



Implications of the Lisbon Treaty on EU External Trade Policy

Synopsis

This background paper examines the changes introduced by the Lisbon Treaty (which entered into force in December 2009) to the European Union Common Commercial Policy (CCP) and the likely implications for the EU's trading partners. It begins with an overview of the major changes brought about by the Lisbon Treaty on the EU's external action and then elaborates more on the specific changes in the area of CCP. The paper further puts forward some possible implications that these changes may have for EU's external trade relations with third countries.

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IMPLICATIONS OF THE LISBON TREATY ON THE EUROPEAN UNION EXTERNAL TRADE POLICY (COMMON COMMERCIAL POLICY)

EXECUTIVE SUMMARY

The Lisbon Treaty that was signed and ratified by all EU member states (MS) came into force on 1 December 2009. The Treaty is intended to make the EU more efficient, more democratic internally and more coherent on the world stage. It introduces a number of changes to the institutional structure and functioning which would also have an impact on EU policies.

The EU now has a single legal personality, which enables the EU as a whole to negotiate and sign in its name international treaties and agreements. To enhance the visibility of the EU and streamline the external representation of the EU, two new positions have been created: the Permanent President of the European Council and a High Representative for the Union's Foreign and Security Affairs. Their work will be supported by a new agency, the European External Action Service.

Of particular relevance to the EU trading partners such as Singapore are changes aimed at making the EU trade policy more comprehensive and more democratic. More generally, the Lisbon Treaty also seeks to achieve greater consistency between the different elements of the EU's external action. The Lisbon Treaty introduces three main changes to its external trade policy or what is usually Common Commercial Policy (CCP) in EU terminology:

The EU trade policy has now to be seen as an integral part of overall EU external action and its relations with third countries

One of the main objectives of the Lisbon Treaty is to increase the coherence and the efficiency of the European Union's external action.

The Lisbon Treaty brings the current external Community policies together in a more comprehensive manner. All elements of the EU's external action - from the Common Foreign and Security Policy to trade policy for example - are from now on submitted to the same principles and objectives. These include *inter alia* human rights, good governance, environmental protection and sustainable development.

This implies that the EU in formulating its trade policy not only considers the economic liberalization agenda, but has to take into account other objectives. The Treaty may therefore provide a basis for the use of conditionality in trade policy, and lead to the "politicization" of trade policy, something that may not be welcomed by EU's trading partners.

How the current Trade Commissioner, Karel De Gucht interacts with Catherine Ashton, the newly appointed High Representative of the Union for Foreign and Security Policy whose task is to ensure the consistency of the EU's external action, could also be an issue of interest but may not necessarily have a huge impact on the overall conduct of trade relations with third countries.

The European Parliament (EP) is given more powers in trade policy

To increase the democratic accountability of the EU trade policy, the Lisbon Treaty gives more power to the EP in scrutinizing trade policy. Before Lisbon, the EP only had a limited role in the negotiations and conclusions of trade agreements and in the adoption of trade legislation. After Lisbon, the EU legislation for implementing trade policies will now be co-decided by the Council and the EP.

Furthermore, the Commission has to report regularly to the Special Committee of the EP on the progress of trade negotiations, and more importantly, the EP must now give consent before a trade agreement can be adopted. This means that the opinion of the EP becomes essential and this even before the initiation of any future trade negotiations if one wants to avoid the risk of having the entirety of the agreement blocked by the EP. However, it is important to point out that the Lisbon Treaty does not grant the EP powers to authorize the EU to engage in trade negotiations. This power still belongs exclusively to the Council.

The enhanced role of the EP will also increase the possibility of having non-economic objectives such as human rights and social standards issues being included in future trade agreements. The increased role given to the EP in the EU trade policy may therefore contribute to increased politicization of future trade negotiations leading to uncertainties and possible delays in getting a trade agreement through.

The system of allocation of competences in the area of EU trade policy is clarified

Before the Lisbon Treaty, the allocation of competences between the European Community and the Member States (MS) was complex and difficult to comprehend. Trade in goods was an exclusive European competence.

Some services and some trade related intellectual property rights fell under the European competence while some others fell under the shared competences of the EU and the MS. Foreign Direct Investment was also an area of mixed competence, giving the MS the freedom therefore to negotiate its own bilateral investment treaty (BITs) outside trade agreements.

With the Lisbon Treaty, trade in goods and services, commercial aspects of intellectual property and foreign direct investment will now all fall under the exclusive competence of the European Union. Member states (MS) will no longer be able to conclude its own bilateral investment treaties (BIT) unless they are empowered by the EU to do so. This also raises concern as to what would happen to existing BITs that MS concluded with its third countries. The Treaty notes that MS will be obliged to adapt their BITs to EU law. How this would be done is however not clearly spelt out, and in the short term a “grandfathering solution” is likely to be adopted. This means that an exemption might be granted allowing the existing BITs to be kept in place until the adoption of EU investment agreements.

All these changes to bring trade in goods and services and FDI under the exclusive competence of the EU are expected to contribute to a streamlining of the trade policy. The need for further mixed agreements will reduce significantly. Future trade agreements concluded by the EU are likely to be comprehensive economic agreements covering all aspects of trade and investments.

Conclusion

The extent of the impact of reforms introduced by the Lisbon Treaty on the EU’s external trade relations is still not entirely clear as the Treaty just came into force in December 2009. What is important to note is that the EU’s trading

partners will have to look more broadly to the EU's trade policy as an integral part of its overall external action globally. This may mean that non-trade policy issues may gain traction and impact specific trade agenda and negotiations. Secondly, the EU's trading partners will have to watch more closely the European Parliament (EP) when dealing with

the EU on trade issues. It is no longer enough just to lobby the key players in the Commission and the Council. The key players in the International Trade Committee of the EP, and the political leanings and mood of the EP will have an impact on the negotiations and conclusions of any trade agreement.

IMPLICATIONS OF THE LISBON TREATY FOR THE EUROPEAN UNION EXTERNAL TRADE POLICY (COMMON COMMERCIAL POLICY)

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Introduction

On 1 December 2009, the Treaty of Lisbon entered into force. This Treaty actually refers to the Treaty amending the Treaty of the European Union (1992, commonly referred to as the Maastricht Treaty) and the Treaty establishing the European Community (1957, commonly referred to as Treaty of Rome). The latter is renamed the Treaty of the Functioning of the European Union (TFEU).

The aims of the Lisbon Treaty is to make the European Union (EU) more efficient, more democratic internally and more coherent on the world stage. It introduces a number of changes to modernize EU institutions and optimize working methods in the EU. Some of the most significant changes are in the area of external relations and the external representation of the EU.

Of particular relevance to the EU trading partners is the EU external trade policy or Common Commercial Policy (CCP). This policy is the main instrument governing EU trade relations with non-EU countries and is used by the EU to shape its interests in the external economic sphere. Consistent with the general aims of the EU reform, the Lisbon Treaty contains novelties aiming at making the CCP more efficient, more democratic and at achieving greater consistency between the different policies of the EU's external relations.

This paper will first give a very broad overview of the main provisions of the Lisbon Treaty that impact the EU's external action, and then zoom

in to focus on the three key changes in the EU's Common Commercial Policy that might have implications for EU relations with its trading partners.

Main Provisions of the Lisbon Treaty in the area of EU's External Action

The Lisbon Treaty groups together the multiple aspects of the EU's foreign policy and external relations under the new heading of "Union's External Action". External Action includes the policy areas covered by Title V of the Treaty of the European Union (TEU), and Part V of the Treaty of the Functioning of the European Union (TFEU), namely Common Foreign and Security Policy, Common Commercial Policy, economic, financial and technical co-operation with third countries, humanitarian aid, and the external aspects of its other policies. It is explicitly stated that "the Union shall ensure consistency between the different areas of its external action and between these and its other policies" (Article 1(3) TEU).

Although the Lisbon Treaty abolishes the old three pillar structure (European Community, Common Foreign and Security Policy, and Justice and Home Affairs), Article 24 TEU states that "the common foreign and security policy (CFSP) is subject to specific rules and procedures." The decision-making structure in CFSP remains essentially intergovernmental and unanimity among the Member States is required for most policies.

Broadly, the key changes that Lisbon Treaty has brought to the external action of the EU are:

1) A single legal personality

The Lisbon Treaty replaced the European Community pillar by the European Union which “shall have legal personality” (Article 47 TEU). Henceforth, the EU will have a defined status in international law. In other words, the EU will be able to negotiate and conclude international agreements in its name and represent itself in international forums and organisations. This should also in principle simplify the EU’s representation in international organisations such as the International Monetary Fund, the World Bank, and others. However, it is clear that Member States will not always be willing to cede their voting rights and to be represented collectively by the EU. Therefore, the reality is that the EU in the foreseeable future will continue to have fragmented representation in the various key international bodies.

2) New positions and representations

The Lisbon Treaty created two new positions, the permanent President of the European Council and a High Representative for the Union’s Foreign and Security affairs (HR). The latter combines the roles of the former High Representative of the Common Foreign and Security Policy (CFSP) and the Commissioner for External Relations.

According to the Treaty, the President of the European Council (Herman van Rompuy has been elected as the first) chairs it and drives forward its work. He ensures the preparation and continuity of the work of the European Council in cooperation with the President of the Commission; “endeavours to facilitate cohesion and consensus within the European Council and reports to the European Parliament after each of the meetings of the European Council”.¹ The President will also share with the HR in representing the Union.

¹ http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/111298.pdf

As for the HR, Baroness Catherine Ashton, she is expected to exercise, in foreign affairs, the functions which so far were exercised by the six-monthly rotating presidency, the HR of the CFSP and the Commissioner for External Relations. More specifically, she “conducts the Union’s common foreign and security policy; presides over the Foreign Affairs Council; ensures the consistency of the Union’s external actions; represents the Union for matters relating to the common and foreign security policy, conducts political dialogue with third parties on the Union’s behalf and expresses the Union’s position in international organisations and conferences; and exercises authority over the European External Action Service (EEAS) and over the Union’s delegations in third countries and at international organisations”.²

More precisely, internally, Baroness Ashton will have to coordinate all aspects of the EU’s external actions and have to work closely with Commissioners responsible for key policy areas such as trade, development, climate action, humanitarian assistance and any other policies with an external dimension. Externally, she will represent the EU, and be the “face” and “voice” of the EU. However, in reality, she will still have to contend with the foreign ministers of MS and compete for international attention. Much of how this will pan out will depend on Ashton’s handling of her relations with the EU leaders, and finding a *modus vivendi* with the President of the European Council, Herman van Rompuy. In short, the coherence of the EU’s external representation remains unclear and will depend on how well Ashton can carve a role for herself.

3) External Action Service

The European External Action Service (EEAS), which has yet to be established, will give the

² http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/111298.pdf

High Representative the necessary assistance in delivering the EU's external policies. It will be working "in cooperation with the diplomatic services of the Member States" and will comprise "officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States." (Article 27 (3) TEU)

The Swedish Presidency report on the EEAS states that "to ensure the consistency and better coordination of the Union's external action, the EEAS should also assist the President of the European Council and the President as well as the Members of the Commission in their respective functions in the area of external relations as well as closely cooperate with the Member States." This shows that the EEAS will have a central role in the efforts to enhance the coherence of the EU's external relations. It will consist of geographical and thematic desks. The report advises that trade and the development policy "should remain the responsibility of relevant Commissioners and DGs of the Commission." The report says that the geographical desks "should play a leading role in the strategic decision-making."³

The Lisbon Treaty significantly enhances the status of the Delegations of the EU, which previously were the delegations of the European Commission. The Lisbon Treaty states that "the diplomatic missions of the Member States and the Union delegations in third countries and at international organisations shall cooperate and shall contribute to formulating and implementing the common approach" (Article 32 TEU). The Presidency report says that "Delegations will contain both regular EEAS staff (including

³ Presidency report to the European Council on the European External Action Service. Council of the European Union, 14930/09, 23 October 2009, <http://register.consilium.europa.eu/pdf/en/09/st14/st14930.en09.pdf>

Heads of Delegation) and staff from relevant Commission services" and that "all staff should work under the authority of the Head of Delegation." It is up to the High Representative to "establish a road map and timeframe for the upgrading of EU delegations."⁴

Currently, there are more questions than answers about the practical arrangements regarding the EEAS. Baroness Ashton has indicated that the EEAS should be independent of other EU institutions; only its budget will form part of the general EU budget and will be controlled by the European Parliament. Baroness Ashton is still working on a legislative proposal, which would set out the functioning of the EEAS, its budget, areas of competence and recruitment procedure. After the consultations with the European Parliament, the proposal will have to be adopted by the European Council by the end of April 2010.

4) Role of the European Parliament

The European Parliament will play an increased role in the EU's external action, since the President of the European Council "shall present a report to the European Parliament after each of the meetings of the European Council" (Article 15 (6) TEU). The High Representative will also have to "regularly consult" the European Parliament about the "main aspects and the basic choices", as well as "ensure that the views of the European Parliament are duly taken into consideration" (Article 36 TEU). The Lisbon Treaty stipulates that twice a year the European Parliament "shall hold a debate on progress in implementing the common foreign and security policy, including the common security and defence policy" (Article 36 TEU).

5) Normative Dimension of EU's external action

⁴ Ibid.

The Lisbon Treaty also adds to the normative dimension to the EU's external action. It states that "in its relations with the wider world, the Union shall uphold and promote its values (...) it shall contribute to peace, security, the sustainable development of the Earth; solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter" (Article 3 (5) TEU). Furthermore, the Lisbon Treaty states that the EU's external action shall be guided by the following principles: "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." (Article 21 (1) TEU)

This normative dimension of EU external relations has always been expounded by some scholars and policy makers and has been included in the former treaties. However, by "enshrining" them in EU's treaty which gives the EU a legal personality, this brings a "legal dimension" which theoretically can open up EU external actions that are seen as "not in conformity to the guiding principles in the Lisbon Treaty" to legal challenges.

Changes in the Common Commercial Policy (CCP)

All the above provisions in the EU's external action made it necessary also for the EU to reform the way the CCP is shaped and operated. To improve coherence and effectiveness and to address the issue of democratic deficit, the Lisbon Treaty introduces three main changes to the CCP. These are:

1. The CCP has now to be operated in the broader context of the EU external action;
2. The role of the EP in the shaping and conduct of the CCP has been enhanced in several ways;
3. The system of competences in the area of the CCP has been clarified and simplified.

1) The EU trade policy as integral part of the broader context of EU external relations

One of the main objectives of the reform process that led to the adoption of the Lisbon Treaty was to increase the coherence and the efficiency of the European Union's external action to enable it to address the challenges of globalization and growing interdependence. Therefore as mentioned in the introduction, a number of changes have been introduced with a view to reduce the number of voices speaking on behalf of the Union and to ensure the consistency between the different areas of the EU's external action.

The Lisbon Treaty brings the current external Community policies together in a more comprehensive manner. It sets out common principles and objectives for the Union's external action and most of the external relations provisions of the existing treaties are now regrouped in a single Title.

This is a significant change from the pre-Lisbon situation where Title V TEU dealt with the common foreign and security policy, whereas the Treaty establishing the European Community (ECT) (Treaty of Rome) had Title IX Common commercial policy, Title XX Development cooperation, Title XXI Economic, financial and technical cooperation with third countries, international agreements, restrictive measures, international relations and instruments among the general and final provisions (Part Six).

All elements of the EU's external action from the Common Foreign and Security Policy to cooperation with third countries and humanitarian aid, the relations with international organisations and the Common Commercial Policy are moreover submitted to the same principles and objectives as laid down in Article 3 TEU and Article 21 TEU. They include inter alia human rights, good governance, environmental protection and sustainable development.

Even if Article 206 TFEU then defines the specific objective of the Common Commercial Policy – *to contribute, in the common interest, to 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*- Article 207 (1) TFEU recalls that these cannot be seen in isolation and stresses that the Common Commercial Policy is to be conducted within the context of the frameworks and principles and objectives of the Union's external action as defined in Article 21 TEU.

The Lisbon treaty also foresees a new system for the conduct of the external action of the European Union. In particular, it creates the two new positions of European President and of High Representative of the Union for Foreign and Security Policy (hereafter High Representative). The latter is to play an essential role in the coordination of the EU external action.

The Lisbon Treaty makes it clear that the Commission will continue to negotiate trade agreements with third countries. At the same time, the High Representative of the Union Foreign and Security Policy has been entrusted with task of ensuring the consistency of the Union's external action. In particular, Article 18 TEU states that *"he [sic] shall be responsible within the Commission for responsibilities incumbent on it in external relations and for*

coordinating other aspects of the Union's external action." This would imply in principle some need for coordination between the Trade Commissioner and the High Representative to ensure consistency of actions.

2) An increased role for the European Parliament

Another major change is the increased role given to the European Parliament in the shaping and conduct of the CCP. This constitutes a significant change from the previous CCP set-up.

The limited role of the European Parliament in the past

Before the entry into force of the Lisbon Treaty, the European Parliament only enjoyed a limited role in the autonomous as well as in the conventional Common Commercial Policy.

The European Parliament had a very limited role in the negotiation and conclusion of trade agreements with third parties. The European Commission proposed to open negotiations and made recommendations to the Council of Ministers. The latter formally authorized the Commission and defined the negotiation directives. The Commission then conducted the negotiation process in consultation with a special committee appointed by the Council and composed of representatives of Member States. Once the negotiations were concluded, the Council adopted a decision authorizing the signing of the agreement. In cases of mixed agreements, the Member States also had to ratify the agreement. There was no requirement to consult with the European Parliament before the conclusion of an international trade agreement.

Following successive revisions of the original EEC Treaty, the European Parliament's assent

has been required for the conclusion of the most important trade agreements⁵:

- When these required changes in EC domestic legislation are adopted by co-decision by the Council and the EP;
- When there were budgetary implications
- When new institutional arrangements were established.

The EP also has to give its assent to association agreements.

In practice, and even in the absence of a legal obligation to do so, the European Commission informed the European Parliament about its main strategies and on the ongoing negotiations.⁶ Unlike the Council, however, that could give 'instructions' to the Commission during negotiations, the EP was merely informed.

Moreover, for political rather than for legal reasons, any major trade agreement has been presented to the EP for its assent. Trade agreements like the most recently concluded EU-South Korea FTA would have been presented to the EP for its assent before the Lisbon Treaty.

However, the Parliament's approval was not required for the adoption of negotiating mandates or for the routine conclusion of all trade agreements.

Likewise, the European Parliament did not have any power in the shaping and adoption of EU legislation defining the framework for implementing the trade policy such as the anti-dumping or the trade barrier regulation. These were adopted by the sole Council of Ministers.

⁵ Article 300 (3) subpar.2 EC Treaty

⁶ This is included in the Framework Agreement on relations between the Parliament and the Commission, Official Journal C 117 18 May 2006, p.21

The limited role of the European Parliament raised the issue of the democratic accountability of the European Common Commercial Policy. With the entry into force of the Lisbon Treaty, the European Parliament has seen its role enhanced both in the negotiations and conclusion of trade agreements and in the adoption of internal trade legislation.

The increased role of the EP after the Lisbon Treaty

The Lisbon Treaty increases the role of the European Parliament in several ways.

Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 207 TFEU, amending former Article 133 TEC, establishes that:

"The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations."

If it is still the Council that gives the Commission its negotiating mandate, the Commission is to report both to a committee appointed by the Council and to the European Parliament on the progress of negotiations. The Lisbon Treaty formalizes in that respect the current practice and gives it a legal basis.

In addition, the consent of the European Parliament is now required before the Council can adopt a decision concluding a certain number of agreements as defined by Article 218(6) (a)(i) to (v) of the TFEU. In particular, the EP has to give its consent to agreements in the fields where the ordinary legislative procedure (hereafter the OLP) applies in the adoption of EU internal legislation. Since the OLP applies in the Common Commercial Policy, the EP will have to give its consent to all trade agreements. It does not however have the possibility to propose amendments to the draft Treaty and can only approve or reject the whole agreement on a “take it or leave it basis”.

This implies that the opinion of the EP will be essential in the conclusion of trade agreements. Even if formally speaking, it is still the Council that gives the negotiating mandate to the Commission, the opinion of the European Parliament may have to be taken into account even before the initiation of any future trade negotiations. To avoid having the EP blocking the whole agreement at the conclusion stage, it will be necessary to ensure that the EP is well aware of the content of the agreement and that its majority backs the whole content of the agreement.

For the adoption of measures defining the framework for implementing the common commercial policy, the Lisbon Treaty establishes that all acts of legislative nature in the Common Commercial Policy will have to be adopted by the Ordinary Legislative Procedure, the former “co-decision procedure”. This means that in the future, all legislation for implementing the CCP - with the notable exception of international agreements – will be co-decided by the Council and the EP. This includes for example all the regulations defining the EU trade defense instruments.

Finally, the new rules for regulating the transfer of executive powers and the comitology mechanism contained in Articles

290 and 291 TFEU give the EP rights with regard to the supervision of measures to be adopted by the Commission for the implementation of EU legislation when the base act was co-adopted by the EP and the Council. The role of the EP in the supervision of measures implementing legislative acts adopted in the CCP field will consequently also be enhanced.

3) A clarification of competences in the area of EU external trade policy

The Lisbon Treaty explicitly places the Common Commercial Policy under the exclusive competence of the Union (Article 3 of the Treaty of Lisbon) and extends the scope of the Common Commercial Policy to all key aspects of external trade. This clarifies the system of competences in the EU external trade policy area and simplifies the procedure for the adoption of far-reaching trade agreements between the EU and its partners. This would be in line with the new strategy defined in the ‘Global Europe’ communication⁷, which aims at reinforcing the role of the EU in the bi- and multilateral negotiation process of the new generation of free trade agreements and putting an end to the long disputed issue of the scope of the Common Commercial Policy.

Trade policy competences in the EU before the Lisbon Treaty

Since the origins of the European Community in 1957, the Common Commercial Policy has been an exclusive European ie Community competence. This means that Member States are precluded from conducting individual trade policies. It is the institutions of the Community, and now of the Union, that are competent to adopt EU trade legislation and enter into bilateral or multilateral trade agreements.

Since the entry into force of the of the EEC Treaty in 1958, the scope of the Common

⁷ see footnote 1

Commercial Policy has changed several times to adapt to the new realities of international trade and economic relations.⁸ If the European Court of Justice has held since 1973 that the Common Commercial Policy constitutes an exclusive competence of the Community, the question of what areas are covered by the Common Commercial Policy has been the subject of many debates.

Originally, at the time of the adoption of the Treaty of Rome in 1957, international trade law had a clear focus on goods, which explains that the EEC Treaty made explicit reference to trade in goods. However, the Court also held in its opinion 1/78 that the Common Commercial Policy should be interpreted widely. As the areas of services, trade related aspect of intellectual property and investment gained importance in the international economy, debates took place within the EU as to the extension of the scope of the exclusive European, that is, Community competence to these areas.

The Court pronounced on the issue in its Opinion 1/94 and held that if trade in goods fell under the exclusive competence of the Community, this was only partly the case for services and intellectual property issues.⁹ This was to reflect the internal competence of the Community in the areas of services and intellectual property regulation. As a consequence, some services were EU and some Member State or mixed competence.

The attempts made in the Nice and Amsterdam Treaties to clarify the situation only resulted in a partial extension of the scope of the Common Commercial Policy to some aspects of services

and trade related aspects of intellectual property.

The result was an “unreadable unsystematic and complex system of competence rules”.¹⁰ Trade in goods was an exclusive European competence. Some services and some trade related intellectual property rights fell under the European competence, some others fell under the shared competences of the EU and the Member States. In practice, “this meant that agreements containing provision on trade in goods and services or intellectual property aspects falling out the European consequence had to be so-called “mixed agreements” that required the ratification by both EU institutions (i.e. the Council) and the national parliaments. This meant that any national parliament of a Member State discontent with the provisions of a chapter could veto the agreement in its entirety”.¹¹

In addition, investment was an area of mixed competence. Member States have concluded around one thousand Bilateral Investment Treaties (BITs) with a view to promote and protect investment flows, leading to the creation of the so-called ‘spaghetti-bowl effect’.¹² The EU institutions have pursued the liberalization of FDI based on the so-called “Minimum Platform on Investment” which was adopted by the EU Council of Ministers in 2006. The EU has so far negotiated agreements covering market access for investment in services¹³ but no general investment liberalization.

Finally, transport does not fall within trade policy and any trade agreement containing provisions applying to the transport area requires mixed agreements. This remains the case with the entry in to force of the Lisbon Treaty.

⁸ Bugenberg, p.1

⁹ Roland Klages, Promoting EU Interest at Global Level, Chapter 8, The EU Internal Market in Comparative Perspective, Economic, Political and Legal Analyses, Cahiers du Collège d'Europe / College of Europe Studies Vol. 9, 2008, p.213

¹⁰ Bungenberg, p.7

¹¹ Bungenberg, p.7

¹² Bungenberg, p.10

¹³ Such as in mode 3 of the GATS

The EU trade policy system of competences in the Lisbon Treaty

The Lisbon Treaty clarifies the EU competence for services and extends the EU competence to the area of Foreign Direct Investments. As a result, all key aspects of trade, goods and services, commercial aspects of intellectual property and foreign direct investment fall under the exclusive competence of the European Union.¹⁴

In the area of services, this means that the existing carve-out (special provisions) for culture or health no longer exists and that the EU is competent for trade in all services. However, the sensitivity of the areas of trade in audio-visual, health, education and social services is reflected in the voting rules in the Council of Ministers.

If the Treaty of Lisbon further extends the scope of application of the Qualified Majority Voting (QMV) and provides for qualified majority voting for all aspects of trade policy, it provides for a limited number of exceptions in sensitive services areas.

Article 207(4) of the TFEU provides for unanimity in the negotiation and conclusion of agreements of culture and audio visual services, where these agreements “risk prejudicing the Union’s linguistic and cultural diversity”. These agreements will be negotiated and concluded by the Union institutions alone but will have to be adopted unanimously in exceptional cases.

Likewise, unanimity is required for the adoption of agreements in the field of trade in social, education and health services, where these agreements “risk seriously disturbing the national organization of such services and prejudicing the responsibility of Member States to deliver them”. If unanimity may still be

¹⁴ Article 207(1) TFEU

required in exceptional circumstances, these areas are no longer mixed competences but the exclusive competence of the Union.

More generally, Article 207(4) provides that “for the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules” in line with the so-called principle of parallelism of competences.

The major innovation of the Lisbon Treaty is to give the EU an exclusive competence on foreign direct investment. The Lisbon Treaty includes foreign direct investment in the scope of the Common Commercial Policy and does not provide for any exception. This means that the EU would have the exclusive competence to negotiate Bilateral Investment Treaties in almost all sectors.

The question however arises as to the definition of Foreign Direct Investment as many argue that it is not clear whether FDI as mentioned in the Lisbon Treaty includes investment protection and investment promotion alongside investment liberalization.¹⁵ The European Commission recognizes that there is no clear full definition of FDI. In their view, however, the EU competence on FDI includes investment protection. It considers however that it does not cover portfolio investment.¹⁶

Implications of Changes in the CCP for the EU trading partners

¹⁵ See Bugenberg, p.11 and Woolcock, p. 4

¹⁶ Report of the DG Trade Civil Society Meeting, The impact of the Lisbon Treaty on trade policy, 27 January 2010, p.3

What will be the implications of the changes introduced by the Treaty of Lisbon on the conduct of the Common Commercial Policy and in particular on the trade relations between the EU and its trading partners?

1) Impact of the integration/insertion of the CCP into a broader context

Until the Lisbon treaty, “the EU had not taken full account of aims and principles outside the economics of trade policy”.¹⁷ The new articles introduced in the Lisbon Treaty make clear that the EU not only has a liberalization agenda, but that other objectives - human rights, good governance, environmental protection, sustainable development – must be taken into account in formulating trade policy within the WTO as well as in the negotiation of bilateral trade and investment agreements.¹⁸ It also makes explicit what is already the case: that trade policy can be used in order to attain other non-economic objectives, and that links can be made between trade policy and the Union’s principles and values. The Lisbon Treaty may therefore provide a basis for the use of conditionality in trade policy.¹⁹

While trade agreements were sometimes used to pursue both economic and political objectives as in the case of the Europe Agreements with Central and Eastern European Countries in the mid-nineties, the decision to enter into a trade agreement with a third country outside of Europe has usually been motivated by economic reasons. In addition, as spelled out in the Global Europe strategy²⁰, “in the global economy, Europe’s trade policy must become an integral part of its wider approach

¹⁷ Bungenberg, p.15

¹⁸ Bungenberg p. 14

¹⁹ Marise Cremona, A Constitutional Basis for Effective External Action? An assessment of the Provisions on EU External Action in the Constitutional Treaty, EUI Working Papers, Law no. 2006/30, p.30

²⁰ See footnote 2

to economic reform and competitiveness”. In particular, the strategy proposes a new programme of bilateral free trade agreements with key partners in which economic – and not political - criteria are a primary consideration.

In that context, it will be interesting to see what role the High Representative will play in “shaping the balance between trade and other objectives. Much may depend on its relations between both the Commission and the Council”.²¹ More generally, some uncertainties remain as to how the key players involved – the Trade Commissioner, Karel De Gucht, the New High Representative, Catherine Ashton, the Member State chairing the EU presidency but also the new EU president - will interact. It seems that the changes introduced by the Lisbon Treaty may lead to more people speaking in the area of trade policy.

It is however likely that in the short to medium term at least, the Commission will continue to shape the nature and content of trade agreements as it has the technical capacity.²²

2) Impact of increased role of European Parliament

The enhanced role of the EP in the CCP will also increase the possibility of non-economic objectives such as human rights issues or environmental and social standards being taken into account. We have seen how the Lisbon Treaty enables the European Parliament to play a full part in trade policy development and treaty-making. If some of the novelties introduced by the Lisbon Treaty are a codification of existing practices, the Lisbon Treaty allows the EP to fully participate in the conduct of the Common Commercial Policy, both in the area of trade agreements and as a co-legislator for the adoption of trade implementing measures.

²¹ Woolcock, p. 3

²² Woolcock, p.3

If, in the past, a lack of legal power and the limited ability to provide close scrutiny of the EC's negotiating position has meant that the EP veto power to an agreement already accepted by the MS and the EC negotiating partners may not have been credible, the new rights given to the EP may impact the conduct of the EU trade policy.

In giving more powers to the EP, the Lisbon Treaty increases the democratic accountability of EU trade policy. This will also give more importance to the political dimension of any future trade negotiations²³ as the EP is expected to exercise a more active and effective scrutiny of trade negotiations. This will need to be well taken into account by all acts involved as the EP is now to give its consent to all trade agreement on a "take it or leave it" basis.

The increased role of the European Parliament may lead to a "politicization" of the Common Commercial Policy and the use of conditionality in trade policy may be reinforced²⁴.

In practice, new inter-institutional arrangements will need to be worked out to reflect the fact that both the Council and the EP will have to give instructions and control to the Commission during the negotiations of trade agreements. More generally, arrangements will need to be defined in order to solve possible conflicts between the positions of the Council and of the Parliament. The participation of more actors in the conduct of the EU trade policy may also lead to longer lead-in times²⁵.

²³ Report of the DG Trade Civil Society Meeting, The impact of the Lisbon Treaty on trade policy, 27 January 2010, p. 2

²⁴ Bungenberg, p.15

²⁵ Report of the DG Trade Civil Society Meeting, The impact of the Lisbon Treaty on trade policy, 27 January 2010, p. 2

These new rules for the conduct apply since 1 December 2009, even if the practical arrangements still need to be defined and put in place. As a consequence, all trade agreements will now need to get the consent of the European Parliament including all pending multilateral and bilateral agreements that are currently being negotiated.

EU trading partners will need to watch more closely the EP when dealing with the EU on trade policy. In that respect, it will be interesting to follow the EP discussions on the recently agreed EU/South Korea FTA that will now be presented to the EP for its consent.

3) Impact of the extension of scope of EU CCP

The clarification of the scope of the CCP and the fact that all aspects of the CCP now fall under the exclusive competence of the EU are expected to contribute to a streamlining of the trade policy conduct and a coherence of the EU trade policy.

The first consequence is that the extension of the scope of exclusive competences in the CCP will reduce significantly the need of further mixed agreements. There will no longer be any mixed trade agreements – only EU ones. However, in cases where agreements cover policies outside the scope of the CCP with no exclusive competence, Member States will still be required to ratify the agreement. The new generation of EU free trade agreements that will be concluded with India, Singapore and Mercosur, for example, will be mixed agreements due to their complexity and wide range of policies covered.

The fact that FDI is now an exclusive competence of the EU will also have several other consequences.

Member States will no longer be able to conclude BITs unless they are empowered by

the EU to continue or conclude such agreements.²⁶ The opportunity and the form of such an empowerment will need to be worked out between the EU institutions and the Member States.

A further issue is the impact of such a change on existing BITs concluded by Member States. According to Article 351 TFEU and Article 4(3) TEU, Member states will be obliged to adapt their BITs to EU law. Since the Lisbon Treaty does not foresee any transitional period or any provision recognizing the right of Member States to keep in place their existing agreements as long as they are fully compliant with EU law, the existing BITs concluded by Member States may have to be denounced.

For the sake of legal certainty, however, a “grandfathering solution” is likely to be adopted in the short term. This means that an exemption might be granted that would exceptionally allow the existing BITs to be kept in place until the adoption of EU investment agreements. The exact conditions of such a clause will have to be discussed among the different parties involved.

This situation will however have to be clarified by the EU both for existing BITs and for BITs under negotiation as the EU trading partners are also questioning why they should continue with or negotiate a series of individual investment agreements with Member States²⁷.

More generally, the inclusion of FDI in EU competence may lead to 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 linked²⁸. The Commission already stressed the importance of

investment in the EU bilateral negotiations as well as at the multilateral level²⁹.

Conclusion

It is not yet clear what the extent of the impact of reforms introduced by the Lisbon Treaty will be. Opinions diverge as to whether in practice the changes proposed by the Lisbon Treaty in relation to the EU’s external trade agreements will significantly alter the status quo and second, whether the proposed changes are sufficient to make the CCP more efficient and more democratic.

Much will depend on the implementation of the newly introduced arrangements. However, at this stage we can say that the EU’s trading partners will have to look more broadly to the EU’s trade policy as an integral part of its overall external policy to the trading partner. This may mean that non-trade policy issues will more easily interfere with specific trade agenda issues. Second, the EU’s trading partners will have to watch more closely the EP when dealing with the EU on trade issues given the increased roles of the EP on trade policy. A lot will depend on the way the EP will exercise the new powers granted to it by the Lisbon Treaty.

²⁶ Article 218 TFEU

²⁷ Woolcock, p. 4

²⁸ Woolcock, p. 4

²⁹ Commission Staff Working Document SEC (2006) 1230, p.14 and p.18

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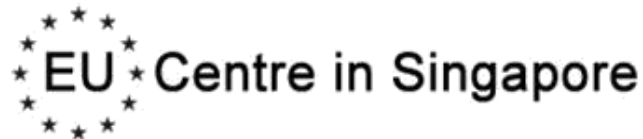
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