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The potential impact of the Lisbon Treaty on European Union External Trade Policy

Summary

The ratification of the Lisbon Treaty will have quite significant implications for European Union external trade policy.²

The most important change will be an increased role for the European Parliament (EP). The EP will have an enhanced role in trade negotiations in the sense that the Commission will be formally obliged to consult with it on the conduct of negotiations. The EP will also have to give its consent to the adoption of the results of trade negotiations on a 'take it or leave it' basis, i.e. there are no powers for the EP to change or modify the results of a negotiation.³ Finally, regulations defining the framework for implementing EU trade policy will be passed using 'ordinary legislative procedures' (OLP).⁴ In other words both Council and EP must agree on such regulations. In OLP the EP will have powers to shape the content of the regulations, although the EU as a whole will of course still be obliged to comply with any World Trade Organisation (WTO) or other trade rules.

The Lisbon Treaty will also simplify and streamline EU

external trade policy. It will dispense with mixed agreements in external trade policy. These were agreements of mixed Community⁵ and Member State competence. With the Lisbon Treaty there will be no more shared competence and thus no more mixed agreements in trade. All trade will be European Union competence and agreements will be ratified by the EU. There will no longer be a requirement for agreements to be ratified by national parliaments. After many years of debate EU competence will therefore be extended to all services trade, trade related intellectual property rights and, in a major innovation, to foreign direct investment. There are, however, certain specified exceptions to the use of qualified majority voting to reflect concerns about retaining cultural and linguistic diversity and effective national health, education and social policies.

A further change with the Lisbon Treaty will be that EU external trade policy will be brought under one heading covering the external action by the union in Part Five Title I,⁶

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² Formally external trade policy is referred to in the treaties as common commercial policy following the precedent set in the Treaty of Rome. The term EU external trade policy is used in this paper because it is in more general use, but it must be understood as a broadly defined to include, for example, investment policy.

³ The term 'consent' replaces that of 'assent' that was used in previous treaties. But as will assent, consent will require a simple majority of MEPs voting.

⁴ Ordinary legislative procedure (OLP) is the new term used to describe the procedure that used to be called co-decision making.

⁵ Until the Lisbon Treaty the formal term for competence was Community competence. After Lisbon it will be European Union competence.

⁶ The references in this paper, unless otherwise specified, are to the articles as numbered in the latest 'Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union' *Official Journal C* 115 9 May 2008. The key articles in the consolidated text are Arts 206 – 207 on common commercial policy that equate to Art 188(c) of the TFEU and Art 133 of the TEC; and Art 218 (of the consolidated text) on the procedures for negotiating international agreements that equates to Art 188(N) in the TFEU and Art 300 TEC.

with foreign and security policy, international environmental policy, development assistance and economic, financial and technical cooperation with third countries. This raises the question of whether EU external trade policy will be used to pursue foreign policy or other EU aims more than has been the case to date. Or, rather less likely, whether foreign and security or other policies will be used in the pursuit of trade policy objectives.

Much will of course depend on how the various changes embodied in the Lisbon Treaty are implemented. This is particularly the case for the placing of the trade together with CFSP. In many respects the Lisbon Treaty builds on and codifies existing practice such as in the case of the Commission consulting the EP on the conduct of trade policy. Generally speaking the changes make EU external trade policy more streamlined, clarifying competences and removing the requirement for national parliaments to ratify mixed agreements. A more logical structure should emerge in which the European Parliament provides more effective oversight thus making EU external trade policy somewhat more democratically accountable and less technocratic in nature.

Background

EU external trade policy has been exclusive EU competence since the Treaty of Rome. This has meant policy has been determined by the Community process. In this the Commission proposed and the Council adopted negotiating mandates, the Commission negotiated agreements in consultation with the Article 133 Committee⁷ and the Council approved the results by qualified majority. The practice has been a little different from this and external trade policy has generally been decided by consensus. Mixed agreements that covered topics in which there was exclusive EU competence, such as tariffs or agriculture, as well as topics that were shared or national competence, such as investment, also required ratification by Member State parliaments. Over the years *de jure* and *de facto* EU competence has grown. *De jure* more policy areas have come under EU competence. *De facto* the Commission has developed strong institutional capacity and detailed knowledge of trade topics and Member State governments have tended to cede more *de facto* competence to the Commission on many of the less contentious external trade topics.

EU trade policy can be characterised as relatively technocratic, compared for example to that of the United States,

with the close interplay between the Commission and national officials in the Art 133 Committee shaping much of the substance of policy. The European Parliament has had powers to ratify (give its consent to) trade agreements when: (i) these have budgetary or (ii) institutional implications, (iii) when the implementation of the agreement required a modification of EU legislation adopted by co-decision making or (iv) when the agreement concerned was an association agreement. But with no direct say in setting objectives or much input into negotiations, the EP could not claim its policy objectives had not been achieved and that it should therefore withhold its consent for the adoption of an agreement.

The conduct of EU external trade policy has been discussed in successive intergovernmental conferences (IGCs) and in each case Commission proposals for increased EU competence were resisted by the Member States. In Maastricht the Commission proposed that services, trade related intellectual property (TRIP) measures and investment should become EU competence, because these formed part and parcel of the ongoing Uruguay Round negotiations that also included tariffs, agriculture and other topics that were EU competence.⁸ The Member States resisted this and the European Court of Justices (ECJ) was ultimately asked to rule. The ECJ decision (1/94) complicated the issue by ruling that some services were EU and some Member State or mixed competence. In the Amsterdam IGC there was another attempt to clarify the position, but without much progress. Agreement was however, reached on an enabling clause in Article 133 (5)(TEC) according to which the Council could decide unanimously if a topic was EU competence without having to go through a treaty change. In the Nice Treaty there were some minor amendments to the EU competence with cultural and audio visual services being carved out. An increase in co-decision making resulted in some potential increase in the role of the EP. Member State governments opposed increased powers for the EP on trade, either for reasons of national sovereignty or out of concern that the EP would politicise EU external trade policy.

The constitutional convention provided for a rather broader debate, in which the issue of democratic accountability of EU policies featured more centrally. In this debate the burden of proof was reversed in that the Member States had to argue against increased parliamentary scrutiny of EU trade policy. Some Member States continued to argue that there should not be a greater role for the EP on the grounds that this

⁷ The Article 133 Committee is the committee appointed by the Council to assist the Commission in trade negotiations. It is made up of senior trade officials from each Member State.

⁸ The practice has been that the Commission negotiates on all topics regardless of competence because of the benefits of the EU having a single voice. Issues concerning legal competence were then resolved subsequently in order to facilitate ratification.

would risk 'politicising' EU trade policy, but this was not the majority view.

Changes in the Lisbon Treaty

Inclusion of External trade policy under the common heading of external action by the Union.

Art 205 (Part Five, External Action) brings EU trade policy under the same EU external action heading as other elements of EU external policy. Trade policy is therefore to be conducted within the 'context of the framework of principles and objectives of the Union's external action' (Art 207(1)). This raises the question as to whether there will be any increased tendency for the EU to seek to use trade policy as an instrument in the pursuit of other external policy objectives. To date EU external trade policy has served broad foreign policy or strategic objectives, but rather indirectly, such as through the negotiation of Association Agreements with the EU's near neighbours in order to promote economic and thus political stability. In this sense the EU has made use of its main leverage in external policy, namely access to the increasingly unified and large EU internal market.

Art 205 states that the Union's external action 'shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union.' These include general aims such as support for democracy, the rule of law and human rights as well as some more specific aims such as sustainable economic, social and environmental development, the integration of all countries into the world economy (including through the progressive abolition of restrictions on international trade), improvement of the environment and sustainable management of global resources and good global governance. The issue is whether the Lisbon Treaty will change how the EU coordinates external trade policy with these other objectives. Article 218 covers the procedure to be followed when negotiating all international agreements. Art 218(3) provides for either the Commission or the High Representative of the Union for Foreign Affairs and Security Policy to be the negotiator for the EU. Art 218(3) states that the negotiator will be nominated by the Council. In cases in which the agreement relates exclusively or principally to common foreign and security policy this would be the High Representative. Art 218 (1) also clearly states that the procedures set out in that article are without

prejudice to the specific provisions laid down in Art 207, which deals with external trade and clearly states that the Commission will negotiate. Consequently, one must expect that the Commission will continue to be the EU's negotiator on trade.

Just what role the High Representative of the Union for Foreign and Security Policy will play in shaping the balance between trade and other objectives will depend on how the relationship develops between the High Representative and his or her staff, the Commission and the Council. In the short to medium term it is difficult to see how the technical capability of the Commission in trade could be matched. As much of trade is about detail the Commission is likely to continue to shape the nature and content of trade agreements. The High Representative can of course seek to influence and the Council can adopt key political decisions, such as with which countries the EU should negotiate free trade agreements. This is of course something the Council has always done in the past, so it remains to be seen whether and if so how the new arrangements will impinge upon EU trade policy.

Clarification of EU competence

The Lisbon Treaty streamlines EU external trade policy by confirming that all key aspects of trade are exclusive EU competence and bringing an end to mixed agreements. The treaty brings all services and trade related aspects of intellectual property into EU competence, thus bringing to an end the long standing debate on competence in these fields. In a major innovation the treaty also brings foreign direct investment into EU competence (Art 207(1)).

In terms of services trade the sensitive topics of audio visual, health, education and social services have special provisions in Art 207 (4). These provides for unanimity in the negotiation and conclusion of agreements in the field of culture and audio visual services, where these agreements 'risk prejudicing the Union's linguistic and cultural diversity.' This does not mean that an agreement that includes audio visual services will be a mixed agreement that requires national parliaments to ratify. Or that the Member States have an automatic veto of any discussion of these types of services. But any agreement that is viewed as prejudicing linguistic and culture identity must be adopted unanimously.

There are similar unanimity rules for social, education and health services in Art 207(4)(b). In this case unanimity would be required if an agreement 'risk(s) seriously disturbing the

national organisation of such services and prejudicing the responsibility of Member States to deliver them.' One could envisage some Member States claiming for example, that commitments in the General Agreement on Trade in Services (GATS) on health services that led to increased competition might be seen as posing a risk to national health care systems. Here as for audio visual services, the Treaty provides the right of Member States to raise concerns, it does not appear to provide an unconditional veto right.⁹

The most important extension of EU competence is the inclusion of foreign direct investment (FDI). To date investment has been Member State or mixed competence. Individual EU Member States have negotiated their own bilateral investment agreements to provide protection for fund repatriation and against expropriation. The Commission has negotiated agreements covering investment in services, such as in mode 3 of the GATS agreement, but not general investment liberalisation. Although FDI is clearly listed as EU competence, it is not yet clear whether this includes investment protection as well as investment liberalisation. Some Member States appear to hold that the Treaty means only investment liberalisation will be included in EU competence (such as agreements that provide for pre-establishment national treatment) and that investment protection will remain covered by the Member State bilateral investment treaties (BITs). Other Member States and the Commission argue that the reference to FDI in Article 207 (1) covers both, so that the EU will in future be able to conclude agreements that include comprehensive investment rules similar to those included in US free trade agreements. In short the scope of coverage of FDI remains unclear. Given the need for legal certainty this issue may be resolved in the short term by including all investment in EU competence, but then delegating powers to negotiate bilateral investment protection agreements to the Member States. This would allow the existing BITs to remain in place. The EU has already developed a common platform on investment rules and one must expect pressure to develop further a common EU policy on FDI. Investment is central to market access and a range of trade related policy areas. In other words if the EU is to have a coherent position on globalisation it cannot leave out FDI. The EU's trading partners are also questioning why they should continue with or negotiate a series of individual investment (protection) agreements with EU Member States.

An increased role for the European Parliament

The role of the European Parliament (EP) in EU trade policy is enhanced in three main ways in the Lisbon Treaty.

First, the Article 207(2) states that the EP and Council acting by means of regulations in accordance with the ordinary legislative procedure (OLP) shall adopt the measures defining the framework for implementing external trade policy. This means that the EP is granted shared powers with the Council to adopt regulations on topics such as anti-dumping, safeguards, 'fair trade' instruments such as the Trade Barriers Regulation (TBR) and rules of origin. It will also share legislative powers with the Council when it comes to implementing autonomous trade measures such as the EU's Generalised System of Preferences (GSP) schemes.¹⁰

Second, the EP will have an enhanced role in ratifying trade agreements. Art 218 (6) (a) (i) to (v) sets out the cases in which the consent of the EP is required before the Council can adopt a decision concluding a trade agreement. These are similar to the existing provisions and include (i) association agreements, (iii) agreements establishing a specific institutional framework, (iv) agreements with budgetary implications and (v) agreements covering fields to which OLP applies. The EP is of the opinion that (v) means that the EP must give its consent before all trade agreements are adopted. In practice one must assume that the EP will be asked to give its consent for all trade agreements. This has indeed been the case in the recent past for both multilateral agreements, such as the results of the Uruguay Round agreements of the WTO, and for a range of bilateral (Association) agreements. This means that the bilateral FTAs being negotiated with South Korea, ASEAN, India and Central America as well as any further comprehensive Economic Partnership Agreements (EPAs) with the African Caribbean and Pacific (ACP) states will, require EP consent. Consent requires a simple majority of the Parliament.

In the past the EP power to grant its assent to agreements did not result in any real influence. The formal power to grant assent simply had no real credibility. Consequently the Commission and the Council went through the motions of consulting the European Parliament, but were seldom much constrained in their policy options by the EP. The possible exception to this has been on human rights issues in Association Agreements. There were a number of reasons for this

⁹ There is a further exclusion of transport policy which is covered by special provisions in title VI of part III of the Treaty.

¹⁰ The view in the European Parliament is that Art 207(2) also implies enhanced powers of scrutiny for the EP over how the Commission implements trade instruments. The argument here is that as Art 207(2) implies essential elements of external trade will be included in legislation under OLP, non-essential elements may be amended or supplemented by the Commission according to Art 290 (Art 249(b) TFEU) (delegated acts). Art 290 then gives the EP scrutiny powers extending to a right to veto the entry into force of delegated acts.

lack of EP influence. First, the EP has no powers to authorise negotiations and could not therefore argue that the negotiated outcome fell short of expectations. Second, the EP lacked both detailed information on the course of the negotiations and the capacity to provide effective scrutiny of the Commission. As a result the power to veto an agreement after it had been accepted by the EU Member States and all the EU's negotiating partners was not really credible.

A third, change giving the EP a greater role is that the Commission will in future be legally obliged to provide the EP with information on the conduct of the negotiations. Under the Lisbon Treaty the EP will still have no power to authorise trade negotiations. Art 218 (2) clearly states that it is the Council that retains the right to authorise the opening of negotiations and thus determine the objectives.¹¹ Article 207 (3) does however, formally require the Commission to report regularly to the special committee of the European Parliament (the International Trade Committee INTA) on the progress of negotiations as it does to the special committee appointed by the Council (presumably henceforth the Art 207 Committee). The EP committee does not however, have the same status as the Art 207 Committee, which will continue to fulfil the role played by the Art 133 Committee in assisting the Commission in negotiations.

In recent years the Commission has regularly informed the EP of the status of trade negotiations. This is included in the Framework Agreement on relations between the Parliament and the Commission.¹² But the Lisbon Treaty makes this a legal requirement that places the duty of the Commission to report to the EP on a par with its duty to report to the Art 207 Committee. This may lead in the longer term to more active and effective scrutiny on the part of the INTA.¹³

Taken together it is these changes in the role of the European Parliament that constitute the greatest potential impact of the Lisbon Treaty on EU external trade policy.

Assessment

The changes that the Lisbon Treaty will bring about in EU trade policy must be seen in the light of past practice and the broader economic and political factors shaping EU trade policy.

On balance the Lisbon Treaty will streamline trade policy by bringing all key policy issues into EU competence. Member States will still have recourse to unanimity when negotiating and adopting agreements that cover the few remaining politically sensitive service sectors such as audio visual and health services, but there will be no more mixed agreements in trade policy.¹⁴ The inclusion of FDI in EU competence is an important step towards the creation of a comprehensive EU approach to trade and investment that reflects the nature of the international economy in which trade and investment are inextricably linked.

The shift towards EU competence and the ending of mixed agreements means national parliaments will have no role in ratifying agreements. On paper this looks like a loss of parliamentary control.¹⁵ In practice few Member State parliaments have exercised effective scrutiny of EU trade policy. The gap in parliamentary scrutiny will be filled by the EP, which is provided with increased powers and opportunities to do so. This raises the question of whether the EP will be able to provide effective scrutiny and whether its increased role will result in a politicisation of EU external trade policy.

It will probably take some time for the INTA committee to gear up to the more important role it will be expected to play in monitoring EU trade policy. With enhanced powers the INTA committee can be expected to assume greater importance among the various EP committees in the next Parliament in 2009. Increased involvement of MEPs may be seen as politicisation by some and democratic accountability by others. Here the political balance of the EP will be a factor. At present the centre right MEPs favour enhanced market access to emerging markets and thus support a liberal agenda. The centre left favours the inclusion of labour standards and environment in trade agreements and 'development friendly' trade agreements. Bearing in mind that a simple majority is required for consent, this suggests that there will continue to be countervailing forces within the EP so that the EP is unlikely to follow either an extreme liberal line or reject agreements that do not have strong binding obligations on labour standards.

Withholding consent for a large multilateral agreement

¹¹ In its opinion on the European Parliament's role and responsibilities implementing the Treaty of Lisbon, the EP Committee on International Trade (INTA) is seeking a means of establishing preconditions for granting Parliament's consent for trade agreement through a revision of the Framework Agreement between the Parliament and the Commission. See European Parliament 2008/2063(INI) 27th May 2008.

¹² Framework Agreement on relations between the Parliament and the Commission *Official Journal* C 117 18 May 2006, pg 21.

¹³ The INTA Committee was only established during the current Parliament. As such it is fairly junior committee. This together with its limited powers has meant that it has not established a very high ranking among the EP committees. This in turn has limited the effectiveness of the committee up to now.

¹⁴ Unanimity will also be required when unanimity is required for internal EU legislation.

¹⁵ Democratic accountability has been provided by a range of checks and balances on EU trade policy, notably the role of the Council and Art 133 Committee in monitoring the Commission's negotiations.

such as any agreement concluding the Doha Development Agenda (DDA) must still be seen as a 'nuclear option' and very unlikely. Withholding consent for a bilateral free trade agreement with an emerging market that fails to offer significant market access, suppresses organised labour and fails to contribute to reductions in carbon emissions may however be a step the EP would be willing and politically able to take.

Finally, the Lisbon Treaty may contribute to the general trend towards trade policy being conducted more and more at the EU level. A general trend towards liberalisation over the past twenty years has meant there is less to discuss in terms of tariffs and other border measures. When behind the border measures/deep integration issues are discussed in trade negotiations there is less need to define a common EU position, because this largely already exists in the shape of the *acquis communautaire*. With the broad lines of external trade policy already defined Member States have, in recent years, tended to leave the detail of trade policy more and more to the Commission. There is also an acceptance, based on decades of experience, that the EU is more likely to achieve its aims in international trade and investment negotiations if it speaks with one voice. The Lisbon Treaty with its enhanced role for the European Parliament and reduced role of national parliaments may therefore be seen as consolidating this trend.