See* E. Wolgast, *Die Auswärtige Gewalt des Deutschen Reiches unter besonderer Berücksichtigung des Auswärtigen Amtes* (AöR N.F. 5), 1923, p. 78.

[37] "Einen zweischlächtigen Charakter", ibid., p. 75.

[38] *See* also C. Tomuschat, Der Verfassungsstaat im Geflecht der internationalen Beziehungen, 36 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (Berlin, de Gruyter 1978), pp. 7–58 (reference to Wolgast at p. 14 and p. 23).

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Only with the treaty of Lisbon did the door – to continue Wolgast's metaphor – become a double door and the CCP was subjected to full parliamentary control. As will be shown, the CCP remained highly political, and in fact the political character of this policy became even more obvious. The meaning of "political" was now, however, a different one. It no longer referred to the discretionary powers of the executive, but rather to fetters introduced mainly by an eminently political organ, the EP.

5. The Role of the EP in the CCP according to the Treaty of Lisbon

By the signing of the Treaty of Lisbon the content and structure of the CCP has undergone profound change. This is already clear from the systematic positioning of the CCP and its link with broader goals of the EU's external action. Articles 206 and 207 TFEU which now regulate the CCP form part of the rules on "External Action of the EU".[39]

The actual conduct of the CCP is governed by two sets of principles and objectives: there are those mentioned in Art. 206 TFEU (the so-called "inner layer of objectives") and – by reference to Art. 205 TFEU – those indicated in Art. 21 (the "outer layer of objectives").[40]

The first set of rules is closely related to the immediate function of the CCP: the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers. There can be no doubt that these objectives rely on a market-based vision of the world economy, but nonetheless they do not give expression to a plea for an unconditional liberalization policy. They rather reflect all the ambiguities of the present-day discussion on the direction to be taken for the further development of GATT/WTO law. While reference to the "progressive abolition of restrictions" calls to mind the process of lowering trade barriers by periodic trade negotiations (a process epitomized by the GATT/WTO rounds), the concept of a "harmonious development of world trade" opens the door to a very broad, politically very loaded discussion in the context of which considerable counterweight to free trade in the traditional sense could also be created.[41] If with

[39] Title II of Part V TFEU. For a good analysis of these rules *see* M. Bungenberg, 'Going Global? The EU Common Commercial Policy After Lisbon', *EYIEL* 2010, pp. 123–151 and M. Hahn, 'Commentary to Art. 206 and 207 TFEU', in Ch. Calliess, M. Ruffert (eds.), *EUV/AEUV, Kommentar*, 4th edition (Munich, C.H. Beck 2011), pp. 2007 ss.

[40] *See* M. Krajewski, 'The Reform of the Common Commercial Policy', in A. Biondi/P. Eeckhout/S. Ripley (eds.), *EU Law After Lisbon,* (Oxford: OUP 2012), pp. 292–311 (294).

[41] For a critical discussion of this issue with regard to the WTO system *see* A. Reich, 'The Threat of Politicization of the WTO', 26 *University of Pennsylvania Journal of International Economic Law* 4/2005, pp. 779–814. For the specific EU context *see* M. Cremona, 'Values in EU Foreign Policy', in M. Evans, P. Koutrakos (eds.), *Beyond the Established Legal Orders* (Oxford, Hart 2011), pp. 275–315.

the Treaty of Lisbon the EP has become the main forum for the formulation of the CCP's higher goals, the wide variety of interests represented in that institution and the specific mechanisms by which the parliamentarian will is formulated may lead to fairly new – and strongly "politicized" – interpretations of what is to be understood by a "harmonious development of world trade".

Referral by the EP to the "outer layer of objectives" indicated in Art. 21 TEU may even accentuate this phenomenon as the goals mentioned there reflect an extremely broad range of ambitions. The "outer layer of objectives" is not to be juxtaposed to the "inner layer". In fact, it is not to be ruled out that the two layers are very compatible. In fact, it has to be highlighted that Art. 21 TEU also mentions the goal to "encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade". Several further goals, also mentioned there, such as those relating to the fostering of a "sustainable economic, social and environmental development of developing countries" and the promotion of an "international system based on strong multilateral cooperation", have for long been discussed within GATT/WTO law and find reflection in positive international economic law.[42] This "outer layer of objectives", however, also contains numerous other goals and principles which had often appeared to be at variance with core economic goals.

To seek to advance in the world values such as "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"[43] are highly laudable, but at the same time open Pandora's box to a huge variety of wishes, desires and goals. As most of these terms are not consensually defined, any attempt at clarification may deliver uncountable outcomes. Some of these possible solutions may end up in a clear conflict in relation to the CCP or require its re-interpretation along lines that are in conflict with international agreements such as the GATT/WTO agreement.[44]

Admittedly, some of these goals at first sight appear to introduce structure into the relationship between international law and the CCP. This would be a welcome improvement, but if the past is any indication of the future it is doubtful whether

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[42] E.-U. Petersmann himself has spent considerable energy in the search for answers in these fields. *See*, for example, E.-U. Petersmann (ed.), *Developing Countries in the Doha Round*, (European University Institute, Fiesole 2005).

[43] Art. 21 para. 1 TEU.

[44] *See*, with regard to attempts to reconcile human rights law with GATT/WTO law, S.J., D. Kinley, J. Waincymer (eds.), *The World Trade Organisation and Human Rights – Interdisciplinary Perspectives*, (Cheltenham, Elgar 2009); P. Hilpold, 'WTO Law and Human Rights: Bringing Together Two Autopoietic Orders', 10 *Chinese Journal of International Law* 2011, pp. 323–372 and E.-U. Petersmann (ed.), *Human rights, constitutionalism and international economic law in the 21st century* (Oxford, OUP 2012).

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the EU is really intended – always and necessarily – to look for a smooth relationship with the international order, in particular if essential interests of the Union, or what it perceives as such, are at stake.[45]

Alongside the newly introduced and/or reformulated material goals of a genuine political nature the politicization of the CCP has been reinforced by the Lisbon Treaty, as already stated, through a considerable strengthening of the EP's powers in the ambit of this policy. While it is not yet certain whether and to what extent the new objectives mandated to the CCP will shape this policy – as already hinted at, their imprecise nature will allow for most diverse interpretations and possibly even for their disregard – the situation is different as regards the institutional role of the EP. Here, the rebalancing of powers was an immediate result of the entry into force of the Lisbon Treaty. In this regard we are therefore not faced with the question whether a significant change has taken place, but rather what its real consequences in the medium term will be, taking into consideration also the reactions of the other actors involved.

According to Articles 207 and 218 TFEU the EP's position has been strengthened as to both sets of policy instruments by which the CCP is formulated and implemented: autonomous trade measures and trade policy through international agreements.

With regard to the autonomous measures which comprise anti-dumping and anti-subsidy regulations, trade preferences programmes, trade barrier regulations, trade defence measures and import and export regulations and – starting with the entry into force of the Treaty of Lisbon – also regulations in the field of foreign direct investment,[46] "the EP and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures

[45] This at least is to be feared if reference is made to the *Kadi* and *Yusuf* cases. As it is known, in these cases the CFI tried to find co-ordination between international law and EU law in a way that would do justice to both orders and that would present the EU order as an integral part of the international system. The ECJ, however, radically overruled the CFI judgments. In particular in cases where "principles that form part of the very foundations of the Community legal" (EU fundamental rights, see para. 304 of the Kadi judgment) EU law could make no concessions to UN law.

On these cases see, i.e. M. Cremona, 'EC competence, 'smart sanctions', and the Kadi Case', 28 *YEL* 2009, pp. 559–592; P. Hilpold, 'EU Law and UN Law in Conflict: The Kadi Case', 13 *Max Plank UNYB* 2009, pp. 141–182; N. Lavranos, 'The impact of the Kadi judgment on the international obligations of the EC Member States and the EC, 28 *YEL* 2010, pp. 616–625 and P. Hilpold, 'UN Sanctions Before the ECJ: the Kadi Case', in A. Reinisch (ed.), *Challenging Acts of International Organizations Before National Courts*, (Oxford, OUP 2010), pp. 18–53.

On the "very foundations of the Community legal order' *see* N. Lavranos, 'Protecting European Law from International Law', 15 *EFA Rev.* 2010, pp. 265–282.

[46] *See*, i.e. K. Osteneck, 'Commentary to Art. 133 TEC', in J. Schwarze (ed.), *EU- Kommentar*, 2nd edition, (Baden-Baden, Nomos 2009), para. 45 ss. On the new competences in the field of international investments *see* i.a. [ditto], M. Bungenberg et al. (eds.), *International Investment Law and EU Law* (Baden-Baden, Nomos 2011).

defining the framework for implementing the CCP".[47] In this field, EP and Council act together as legislators on an equal footing.[48]

If international trade agreements are implemented internally, again Art. 207 para. 2 TFEU applies. As regards the conclusion of international trade agreements, Art. 218 (6) sub-para. 2 (a) requires the EP's consent for the conclusion of a series of international agreements. Among them, reference to "association agreements", to "agreements establishing a specific institutional framework by organizing cooperation procedure" and to "agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required" are of particular importance for external economic relations. On this basis, it can be said that the conclusion of international trade agreements is now generally subject to the consent of the EP.[49] Only a few months after the entry into force of the Lisbon Treaty the EP has used its powers in this field and opposed the conclusion of the so-called SWIFT agreement between the EU and the United States of America which should have allowed for the easing of bank data exchanges, i.e., in the fight against terrorism.[50]

Equally important are the new powers given to the EP during the negotiating process, even if the relevant changes may appear to be not so radical at first sight. In fact, the initiative for the start of such negotiations is, in principle, still taken by the Commission by way of a recommendation to the Council, "which shall authorize it to open the necessary negotiations".[51] As in the past, the Commission conducts these negotiations in consultation with the Council's Trade Policy Committee (the former 133 Committee). This Committee is composed of representatives of the Member States, who meet weekly for consultations with the Commission's representatives and for the preparation of the Council's trade policy decisions.[52] The Treaty of Lisbon, however, introduced an important innovation when it required the Commission also to report to the EP. The Commission addresses

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[47] Art. 207 para. 2 TFEU.

[48] As explicitly stated in Art. 207 para. 2, these powers of the EP refer only to framework regulations and do not extend to individual trade measures. *See* also H.-G. Dederer, 'Die gemeinsame Handelspolitik im Einflussbereich von Kommission, Rat, Hohem Vertreter und Europäischem Auswärtigem Dienst', in M. Bungenberg/Ch. Herrmann (eds.), *Die gemeinsame Handelspolitik der Europäischen Union nach Lissabon* (Nomos, Baden-Baden 2011), pp. 103–120 (105).

[49] The main exceptions are the conclusion of trade agreements which need not to be implemented in accordance with the provision of Article 207 (2) TFEU (this would apply, for example, to a modification agreement to the WTO dispute settlement understanding, DSU: *see* M. Krajewski, *supra* note 40, p. 309) or to trade agreements which are provisionally applied (*see* Hoffmeister, 'The European Union's Common Commercial Policy A Year After Lisbon – Sea Change or Business as Usual?', in P. Koutrakos (ed.), *The European Union's external relations a year after Lisbon* (The Hague, T.M.C. Asser 2011), pp. 83–95, 92.

[50] *See* J. Hillmann, D. Kleimann, *Trading Places: The New Dynamics of EU Trade Policy under the Treaty of Lisbon*, Economic Policy Paper Series (Washington D.C. 2010), p. 1.

[51] Art. 207 para. 2.

[52] *See* B. Fairbrother, G. Quisthoudt-Rowohl (eds.), *supra* note 35.

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the Parliament, in particular, through the Committee on International Trade (INTA), a committee constituted by the EP in 2004. While the obligation "to report" (to the EP) may appear to be formulated in a somewhat weaker form than that "to consult with" (the Commission's obligation towards the Council, which hints at a more active involvement by the latter body), in the end the practical difference may not be so great. In fact, the wording of Art. 218 para. 10, "the EP shall be immediately and fully informed at all stages of the procedure", evidences that the Commission is under a qualified obligation to act. Much will depend on how these obligations are implemented at the practical level.[53]

The relationship between the Council and the Commission in international trade negotiation has been described in the past using the "principal-agent" metaphor (the Council being the principal, the Commission the agent).[54] Even then that metaphor was far too simplistic,[55] but it is surely no longer applicable as trade negotiations now take place in a trilateral basis.

With regard to trade negotiations in the stricter sense, on 20 October 2010 a Framework Agreement, based on Art. 295 TFEU was concluded between the European Commission and the EP, according to which the Commission granted the EP more or less the same information rights as the Council, even beyond the requirements of the TFEU.[56] These powers of the EP are further reinforced when it comes to the internal implementation of the negotiations' outcome where, as mentioned, the ordinary legislative process applies. Accordingly, "trilogue negotiations" have been started in the recent past between the Commission, the Council and EP to iron out dissent at very early stages, at least with regard to the most contentious issues.[57]

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[53] Certainly, even before the entry into force of the Treaty of Lisbon the EP was asked, in a very extensive way, to grant its assent to trade agreements. But, as Stephen Woolcock has explained, this happened at a very late stage in the negotiating process, where "a negative vote by the EP has simply not been a credible option". *See* S. Woolcock, *The Treaty of Lisbon and the European Union as an actor in international trade*, ECIPE Working Paper 1/2010, p. 11. It might now be commendable to involve the EP even before actual negotiations start in order to avoid a later veto from that organ. *See* S. Pollet-Fort, *Implications of the Lisbon Treaty on EU External Trade Policy*, EU Centre in Singapore, Background Brief 2/2010, p. 3.

[54] *See* A. Dürr, H. Zimmermann, 'Introduction: The EU in International Trade Negotiations', 45 *JCMS* 2007, pp. 771–787 (779).

[55] This has been analysed in detail by Dürr and Zimmermann (*supra* note 54) who pointed out, inter alia, that neither was the Council a monolithic actor, as the Member States represented in that organ often had widely different interests, nor was the Commission necessarily in a dependent position with respect to the Council ("agent"), as it always had considerable information advantages. Furthermore, the Commission could make use of so-called "cognitive framing", "stressing common interests rather than conflicting ones, to engineer consensus among Member States". Ibid., p. 774 and 780 with further references.

[56] *See* Kleimann, *Taking Stock: EU Common Commercial Policy in the Lisbon Era*, CEPS Working Document, Centre for European Policy Studies, 2011, p. 20.

[57] Ibid., p. 5.

Fears have been voiced in the past that the Union's High Representative for Common Foreign and Security Policy might contribute further to the politicization of the CCP, in particular as the CCP is now included under the heading of EU external action. It has, however, been convincingly demonstrated that there is no legal basis for such interference.[58]

Finally it has to be mentioned that national parliaments have lost clout in the CCP due to the Lisbon Treaty, both because of the weakening of the Council's role within that policy and because of the greatly reduced role of "mixity".[59]

6. Conclusion

The reader may have noticed that in this piece the terms "democratization" and "politicization" have often been used interchangeably. It is now time to put things straight. The terms mentioned are, of course, not legally defined, but nonetheless, if we look at the settings in which they are commonly used and the undertones they are usually accompanied by, we can make out some significant differences. The term "democracy", notwithstanding all the uncertainties it is surrounded by, is definitely understood in a positive way. To be qualified as "democratic" constitutes an aspiration of most legal and social orders.[60]

Of course, the term "politicization" in several senses also overlaps with "democratization". A working democracy needs an effective political process. Political dialogue, even the political dispute, is an essential aspect of life for a democracy. But "politicization" also has additional meanings which are often preponderant.

First, it may introduce a material component when it refers to values and goals as they have been amply inserted in EU law. According to this meaning, "politicization" would be something positive as it contributes to the achievement of outstanding ambitions, of long-term values that are commonly shared.

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[58] In fact, Art. 207 TFEU makes no reference to the High Representative or to the CSFP. *See* D. Kleimann *supra* note 56), p. 11. It is correct that even without such a legal basis the principle of coherence requires some balancing between these provisions. *See* H.-G. Dederer *supra* note 48, p. 114. Nonetheless, it appears to be doubtful whether that obligation reaches beyond somewhat generic policy considerations.

[59] Of course, this influence, even in the past, was not always a straightforward one. With regard to the Council's activities in this field national parliaments could exercise some control over their governments. More immediate was its control over those subjects that had remained within the national competence and that could be considered in EU agreements only via mixed agreements. On the remaining importance of mixity *see* M. Bungenberg *supra* note 39, (132 s.), and E. Brok, 'Die neue Macht des Europäischen Parlaments nach 'Lissabon' im Bereich der gemeinsamen Handelspolitik', *Integration* 3/2010, pp. 209–223 (221 s.) who expects that in future more and more trade agreements with extensive political elements (requiring the participation of Member States) will be concluded.

[60] Even orders such as the Catholic Church which, by its very structure, is not democratic have over the years tried to enhance the participatory elements, introducing thereby at least some democratic trait.

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Secondly, it is often used in a disparaging sense, namely to criticize a tendency towards quarrelsome discussions, the pursuit of factious interests and losing sight of the common good. In extreme cases it may be considered to be tantamount to the abandonment of any quest for an "objective" solution based primarily on technical considerations. As regards the situation within the EU it is evident that with the Treaty of Lisbon a strong tendency towards such a "politicization" of the CCP has taken place. It is, however, not yet clear what specific understanding, apart from the ones mentioned above, is to be attributed to this process. To put it differently, it has still to be sorted out whether the more positive elements of this reform will prevail, leading to more extensive and more solid democratization, or whether the CCP will fall prey to group infighting and be taken hostage by interest groups. There is the concrete danger that lobbying in international trade matters will assume a similar role to that within the American Congress.

In the trilateral relationship between the Commission, the Council and the EP each actor has specific duties to fulfill in order to achieve success from the CCP's design. It may be true that the EP appears to be the winning party in this reform process but, on the other hand, that organ is now under an obligation to demonstrate that it is able to make use of these new powers in a responsible way. The INTA will have to catch up in external trade knowledge in order to be able to be an informed and competent actor.

It has been argued that the upgrading of the EP's role within the CCP will enhance transparency and foster a serious discussion about the direction this policy should take. According to this perspective, the Parliament offers a "bully pulpit" to speak directly to the people of Europe.[61] For this idealistic vision to become true the EP must be both willing and able to start and to conduct such a discussion in a disinterested, technical way. It is not totally to be ruled out that such a result can be achieved, even though there remain considerable impediments to the achievement of such an objective.[62] Of decisive importance will be the question whether the EP manages to build up suffifcient knowledge and capacity to be worthy of this mission and whether MEPs develop a sense of this new extraordinary institutional responsibility. Not least this is also a question of resources that have to be directed towards this field.

It might be true that this extremely complicated consensus-finding process within the EU in external trade matters could also be an advantage for the

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[61] According to Hillmann, Kleimann, *supra* note 50, p. 7.

[62] In fact, MEPs continue to programme their efforts and engagement according to the – rather short term – election cycle, and in this period they remain strongly dependent on their constituencies and their immediate interests. *See* Kleimann, *supra* note 56, p. 27. It is furthermore known that the advantages of trade liberalization are often not really understood by the broader public, while restrictive measures are often hailed by the groups they seek to protect and widely ignored by the broader public. Protectionist measures are therefore often associated with higher political payoffs than trade liberalization initiatives.

negotiating position of the EU as this could be presented as a justification for taking a rigid position.[63] This aspect should, however, not be overemphasized by the EU as it constitutes one of the leading trading blocs, which also bears enormous responsibility for the success of the international trade system essentially based on continuous – and balanced – trade liberalization.

Throughout his whole academic life Professor Petersmann has been a staunch advocate of more extensive democratization of the EU and the GATT/WTO in general and the CCP – the place where EU law and GATT/WTO law meet – in particular. In the meantime, very much has been achieved and the legislative development has evidenced that it is possible to overcome the so-called "Lockean dilemma", a goal so vigorously and spiritedly advocated by Professor Petersmann. Nonetheless, the danger that this whole process could derail still looms large. The EU is faced with an extraordinary challenge. It may be in a position to demonstrate that the "post-Lockean" era has dawned, thereby giving an enormous boost also to the reach and the value of democracy as such. On the other hand, if the EU fails in this attempt the consequence may not only be the weakening of that actor on the international economic scene but the very idea of parliamentary democratic participation in foreign economic affairs may become irreversably tainted. As a consequence, a new discussion about the limits of democracy could arise.

It can therefore be stated that the newly conceived CCP offers enormous opportunities but also contains a series of dangers that should be addressed in a timely and effective fashion. Democracy has made a great step forward. It is up to all the institutions involved, and in particular to the EP, to demonstrate that this was not a step too far and that in the "post-Lockean" era democracy in Europe has entered a new stage of advancement.

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63 *See* Fairbrother, Quisthoudt-Rowohl *supra* note 35, p. 74.

Petersmann

Reflections on the Constitutionalisation of International Economic Law

Liber Amicorum for Ernst-Ulrich Petersmann

Edited by

Marise Cremona
Peter Hilpold
Nikos Lavranos
Stefan Staiger Schneider
Andreas R. Ziegler

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