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**Enhancement of the European Parliament's
monitoring for better coherence between
trade policy and non-trade policy objectives
(NTPOs)**

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Abstract

Since the Treaty of Lisbon, trade policy has become an explicit part of the EU's external policy and integrated into the general framework of the EU's external policy, but must also be in conformity with internal policies. Thus, trade policy is subject to a requirement of multiple coherence. Beyond constitutional obligations, other drivers work for the inclusion of non-genuine commercial policy objectives in trade policy, such as the orientation of contemporary trade politics towards the behind the border issues of national regulation, so that trade policy became closely intertwined with domestic regulatory policy. Therefore the actors primarily responsible for legislation, i.e. parliaments, advocate for their extended participation in determining trade policy, and rightly so for reasons of transparency, control and political inclusiveness. Parliaments thus become actors of respect for and positive consideration of non-commercial policy objectives in trade policy, which applies as well to the European Parliament (EP). Hence, an institutional design of policy formulation cycles and decision-making in EU trade policy that strives for better coherence of trade concerns with NTPOs must focus on strengthening the influence of the EP and improve its participatory rights in decision-making and its control and monitoring mechanisms. Consequently, the present paper derives proposals for improving EP's monitoring mechanisms for the benefit of non-trade policy objectives (NTPOs) in trade policy from an analysis of weaknesses in the negotiation and implementation stage of trade policy.

Keywords

Policy coherence, trade, European Parliament, non-commercial policy objectives.

A. Introduction*: Trade Policy and Non-Trade Policy Objectives (NTPOs)

Since the Treaty of Lisbon, trade policy has become an explicit part of the EU's external policy and must be integrated into the general framework of the EU's external policy. The general objectives of EU foreign policy now also apply to the common commercial policy. According to article 207 (1) TFEU, the common commercial policy shall be conducted "within the framework of the principles and objectives of the Union's external action", in accordance with articles 205 TFEU and 21 (3) TEU. This constitutional integration of foreign policy within overall policy principles and objectives is quite unique and exemplary internationally. At the same time, under article 207(3) TFEU, trade policy must be compatible with internal policies and rules. This re-contextualization of trade policy has recently been emphasized by the European Commission in particular in its Communication "Trade for All". There, the Commission states that an *"effective trade policy should ... dovetail with the EU's development and broader foreign policies, as well as the external objectives of EU internal policies, so that they mutually reinforce each other... The EU will continue its long-standing commitment to sustainable development in its trade policies, contributing to the newly agreed global sustainable development goals (SDGs) under the 2030 Agenda for Sustainable Development"* (Commission 2015, p.3). The objectives of trade policy thus go beyond the genuinely commercial policy objectives set out in article 206 TFEU (harmonious development of world trade, the gradual removal of restrictions on trade and direct investment and the reduction of customs and other barriers) and comprise founding principles such as respect for democracy and human rights, and fundamental policy objectives such as sustainable development, respect for international law, and a cooperative and just world order (article 21(1) and (2) TEU). The inclusion of, for example, development policy objectives in trade policy - including in trade treaty making - has reached a high level of maturity nowadays, so that trade policy is more consistent with development policy objectives, unlike agricultural policy (Weiß 2017, p. 337 f). Since the Common Commercial Policy (CCP) is a continuation of the internal market concept - it serves to increase the external trade of EU member states - it must not contradict internal law and internal objectives. Thus, the CCP as a whole is subject to a **requirement of multiple coherence**.

The comprehensive commitment of trade policy confirms the pre-Lisbon practice that trade policy is not limited to trade issues.¹ The explicit embedding of the EU's CCP in non-genuine trade policy objectives under the Lisbon Treaty continues with this traditional approach. The broad politicization of trade policy and its conditionality has thus acquired a definitive legal basis (Asteriti 2017, p. 124). Contrary to the comprehensive goal-orientation of trade policy, the determination of the Union interest in autonomous trade policy by the European Commission, for example in the adoption of anti-dumping measures, has so far usually been based on purely commercial interests. In some cases, this is expressly prescribed by law (see article 9 of the Trade Enforcement Regulation 654/2014),² whereas in others, the wording used is much more open so as to include non-commercial interests (see article 21 of the Basic Anti-

* Forthcoming in Manchin/Yildirim/Puccio (eds), *Coherence in EU trade policy*, Cambridge Univ. Press 2021.

¹ Opinion procedure 3/15, Opinion of Advocate General Wahl delivered on 8 September 2016, ECLI:EU:C:2016:657, para. 69. ff.

² Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, OJ L 189, 27 June 2014, p. 56.

dumping Regulation 2016/1036).³ Recently, there have been increasing signs of a cautious change in the decision-making practice of the Commission. In setting the anti-dumping duties for Chinese solar modules, ecological aspects have at least been addressed. In recent measures imposing definitive anti-dumping duties, the Commission has discussed the negative impact of anti-dumping measures on the fulfilment of climate change objectives but has considered this to be negligible at that time. Other anti-dumping implementing regulations have deliberated about the possible frustration of energy efficiency and environmental objectives by taking defensive measures, but as these effects were only minor, they did not influence the determination of the Union interest.

As to the substantive effect of the broad policy orientation, it is not yet clear whether the EU external policy objectives do all engender material impact, i.e. whether they guide the substance of trade policy, or whether some of them merely translate into procedural obligations (Cremona 2017, p. 14 f).⁴ Such procedural obligations could, for example, imply the obligation to extend the Commission's Sustainability Impact Assessments to include consideration of the human rights situation in the treaty partner of the EU (as has been usual practice since 2011)⁵ and to establish obligations to provide reasons in this respect, thus enabling judicial control of trade policy. In any case, the requirement that international law be observed is clear (cf. article 3 (5) TEU), and the objectives are not merely political agendas (Müller-Ibold 2019, p. 150). They influence the interpretation of the EU's competence in trade policy, so that chapters on sustainable development became part of the EU's CCP (Cremona 2018, p. 242 f).⁶ As a result of the reference to EU objectives in art. 216 (1) TFEU, they impact on the interpretation of the EU's external competences generally.⁷ Thus, the EU general objectives reflect in the substance of EU trade agreements⁸: the EU's trade policy increasingly became linked to the pursuit of NTPOs (Bilal and Hoekman 2019, p. 9 f; Borchert, Conconi, Di Ubaldo and Herghelegiu 2020). The most traditional example for NTPOs reflected in trade agreements is the EU human rights conditionality. Implementing the conclusions of the Luxembourg European Council of June

³ Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ L 176, 30 June 2016, p. 47 f.

⁴ Case C-104/16P, Council of the European Union v. Front populaire pour la libération de la sagaia-el-hamra et du rio de oro (Front Polisario), Opinion of Advocate General Wathelet delivered on 13 September 2016, ECLI:EU:C:2016:677 deliberates (in paras. 254 and 274) about an obligation flowing from Article 21 TEU to examine the human rights situation in the third country before concluding an agreement. The CJEU, Case C-104/16 P, Council v. Front Polisario, 21 December 2016, ECLI:EU:C:2016:973 did not comment on whether the Council must comprehensively assess all the circumstances for the assessment of the situation and the international law situation before concluding an agreement. Rather, the decision of the GC, Case T-512/12, Front Polisario v. Council of the European Union, 10 December 2015, ECLI:EU:T:2015:953, was set aside on grounds of disregard (in paras. 223 ff., 247 there) for the requirements of international law.

⁵ Ombudsman O'Reilly has found a breach of good administration by the Commission in relation to the FTA with Vietnam, because the evaluation on this issue in 2009 did not include human rights, which the Commission failed to provide adequate reasons for, contrary to Article 21 TEU. See Decision in Case 1409/2014/MHZ of 26 February 2016 on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement (<https://www.ombudsman.europa.eu/en/decision/en/64308>).

⁶ Opinion 2/15 of the Court, 16 May 2017, ECLI:EU:C:2017:376, para. 142 ff. See also Opinion procedure 1/17, Opinion of Advocate General Bot delivered on 29 January 2019, ECLI:EU:C:2019:72, paras. 177 f and 195; Case C-244/17, European Commission v. Council of the European Union, Opinion of Advocate General Kokott delivered on 31 May 2018, ECLI:EU:C:2018:364 para. 78.

⁷ See fn. 6, Opinion 2/15 of the Court, paras. 239 ff.

⁸ Cremona, 2017, p. 11 rightly points out that the political impact of the objectives need not necessarily be reflected in specific chapters in the agreements.

1991 on human rights⁹ and following the introduction of this objective in the Maastricht Treaty, the EU relatively consistently began to include value clauses in agreements from 1992 onwards, in the form of commitments to democratic principles and human rights as the basis and condition for cooperation and the respective agreement (see Bartels 2014, p. 7 ff; Hoffmeister 1998). These clauses are regularly accompanied by additional provisions laying down the consequences of non-implementation.¹⁰ Some agreements are limited to mere preambular confessions to human rights, such as the most recent Free Trade Agreement with Singapore whose human rights conditionality only arises through article 16.18 in conjunction with the accompanying Partnership and Cooperation Agreement, article 44 of which permits suspension in case of non-compliance.¹¹

The concrete political transposition of the CCP's commitment to respect general EU objectives, in particular the mutual weighing and balancing of these very diverse and sometimes conflicting objectives is left to the political process. The political process will, however, find only a rather sketchy and patchy framework in the above-mentioned TEU provisions as their rather vague formulations of the EU's objectives make room for considerable executive discretion in determining their meaning in a given situation. Trade policy practice is characterized by a wide range of interests that have to be considered and balanced against each other, so that the responsible EU institutions have a wide discretion in determining trade policy. The concrete formulation of the EU's trade policy strategy must therefore weigh up the various objectives according to current problems and needs (cf. the mandate to the European Council in article 22 TEU and to the Council and the Commission in article 207 (3) TFEU). The institutions have always done so, as can be seen in the development of external trade policy. None of the objectives set out in articles 206 TFEU and 21 TEU has any legally required priority.

Beyond the constitutional obligation, another driver for a stronger inclusion of non-genuine commercial policy objectives in trade policy is the orientation of contemporary trade politics and trade agreements towards the so-called behind the border issues of national regulation (Hoekman 2018, p. 243). Since the 1980s, non-tariff barriers to international trade have become core concerns for trade policy. Since tariffs have already been largely dismantled, the focus of multilateral as well bilateral trade policy has been shifting to the reduction of regulatory barriers. Consequently, and going beyond WTO disciplines, FTAs contain an increasing number of provisions addressing domestic regulatory policies or even regulations, and include chapters on policy areas that have traditionally been primarily the subject of national legislation, such as consumer protection, environmental protection or product safety. This expansion of trade policy issues thus leads to the fact that the resulting policy objectives influence the orientation of trade policy. Such policy objectives need to be included in trade policy. From an institutional point of view, this orientation also has a significant consequence as it results in a situation where trade policy becomes more intertwined with domestic policies and regulatory policy, and therefore the actors primarily responsible for national legislation, i.e. parliaments, advocate for their extended participation in determining trade policy, and rightly so for reasons of transparency, control and political inclusiveness. The interference of trade instruments with traditionally domestic policies increase the need for democratic legitimization of trade policies. Hence, for democratic legitimacy reasons, parliaments must be given more opportunity to participate in determining trade policy (Petersmann 2017, p. 44 ff; Young and

⁹ See Annex V „Declaration on Human Rights“ to the Conclusions of the Council. Therein, the Council declares that respecting human rights is a decisive factor of international relations and a cornerstone of European cooperation. See http://www.europarl.europa.eu/summits/luxembourg/default_en.htm.

¹⁰ For the different legal techniques used to express the conditionality see Beke et al, 2014, p. 55 ff.

¹¹ For a critical assessment insofar see McKenzie and Meissner, 2017, p. 832.

Peterson 2006, pp. 795 and 797) which again will increase transparency and information for the general public.

Parliaments thus become actors of respect for and positive consideration of non-commercial policy objectives in trade policy. This applies not only to national parliaments (Jančić 2017, p. 204 ff), but also to the European Parliament (EP). The broad political mandate and thus decision-making powers of the EP generally as legislator and treaty consentor, its membership from diverse regional and political contexts, its Members' accountability towards their manifold constituencies make the EP particularly apt and receptive for considering and combining diverse political objectives also transnationally. From these institutional conditions, the EP is a lively forum and suitable actor for pluralistic deliberation of political issues in which diverse aspects of common interest to the EU can be fed into the policy formation cycle, in particular when compared to the Council that predominantly represents domestic governments and hence a majoritarian political approach which might be more receptive for mere technocratic approaches to determining (trade) politics (Weiß 2018, p. 552). Hence, an institutional design of policy formulation cycles and decision-making in EU trade policy that strives for better coherence of trade concerns with NTPOs must focus on strengthening the influence of the EP and improve its participatory rights in decision-making and its control and monitoring mechanisms. Institutionalism informs us about the relevance of institutional designs and arrangements for policy outcomes: Hence, searching for ways to strengthen the role of an actor for a specific policy outcome requires analysis of this actor's preferences, as expressed in its mandate and composition, as well as this actor's powers and roles in the related policy processes (Milner and Moravcsik, 2009). Consequently, proposals for improving EP's monitoring mechanisms for the benefit of NTPOS in trade policy are derived here from an analysis of weaknesses in the currently foreseen implementation mechanisms; additional insights might be won from a comparative view to domestic parliamentary instruments for impacting trade policy.

B. The EP and NTPOs

One actor particularly active in making trade policy receptive to and available for non-economic objectives is the EP. The Treaty of Lisbon has strengthened the importance of the EP in the Common Commercial Policy, especially with regard to the conclusion of international agreements, because trade agreements are now subject to a requirement of explicit consent by the EP (article 218 (6) lit. a) TFEU). The EP uses this newly acquired power to influence the substance of trade agreements. This increase in EP powers strengthens the political dimension of trade policy. Parliament's newly gained importance in trade policy was also recognized by the Commission early on, as confessed in the Commission's trade strategy "Trade, Growth and World Affairs",¹² presented in November 2010, soon after the entry into force of the Lisbon Treaty. The Commission proposed the new trade policy agenda "within the new institutional framework of the Lisbon Treaty, which should be seen as a major opportunity in that it lends greater transparency and legitimacy to EU trade policy, gives a new voice to the European Parliament in trade matters".¹³ Besides this institutional-constitutional reason for the more influential, augmented formal powers that the Parliament soon amended by (partly pre-existing) informal channels of exercising influence on trade politics (Kerremans et al. 2019, pp. 12-14; Meissner 2016), the above-mentioned trade policy interference with domestic legislative affairs contributes, also in the EU institutional set-up, to a stronger role of the EP in advocating

¹² Communication of the European Commission, Trade, Growth and World Affairs – Trade Policy as a Core Component of the EU's 2020 Strategy, COM (2010) 612 final.

¹³ See fn. 12, page 4-5.

non-commercial policy objectives in trade politics. Thus, both the increased powers of the EP in trade policy, formally as well as informally, and the interference of trade policy with internal policies allow the EP to be even more active and effective in feeding NTPOs into trade policy, which is required by both the re-contextualization of trade policy within the general objectives of the EU and the thematic expansion of trade policy. Both developments are mutually reinforcing: The strengthening of parliamentary influence in trade policy was motivated by the effort to increase the democratic input legitimacy of trade policy and, conversely, as regards the substance of trade policy, it also contributes (by implementing the commitment to EU objectives, and by considering regulatory interference) to the increase in the out-put legitimacy of trade policy.

This theoretical expectation is confirmed by the EP's actual practice. Core demands of the EP repeatedly relate to NTPOs in the context of trade agreements and trade relations more generally. Insofar, the EP often calls for enhanced respect, intensified disciplines and strengthened enforcement mechanisms, for example with regard to human rights, labor standards and environmental issues (EP 2019). In particular with regard to new generation trade agreements, the EP also raised demands for strengthening sustainability commitments contained in specific chapters of the EU FTAs. Furthermore, the EP calls for their increased enforceability, and it does so out of an attempt to place sustainable development objectives and disciplines on equal footing with those on trade. Analyses of the EP's influence on trade agreement negotiations' demonstrate that the EP, in different ways, contributes to policy formation and influences the substance of a treaty under negotiation, in particular with regard to linkage of trade issues with social, labor, sustainability and environmental issues (Meissner 2016; Ott 2016, p. 1012 ff; Rosén 2018, pp. 118 and 122 ff; Schütze 2014, 385 f; Wessel and Takács 2017, p. 113 f), but EP involvement also leads to the defence of sectorial economic interests (Passos, 2015, p. 104). With regard to CETA, for example, the change from the Investor-State-Dispute Settlement system (ISDS) provided in the first version of the CETA agreement of 2014 to the novel Investment Court System which is provided for in Chapter 8 of the final version of CETA was also caused by demands from the EP which raised concerns over the legitimacy of the traditional arbitral versions of ISDS (cf. Kerremans et al. 2019, p. 18).

Besides, the EP also backs or calls for the suspension of trade relations or preferences for reason of lack of conformity with NTPOs.¹⁴ Furthermore, the EP fosters the pursuit of NTPOs in the EU's autonomous trade policy by setting sustainability standards in import regulations (as for example in the EU conflict minerals regulation, see Jaremba 2020, p. 172 f) or by introducing channels for their consideration in other relevant legislative instruments (like the GSP+ Scheme in Regulation 978/2012).¹⁵

¹⁴ See e.g. EP resolution of 14 March 2019 on the situation in Nicaragua (2019/2615(RSP)) https://www.europarl.europa.eu/doceo/document/TA-8-2019-0219_EN.html , or with regard to the suspension of some GPA preferences of Cambodia, see European Parliament resolution of 14 March 2019 on the implementation of the GSP Regulation (EU) No 978/2012 (2018/2107(INI)), para. 16, https://www.europarl.europa.eu/doceo/document/TA-8-2019-0207_EN.pdf .

¹⁵ Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, *OJ L 303*, 31.10.2012, p. 1-82.

C. EP's Monitoring in the Negotiation Stage of FTAs with a view to NTPOs

I. State of play

The most pivotal instrument for the inclusion and implementation of NTPOs into trade policy are trade agreements. Even though recent research suggests that stakeholders do not consider trade agreements in themselves to be the most effective instruments for the realization of NTPOs (Yildirim, Basedow, Fiorini, and Hoekman 2020, p. 9), trade agreements are nevertheless central to this, because the pertinent commitments enshrined in trade agreements (e.g. in the TSD chapters, which are part of the EU's new generation FTAs since the conclusion of the EU FTA with South Korea in 2011) form the basis for relevant obligations and any effective implementation efforts after their conclusion. Hence, it seems that the lack of effective monitoring of the implementation of trade agreements and their provisions on non-genuine trade policy objectives (such as human rights, labor and environment, development commitments) is behind the view that trade agreements themselves are not effective instruments in this respect (ibid.). Consequently, the EP's monitoring powers regarding trade agreements and their implementation will form the focus of this and part of the next section of this analysis.

Due to the EP's power to constitutively express consent to trade agreements, the EP and the Council of the EU "enjoy the same powers" in a policy field also with regard to the procedure for adopting international agreements, thus in the negotiation phase of trade agreements.¹⁶ During the preparations (i.e. mandating stage) and the negotiations leading to an FTA, the EP also has a right to be informed (article 218 (10) of the TFEU), the details of which have been set out in the Interinstitutional Framework Agreement on relations between the EP and the Commission¹⁷ with a view to accomplish equality between Council and EP also with regard to access to information (Puccio and Harte 2019, p. 395). Hence, the EP demands "immediate, full and accurate" information (Kerremans et al. 2019, p. 14) at all stages of the procedures, and to be given access to the EU negotiation mandates and negotiation texts and documents (EP 2014, para. 46), subject to the appropriate procedures and conditions¹⁸, as a prerequisite for taking its final decision fully knowledgeable of the subject matter. Thus, the right to be informed and the power to approve or deny consent allows the EP to exercise monitoring and control functions over the Commission as the chief negotiator and to play a significant political role from the very beginning of the preparatory process¹⁹, also in view of introducing NTPOs into the substance of trade agreements. Its main instrument insofar are its resolutions which set out the EP's position and indicate the conditions for its consent to a treaty. The EP can thereby also respond to the Commission's draft negotiating authorization/mandate and

¹⁶ Case C-658/11, *European Parliament v. Council of the European Union*, 24 June 2014, ECLI:EU:C:2014:2025, para. 56.

¹⁷ Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304, 20.11.2010, p. 47 – 62.

¹⁸ The Interinstitutional Agreement of 12 March 2014 between the EP and the Council concerning the forwarding to and handling by the EP of classified information held by the Council on matters other than those in the area of the common foreign and security policy, OJ C 95, 1.4.2014, p. 1–7, provided details of the EP's access to the adopted negotiating mandates and guidelines (hence being Council documents, to which the EP does not have immediate access), but as these texts are now made public, practice has gone even further.

¹⁹ See fn. 17, Annex III. para. 1.

negotiating directives sent to the Council²⁰ of which the EP has to be informed (van der Mei 2016, 1066 f).²¹

The practice of the EP indeed demonstrates that it uses its position as a veto player, its information rights and also its informal ways of trade policy formation (Kerremans et al. 2019, pp. 11-14) effectively to enter into a constant dialogue with the Commission,²² in particular via its Committee on International Trade (INTA), its monitoring groups (consisting of INTA Members, EP staff, and Commission staff, Puccio and Harte, 2019, p. 396), but also via its Committee on Development with regard to development oriented trade policy issues,²³ and to express its political preferences and ideas from the start, even prior to the formal start of the negotiations. The EP adopts resolutions regarding future agreements, communicating its red lines even before the Council adopts the negotiating directives (Kerremans et al. 2019, p. 11; for an example see EP 2017 regarding the negotiating mandate for negotiations with New Zealand, communicating its position before the Commission tabled its draft). The EP expects the Commission to “take Parliament’s views as far as possible into account”.²⁴ At least during the negotiation phase, the Commission is under a duty to explain whether and how the views and comments were incorporated in the texts and if not why (Commission’s guidelines indicate such commitment also in the mandating phase, Kerremans et al. 2019, p. 9), which signals that the Commission is not under a legal obligation to follow the EP’s wishes.²⁵ This can be seen as an imbalance of power compared to the Council’s position as, first, the Council adopts the Commission’s drafts of negotiating mandates and guidelines and hence can change them, and, second, the Commission is formally obliged to consult the Trade Policy Committee, hence a Council committee, whereas there is no such formal consultation mechanism – as opposed to mere reporting - provided for with regard to the EP (see article 207 (3) TFEU and Kerremans et al. 2019, p. 9). Nevertheless, the Council is in a position comparable to the EP’s one, as it is the Commission which conducts the negotiations and hence shapes the substance of agreements.

In sum one can state that the EP, by virtue of its monitoring powers in the preparatory and in the negotiation phase of EU FTAs manages to influence the substance of a treaty under negotiation by its resolutions, its public debates, hearings and exchanges with other institutions, by the work of its monitoring groups and its parliamentary diplomacy through delegations. The EP does so in particular with a view to linking trade with social, labour, sustainability and environmental issues (Meissner 2016; Ott 2016, p. 1012 ff; Rosén 2018, pp. 118 and 122 ff; Schütze 2014, p. 385 f; Wessel and Takács 2017, p. 113 f). The EP strives for conditioning market access to the EU’s internal market or preferences insofar on trade partners fulfilling NTPO commitments. Combining trade rules with labour and environmental standards initiates important reforms in the partner countries.²⁶ Therefore, the EP supports the inclusion of strong and enforceable NTPO clauses such as human rights clauses in all EU trade agreements (Zamfir 2019, p. 11). The human rights situation in a treaty partner is an

²⁰ Ibid., para. 23.

²¹ Case C-263/14, European Parliament v. Council of the European Union, 14 June 2016, ECLI:EU:C:2016:435, paras. 75 ff.

²² Taking CETA as an example, MEPs were continuously informed by Commission staff about the negotiation rounds; there were 148 parliamentary questions posed to the Commission. See for example Committee on International Trade (2011), Committee on International Trade (2014); for more detail Kerremans et al. 2019, p.15.

²³ European Commission, EU Report 2019 on Policy Coherence for Development, p. 15.

²⁴ See fn. 17, para. 24.

²⁵ Ibid., Annex III, paras. 4 and 5.

²⁶ European Commission, EU Report 2013 on Policy Coherence for Development, p. 54 ff.

important factor in the EP's debates about the approval of an agreement (Zamfir 2019, p. 5) so that the EP is in a position to use its consent power to enforce changes in NTPO clauses such as human rights clauses to make them more effective, in particular by adding strong monitoring and enforcement mechanisms (such as proposed by Bartels 2014, p. 21); however, the EP does not always use its powers to this effect. An example of this is the EP's resolution on the EU trade agreement with Colombia and Peru, in which the EP called "*on the Andean countries to ensure the establishment of a transparent and binding road map on human, environmental and labour rights*" and suggested to "*take into account the Action Plan related to Labour Rights between Colombia and the US*". It also gave particular reference to enforcement and implementation by domestic legislation and policies, and urged the European Commission to produce a regular report to be presented and assessed by the European Parliament" (EP 2012, para. 15). This call neither changed the agreement in any substantial way, nor led to any meaningful improvement of the relevant situation in Colombia as the EP was satisfied with Colombia presenting an action plan on human, labour and environmental rights which did not contain any new commitments (Van den Putte, De Ville and Orbie 2014, p. 7; Marx, Lein and Brando, 2016, p. 589 f). More recently, however, the EP resolution on the trade negotiations with New Zealand (EP 2017, para. 20 lit. g), expressed the attitude of the EP that an FTA, in order to be truly advantageous for the EU, should include

"in view of CJEU Opinion 2/15 on the EU-Singapore FTA that trade and sustainable development fall within the EU's exclusive competence and that sustainable development forms an integral part of the EU's common commercial policy, a robust and ambitious sustainable development chapter [as] an indispensable part of any potential agreement; provisions for effective tools for dialogue, monitoring and cooperation, including binding and enforceable provisions which are subject to suitable and effective dispute settlement mechanisms, and consider, among various enforcement methods, a sanctions-based mechanism, while enabling social partners and civil society to participate appropriately, as well as close cooperation with experts from relevant multilateral organisations; provisions in the chapter covering the labour and environmental aspects of trade and the relevance of sustainable development in a trade and investment context, encompassing provisions that promote adherence to, and effective implementation of, relevant internationally agreed principles and rules, such as core labour standards, the four ILO priority governance conventions and multilateral environmental agreements, including those related to climate change".

From a comparison of the latter text with the former, one can infer that the EP has strengthened its stance with regard to the NTPO clauses by stipulating clearer commitments and by striving for more effective implementation mechanisms enshrined already into the FTAs.

In addition, the EP could use its veto power to demand the inclusion of treaty institutions that could be used as communicating vessels also for NTPOs. As has been done in some agreements (in particular in association agreements and in the Cariforum EPA), parliamentary committees and consultations with civil society in trade agreements could be established as both fora can adequately address e.g. human or labour rights issues coming up during the lifetime of an agreement. The EP also demands the Commission to adopt a more structured and strategic approach to human rights dialogues in future agreements which may provide for ex post monitoring mechanisms that allow for tangible action in case of breach of commitments, such as sanctions (Zamfir 2019, p. 11).

This influential position of the EP also applies to agreements' provisional application, although article 218 (5) of the TFEU attributes the decision-making insofar solely to the Council. Under current political practice (and there are sound constitutional reasons for it, Passos, 2016, p. 121), the Council's decisions on provisional application only enter into force after the EP gave its consents (see European Parliament 2014; Framework Agreement 2010, Annex III, para. 7; van der Loo 2019, p. 222; and Passos 2017, pp. 384 and 387 f).

II. Enhancing the EP's monitoring in the negotiation stage

Even though the veto power, the information rights and the formal and informal mechanisms of the EP's influence on the substance of trade agreements appear quite effective and influential, one could still think of enhancing the EP's influence on trade negotiations when comparing it to the mechanisms used by the US Congress in their monitoring of trade negotiations by the USTR. Under the trade promotion authority, US Congress first of all sets out a detailed rule-based mandate for the negotiations conducted by the USTR that specifies the issues to be tackled in extensive detail (da Conceição-Heldt 2013, p. 27). Compared to that, the red lines set out in the EP's resolutions on the Commission's negotiating mandate merely formulate the agenda of topics to be dealt with in the future agreement and prescribe only rather general negotiating guidelines that leave ample discretion to the negotiator. Hence, a more detailed guidance for the Commission might prove a more effective tool in communicating red lines. Furthermore, US Congress has strengthened its expertise in the monitoring of the negotiations by establishing trade policy advisory committees (some of them are more general policy-oriented, whereas most of them deal with technical and sectoral issues) which allows Congressmen to rely on the knowledge and assessments of organized interest groups, representing economic interests, local governments, think-tanks, and universities (da Conceição-Heldt 2013, p. 27 f). While the EP INTA committee establishes monitoring groups for each trade negotiations to be monitored and has gathered considerable in-house expertise (Kerremans et al 2019, p. 12; Coremans and Meissner 2018, p. 567 ff), the EP could use advisory institutions on a more institutionalized basis in order to increase the pertinent expertise of its monitoring groups and Committees and to establish entrenched communication valves for stakeholders to draw attention to sensitive issues.

Another means of complementing the EP's monitoring power could be the introduction of direct links with the parliament of the treaty partner as existing since 1999 with the EU – US Transatlantic Legislators' Dialogue which over time developed ever-broader agendas that mirrored the intergovernmental meetings (Jančić 2017, p. 203). Such links of an EP delegation with a foreign parliament could be established whenever trade negotiations are started, thus giving a rather institutionalized frame to parliamentary diplomacy allowing for directly advocating also non-commercial negotiation objectives to the treaty partner. An inter-parliamentary dialogue taking place under such frame might prove helpful for monitoring the executive, for influencing the substance of the trade agreement in favor of NTPOs, and as a forum for discussing issues in the later implementation stage.

D. EP's Monitoring in the Implementation Stage with a view to NTPOs

I. State of play, and Weaknesses

In contrast to the influential political and legal role of the EP at the mandating, negotiation and ratification stage, in the implementation stage of trade agreements it plays only a very restricted role, which of course also restrains its capacity to foster NTPOs in the implementation of a trade agreement. As implementation of EU legal acts is an executive task entrusted primarily to the Commission, the scant role of the EP basically conforms to its character as a parliament. Nevertheless, a parliament must have effective means for controlling the executive also with regard to the implementation of agreements. The right to information, however, does not apply in the implementation phase (with the exception of Council decisions under article 218 (9) TFEU). Thus, the EP has to use informal channels of information, like exchange with stakeholders, field trips of its delegations, in-house research such as European Implementation Assessment studies commissioned by INTA, and workshops (Puccio and Harte 2019, p. 394 f). There are only very few formal monitoring mechanisms for the EP in the

implementation stage of agreements. The Commission reports on the implementation of trade agreements; these annual reports are also sent to the EP (for the 2018 report, see European Commission 2019). MEPs can also attend the meetings of the Commission's Expert Group on the TSD chapters, enabling information gathering and sharing (Kerremans et al. 2019, p. 16). Furthermore, the EP has expanded the task of monitoring groups to include discussion about implementation (Puccio and Harte 2019, pp. 396, 400, 408).

One important instrument of implementing trade agreements is decision-making by treaty-bodies whose decisions further elaborate on the agreement or even amend it. Also insofar, EP influence and control is extremely limited. The determination of the EU position in such treaty-bodies, which the Commission has to represent therein, is adopted by the Council, deciding on a draft by the Commission (article 218 (9) TFEU). The EP is not involved in the decision-making, but is only informed of the Council positions by virtue of article 218 (10) of the TFEU, which might include also prior information on the Commission draft. The EP anyway assigns itself a right to information already on a draft Council decision under article 218 (9) of the TFEU. Rule 115 of the EP's Rules of Procedure provides for a right to have a debate and to issue recommendations once the Commission proposes such a draft. In contrast to internal implementing or delegated acts of the Commission, where the EP can veto a delegated act or withdraw the delegation (see article 290 (2) TFEU) or raise objections against a draft implementing act of the Commission (see article 291 (3) TFEU in conjunction with article 11 Comitology regulation 182/2011), the EP has no powers to veto or object a Council decision under article 218 (9) TFEU, nor must the EP's resolutions insofar be considered (in contrast to the EP's resolutions during the negotiation stage). The same lack of influence of the EP applies to the simplified procedure under article 218 (7) TFEU which allows the Council to mandate the Commission to amend an agreement; the EP again is only informed before the Commission approves modifications (Framework Agreement 2010, Annex III, para. 9). Whereas MEPs take part as observers at international conferences and in decision-making bodies in multilateral international agreements, as part of the EU delegation (Framework Agreement 2010, para. 25 ff), such right is not foreseen with regard to treaty-bodies in bilateral agreements. Hence, these participatory guarantees do not apply to bilateral trade agreements (Puccio and Harte 2019, 396); anyway, these guarantees would not provide for any influence of the EP on the Council decision under article 218 (9) TFEU or the decision-making of the treaty-bodies, nor any effective control over these.

In particular with regard to decision-making of treaty-bodies, *ex ante* control appears important as decisions and rules agreed upon with a third party in treaty-bodies, which also concern rather political issues of discretionary rulemaking, treaty amendment and decision-making in quite substantial affairs (Weiß 2018, p. 534 ff), cannot be changed unilaterally; hence *ex-post* control is insufficient as any stipulations formulated as a result thereof cannot be implemented. The EP hardly has any influence on decisions of treaty-bodies, and the efficiency of the above-mentioned informal *ex-post* control mechanisms is not ensured. Such lack of influence of the EP is worrying as the EP might be obliged to implement such decisions in case they require changes to or adoption of secondary EU law.²⁷ For, under article 216 (2) TFEU, the obligation to implement decisions of treaty-bodies concerns the EP if they require amendments to secondary EU law.

²⁷ In the case of CETA, for example, amendments of EU legislation could be necessary for the implementation of mutual recognition of professional qualifications agreements adopted in the framework of Chapter 11 of CETA (for requirements for change of the EU Directive 2005/36 on the recognition of professional qualifications, see Office des professions du Québec (2018, 20)), or for the implementation of committee decision on the procedures for the mutual exchange of product warnings, based on article 21.7(5) of the CETA.

Another common instrument of enforcing compliance with human rights commitments in trade or related cooperation agreements is the human rights conditionality, which enables the suspension of trade preferences or of the whole trade agreement and which is an important tool for sanctioning material failures of the treaty partner to comply with human rights or other essential commitments in trade agreements (which might be used also with regard to enforcing sustainability provisions as currently under discussion). The decision-making in this respect is again attributed to the Commission and the Council only, without involvement of the EP (first alternative of article 218 (9) TFEU). Of course, the EP can monitor the human rights situation in the treaty partner by carrying out consultations and can communicate its assessment in resolutions and call on the Commission to monitor the implementation of human rights clauses effectively and systematically, to consider and assess measures in response to serious breaches of human rights, and to provide it with regular reports on how partner countries respect human rights (Zamfir 2019, p. 11); the EU's practice insofar, admittedly, may be assessed as rather selective and inconsistent (de Witte, 2011, p. 127, 143). Such postulations from the EP may not prove effective as the EP has no power in the enforcement of treaty commitments by initiating dispute settlement procedures or suspending trade preferences. The decision-making insofar is in the hands of the Commission and the Council. Thus, any enhancement of EP's monitoring over implementation of NTPO commitments in the end might prove ineffective as there is no follow-up mechanism which the EP could instigate out of its own motion.

In conclusion, there is no effective *ex-ante* control mechanism for the EP in the implementation stage, and only limited *ex-post* control which the EP can exercise by resolutions and informal channels, in order to stir up debates also with regard to the implementation of NTPOs in the trade agreements. Of course, the EP is in a position to use its general accountability mechanisms (e.g. inquiries, article 230 (2) of the TFEU), or the ultima ratio of a motion of censure (article 17 (8) of the TEU i.c.w article 234 of the TFEU) with a view to issues occurring in the implementation of trade agreements in order to add force to its positions, but has never done so nor might ever do so for the high political costs implied in the use of such mechanisms.

As a consequence of these monitoring deficits, on the one hand, and of the increased requirements for strengthening the democratic legitimacy of trade policy as another politicized, and not merely technical area of EU competence, on the other hand, there is both room and need for improving and enhancing the EP's monitoring mechanism with regard to the implementation phase of trade agreements. The resulting increased politicization of trade policy will be reflected in particular in a better coordination between trade policy and the pursuit of NTPOs, especially as the use of the normal decision-making procedures with decisive participation of the Parliament has a positive impact - compared to other forms of policy formation in the EU - on the consideration and inclusion of human rights requirements (Dawson 2020, p.73), and hence probably so also on other non-commercial policy objectives, in EU's policy formulation.

II. Enhancing the EP's monitoring in the implementation stage

The Commission since recently is a proponent of strengthened EP monitoring mechanisms over the implementation of EU trade agreements. In its "Trade for all" communication it had announced a more effective trade policy by setting up an "enhanced partnership" inter alia with the EP to implement trade agreements better (European Commission 2015, p. 15). Therein, the Commission also promised to expand measures beneficial for sustainable development, for fair and ethical trade and for the protection of human rights, including by ensuring effective implementation of related FTA commitments and the GSP preference scheme, and

acknowledged the particular importance of the EP in the implementation of the trade agreements' TSD chapters (European Commission 2015, p. 15).

Indeed, as one can conclude from the previous section, there are different areas in which the EP's monitoring rights and capacities may be enhanced, and which might particularly serve for better coherence between commercial trade policy aims and NTPOs. In what follows, some proposals to address the weaknesses identified above will be formulated.

With regard to treaty-bodies' decision-making, the EP should be granted more influence *ex-ante* by involving the EP in the decision-making of the Council under article 218 (9) TFEU (even to the degree of a consent requirement in instances where the rule-making function of the EP is interfered with) and by subjecting the Commission to a "comply or explain mechanism" with regard to EP resolutions adopted with regard to a Commission's draft for a Council decision. Furthermore, MEPs, e.g. from the pertinent monitoring group, should generally be given observer status in decision-making treaty-bodies, or, even more, should become part of the EU delegation in the treaty-bodies. Moreover, the *ex-post* control of the decisions should be increased in its effectiveness by establishing follow-up mechanisms that enable revisions. In this regard, the EP should be granted a right to oblige the Commission to initiate a suspension or repeal procedure for treaty-body decisions (Weiß 2021, p. 224). Furthermore, the *ex-post* control capacity of the EP could be strengthened by establishing a parliamentary committee that has certain rights with regard to treaty bodies. Some of the EU association agreements already provide for direct parliamentary links insofar. In the association with Ukraine, a Parliamentary Association Committee is foreseen, which consists of members of the EP and the Ukrainian parliament; this inter-parliamentary body has a right to request information on the implementation of the agreement from the Association Council established in the association agreement, and on its decisions and recommendations; furthermore, the Parliamentary Committee can adopt recommendations directly addressed to the Association Council (articles 467 and 468 of the EU Ukraine Association Agreement).

Similarly, the role of the EP in the monitoring of compliance with human rights and TSD commitments, both of which are of particular relevance for achieving NTPOs, should be strengthened. With regard to the human rights conditionality of trade agreements, stakeholders have already proposed remedies to improve the role of the EP in the application of human rights clauses with regard to the decision-making on the suspension of trade preferences. EP should be granted a right to oblige the Commission to initiate the suspension procedure (Zamfir 2019, p. 11). Such improvement should also apply once the enforcement of TSD chapters has been improved beyond the soft level currently provided in the EU agreements. But even under the current system of soft dispute settlement with regard to the TSD chapters, the monitoring capacities of the EP could be strengthened by inviting MEPs to participate in the EU Domestic Advisory Groups' meetings and in the transnational Civil Society Forums provided for in many EU trade agreements with regard to the implementation of TSD commitments. These platforms for deliberative discussions and consultation currently meet without participation from the EP (Mancini 2020, p. 6 f), even though they may be important forums for gaining information on implementation problems. Participating therein would foster the EP's function as a forum to communicate with civil society. The EP's participation could contribute to remedying the many weaknesses and shortcomings of the currently foreseen civil society dialogues (Marx, Lein and Brando, 2016, p. 599 f) by making a key actor in trade politics aware of the actual processes and giving it a chance to hold the Commission accountable (even though merely by debates, resolutions and discussions in meetings with Commission staff) for how it dealt with the input from civil society.

E. The EP's Powers in the Autonomous Trade Policy

In its legislative capacity, the EP is at par with the Council when the ordinary legislative procedure applies. Autonomous trade policy is subject to the ordinary legislative procedure (article 297 (2) TFEU) so that any laws and regulations setting out the framework for executive action by the Commission in the area of trade policy need the consent of both the Council and the EP. Thus, the EP has an influential voice in determining the basic rules for autonomous trade policy, like for example trade defense measures. This can be observed in the current trilogue between Council, Commission and EP on the proposal for amending the Trade Enforcement Regulation 654/2014 where the EP demands considerable amendments which, if adopted, enlarge the scope of application of the regulation and vest the EU with strong powers for unilateral countermeasures in case of material breaches of the EU's trade rights (Weiß and Furculita 2021). Thus, the EP has the power to provide for the consideration of NTPOs in the adoption of trade policy instruments by the Commission (which is in charge of the implementation of the basic legislative instruments of trade policy due to article 291 (2) TFEU), if the basic legal instruments foresee rules to this effect. Hence, the co-legislator is capable of indicating, for example, which kind of interests the Commission has to consider in its determination of Union interest and which weight such interest has in its discretionary decision-making. In the same way, the EP as co-legislator is in a position to make the granting of tariff preferences by the EU's Generalized System of Preferences (GSP), in particular the additional benefits of the GSP+ dependent on fulfilling non-commercial objectives of sustainable development and good governance by the beneficiary states.²⁸ In this respect the EP was slightly stricter in formulating the criteria for benefits (Van den Putte, De Ville and Orbie 2014, p. 7 f). Thus, the EP can use its legislative leverage to achieve better consistency of trade policy instruments with NTPOs.

The Commission enjoys considerable discretion in the implementation of the basic legislative acts of autonomous trade policy as these acts use rather indeterminate formulations and concepts (such as Union interest, injury to an EU industry, the notion of dumping) which give ample room of manoeuvre for the decision-making of the Commission, but which increase the need for its accountability. In implementing the basic legislative acts, the Commission usually adopts implementing acts in accordance with article 291(2) TFEU. The use of this legal instrument is foreseen in the legislative acts, e.g. in the trade defence legislation, the trade enforcement regulation or the GSP regulation. The EP, however, only has meagre monitoring powers over the Commission's decision-making on implementing acts. As mentioned, article 11 of the so-called Comitology Regulation 182/2011²⁹ provides for the EP a right of scrutiny which is not very effective ("control without an effective consequence", Dordi and Forganni 2013, p. 374). The EP can only indicate to the Commission that, in its view, a draft implementing act exceeds the implementing powers provided for in the basic act, but cannot interfere for strategic political considerations (Willems, Jinaru and Moroni 2019, p. 273). Furthermore, even if the EP uses its right of scrutiny, which happens only rarely, the Commission is under the duty merely to review the draft implementing act, taking account of the positions expressed, and to inform the EP whether it intends to maintain, amend or withdraw the draft implementing act. In accordance with article 291 (3) TFEU, the comitology procedures applicable to the decision-making of the Commission give powers of scrutiny to the Member States representatives in the pertinent committees (article 291 (3) TFEU in conjunction with articles 3-6 Regulation 182/2011) which allows them to influence the

²⁸ For the rising importance of NTPOs in the GSP/GSP+ schemes see Borchert et al 2020, p. 14 ff.

²⁹ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 18.

Commission's draft (Dordi and Forganni 2013, p. 371); the EP is not involved. The committees' powers are rather effective when the examination procedure applies because then the Commission's draft implementing measure can be blocked by a positive vote by the national representatives' majority. The examination procedure applies in cases such as the adoption of definitive antidumping measures, the adoption of enforcement measures, or the termination of antidumping investigations without measures. Hence, there is little accountability of the Commission to the EP and an imbalance in control powers between the Council and the EP. The lack of control by the EP is particularly deplorable as the Commission enjoys wide discretion in adopting trade measures (Dordi and Forganni 2013, p. 380 f). The reporting requirements for the Commission usually foreseen in the legislative acts do not provide for effective policy impact; they only work *ex-post*, with a considerable delay.

One remedy could be to enhance the EP's right of scrutiny by allowing it to interfere for reasons of political consequences a draft implementing act has. Another option would be to grant MEPs at least an observer status in the comitology committees, as demanded by the EP in the legislative procedure leading to Regulation 182/2011³⁰ (Willems, Jinaru and Moroni 2019, p. 276). Still another remedy would be to replace implementing acts by delegated acts under article 290 TFEU because the latter allow more intensive scrutiny by the EP as it may withdraw the delegation or block the adoption of the draft act by voicing objections (article 290 (2) TFEU). Such a shift could be justified by the fact that, in the case of trade-restrictive measures, the Commission takes decisions on matters of - at least sometimes³¹ - considerable political importance and enjoys considerable discretion which needs to be monitored (see also Willems, Jinaru and Moroni 2019, p. 277).

Other implementing measures within the autonomous trade policy must be adopted by the Commission as delegated acts in the sense of article 290 TFEU, as for example the list of the countries benefitting from the GSP scheme and the further GSP+ benefits.³² As mentioned, in such cases, the EP enjoys stronger rights of scrutiny, which allows the EP to have a considerable impact on the decision-making about the granting, but also about the suspension of GSP+ benefits.³³

F. Conclusion

The EP is a meaningful actor in trade policy, but more so in its definition than in its implementation. This diminishes the position of the EP as a political counterweight to and monitoring instance over the Council and the Commission. Still the EP can play a powerful role in shaping trade policy towards better coherence with NTPOs. There are different ways the EP might use to strengthen this coherence: The EP may use its veto power more effectively to make the Commission negotiate stronger disciplines on NTPOs in EU FTA both with regard to substantive obligations and with regard to effective monitoring mechanisms and rule on consequences for breach of the commitments. Insofar, the EP should communicate its red lines to the Commission in the negotiation stage in order to ensure that such stronger disciplines will finally find their way into the treaty text, and the EP could do so by proposing detailed rules-based mandates. However, these attempts might face resistance from the other

³⁰ Fn. 29.

³¹ Admittedly, the adoption of antidumping or countervailing measures or safeguards may in many cases be a decision based on purely economic assessments. But in the context of a trade policy that has to serve NTPOs as well, and that moves in highly politicized trade relations (e.g. with regard to China), trade instruments no longer appear to be instruments of mere executive kind in any situation.

³² See fn. 15, articles 5 and 9.

³³ See fn. 15, article 15(9).

party. Therefore, the EP is well advised not to overstretch its influence on the negotiations as extensive exigencies regarding NTPOs may become a stumbling block for successful negotiations. Lower NTPOs commitments that have suitable, even though not the most effective enforcement mechanisms are more beneficial to coherence of trade with non-trade objectives than having no commitments or no enforcement at all. The EP thus may also act wisely to search for other ways of impacting the negotiation result to the benefit of NTPOs. One avenue would be the establishment of institutions such as parliamentary committees or consultation and dialogue fora or advisory institutions, which might enhance the EP's position in the implementation stage after the entry into force of the agreement by providing for more transparency, also to the benefit of public participation. Another avenue would be direct inter-parliamentary links with the other party.

While the EP has a strong position in the negotiation stage, its monitoring powers are rather limited and hardly effective in the implementation stage. Thus, enhancement of EP's monitoring powers is particularly necessary here. The EP must be strengthened in its control over the decision-making of treaty-bodies and over the compliance of treaty partners with directly NTPO-related disciplines such as human rights commitments and TSD chapters. The EP should be involved in the pertinent fora and in the decision-making about suspension of concessions in response to grave human rights breaches. Additionally there are remedies for the hitherto limited role of the EP in the implementation of trade legislation. The efficiency of these suggestions, however, depends on the capacity of the EP to use enhanced monitoring mechanisms. Their mere existence will not improve coherence of trade policy with NTPOs.

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