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# The Treaty of Lisbon and the European Union as an actor in international trade

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## ABSTRACT

THE TREATY OF Lisbon will introduce a number of changes to European Union (EU) external trade policy decision making. These involve the scope of exclusive competence of the EU, the role of the European Parliament and the inclusion of trade in the common external action of the EU. This article discusses these changes but also provides an initial assessment of how the Treaty of Lisbon (ToL) might affect the role of the EU as an actor in international trade. After an introduction to the attributes of 'an actor' in international trade the article then summarises the main changes the ToL will bring about before discussing their likely ramifications. It argues that the ToL can be expected to strengthen the EU as a trade actor in a number of respects and that these should, to some degree, compensate for the relative decline in EU market power due to systemic changes in the international trading system.



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## 1. INTRODUCTION<sup>1</sup>

A CENTRAL AIM of the Treaty of Lisbon (ToL) is to ensure that the EU remains effective in policymaking following enlargement. Like the Draft Constitutional Treaty that preceded it, the ToL also seeks to make EU decision making more accountable and transparent for European voters. This article looks at how the ToL is likely to affect EU policymaking and negotiation in the field of external trade (and investment) policy. External trade policy, or the common commercial policy as it was more accurately called in the Treaty of Rome, is an area in which the EU has been an important actor for some time. So the question here is not whether the ToL will enable the EU to become an effective actor, something that preoccupies those concerned with the common foreign policy of the EU, but how the changes in the treaty will affect the EU's existing role. The treaty brings about three main changes, it will:

- extend exclusive EU competence to cover more trade, trade-related issues and, importantly, foreign direct investment;
- enhance the role of the European Parliament (EP) by granting it joint powers with the Council in shaping the legislative framework for trade and by facilitating a more active role for the EP in the negotiation and ratification of trade agreements;
- bring external trade into European external action along with foreign policy, development, humanitarian aid and international environment policy.

All of these could have implications for the EU's role as an actor in trade.

The article first discusses the existing literature on the EU as an actor and how this can be applied to the case of external trade, thus providing a framework for assessing the impact of the ToL on the EU as an actor in trade. There is also a brief summary of EU decision making and negotiation prior to the adoption of the ToL to provide a reference point and background for those not so familiar with EU trade policymaking. This is followed by a presentation of the changes the ToL will bring about and then an assessment of the impact of these changes on the EU's role as an actor in future trade and investment policy. The conclusions argue that the ToL will enhance the EU as an actor in trade and investment, but that this must be seen against the relative decline in the market power of the EU as a result of structural changes in the international trading system. The impact of the ToL on decision making is also important. It should improve the transparency and efficiency of EU trade policy by the streamlining and simplifying of EU competence. Accountability will be enhanced thanks to the greater role of the European Parliament. However, as the EP will need to further develop its capacity before it can be effective in close scrutiny of the Commission during negotiations, the impact of the ToL in this respect is only likely in the medium term, perhaps over the life of a European Parliament. The article also argues there will be little immediate change due to the inclusion of external trade in common EU external action. It is argued that the effectiveness of EU external policies has more to do with the existence of well-established decision-making procedures and the shared expectations of key decision makers than formal competence. It will be some time before the newly established High Representative for Foreign and Security Policy (HRFSP) and the European External Action Service (EEAS) will have much influence on procedures and practices in the Commission and the Council that have evolved over half a century in the field of external trade policy. Whilst foreign and security policy considerations will continue

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to influence broader strategic questions, such as when and with whom the EU negotiates, they are unlikely to have more influence on the substance of policy.

## 2. THE EU AS AN ACTOR IN TRADE POLICY

There is extensive literature on the EU as an actor. Most of this is about the ‘actorness’ of the EU in international relations and is especially, but not exclusively, a preoccupation of those concerned about the EU’s role in foreign policy<sup>2</sup>. The purpose of this section is not to propose yet another classification of what might constitute ‘actorness,’ but to produce a synthesis, based on the existing literature, of the attributes of an actor in the field of trade policy, namely; market power, recognition (or presence), capability, normative power and legitimacy/parliamentary accountability.

### MARKET POWER

THE ATTRIBUTE OF economic power could be said to encompass much of what Allen and Smith (1990) called ‘presence.’ Presence clearly implies that there is a form of latent power derived from the size of the EU economy. Bretherton and Vogler (2006) also recognise that ‘actorness’ can be derived from the EU’s presence including the unintended effects of EU policies due to its weight in the world economy, such as the impact of the Common Agricultural Policy on trade relations. Gupta and Ringius (2001) in discussing whether the EU fulfils a leadership role (in international environmental policy) use the concept of structural leadership or the use of power to bring about changes in other countries’ policies, contrasting this to other forms of leadership such as directional leadership. Jupille and Caporoso (1998) also start from the premise that power and influence are key factors in determining presence and then go on to consider the kind of standards that would be central to discussions of power, such as authority, autonomy and cohesion, which will be discussed below.

In contrast to the case of foreign policy in general there is a fairly straightforward metric for power in trade – and to a lesser degree investment – policy in the shape of market power derived from the size of the domestic market. Central to trade policy as practised to date by the EU and other major trading powers has been the negotiation of reciprocal concessions on market access, so that the larger the domestic market relative to that of one’s trading partners, the greater the negotiator’s power by virtue of his or her ability to withhold, or withdraw, access to this market. Binding commitments to tariff reductions and other liberalising measures in recent decades has reduced the scope for withdrawing market access concessions, but there remains room for discretion in many fields of trade. At the beginning the European Economic Community (EEC) possessed market power through the creation of a customs union. The EEC was then able to use this power to bring about reductions in US and other countries’ tariffs during the Kennedy Round of the GATT (Duerr, 2008). After stagnation in the integration process during the 1970s the EC’s market power was again enhanced by the deepening of the European single market from the mid 1980s until the mid 1990s. The single market programme meant that EC trade policy determined access to new markets such as services, government procurement and other markets that had previously been shaped by member state policies. Enlargement of the EU also provided a boost to EC market power.

There can be little doubt therefore that the EC possesses considerable market power, a key attribute of an actor. Relative EC market power also increased through the 1980s and early 1990s with the deepening and widening of the internal market integration. With it the EC was, along with the United States and other members of the ‘quad’ (US, EC, Japan and Canada), able to

shape the international trade regime. But during the 1990s the EC's relative market power was held in check. The US economy grew faster over the decade thanks to productivity gains from the information technology and from debt financed consumer led growth. In the 2000s relatively fast economic growth in large emerging markets with higher tariffs and thus real bargaining power, such as China, India and to a lesser degree other emerging markets has reduced the EC's relative market power. Binding EC tariff reductions and other liberalising measures during the Uruguay Round as well as the generally liberal nature of the Single European Market (SEM) programme also reduced the scope for the EC to threaten to withhold or withdraw market access. The main leverage that remained was in terms of access to the EC agricultural market.

Perhaps equally important have been the changes in the nature of trade and investment policy. EC interest in trade has become more and more one of persuading its trading partners to adopt rules and standards that address non-tariff and regulatory barriers, the SEM and the strengthening of the EU *acquis*, the body of EU domestic legislation, established liberal rules for such issues. The EC therefore had an interest in pursuing a comprehensive World Trade Organisation (WTO) agenda that would at least move other countries in the same direction. In the WTO negotiations before and during the Doha Development Agenda (DDA), the EC therefore sought to maximise its negotiating leverage (in agriculture) in order to make progress in other policy areas, such as the so-called 'Singapore agenda' items of investment, government procurement, competition and trade facilitation (Woolcock, 2003). The EU largely failed in this attempt to shape the multilateral trade agenda during the late 1990s and early 2000s, as either the emerging markets (investment, government procurement) or the US (competition), opposed or failed to support the EC's proposals. A lack of success that is consistent with the relative decline in EC market power and which helps explain the reversion - from 2006 - to a more active use of bilateral negotiations (Evenett, 2007) that allow the EU to make the most of its relatively diminished market power. The shift to bilateral agreements is, however, due to other factors such as a desire to match the shift in the policies of the USA and other major WTO members towards a more active use of bilateral trade agreements.

## RECOGNITION

*De facto* recognition as an actor can come as a consequence of market power. From the time the European Commission (henceforth Commission) emerged as the negotiator for the EC during the Dillion and especially the Kennedy rounds of the GATT, the EC was recognised as an actor distinct from the EU member states. It was also the EC, in the shape of the Commissioner responsible for external trade, not the member states that participated in the 'quad' during the 1980s. The picture differs in the OECD, an important forum for setting the trade agenda during the 1970s and 80s, where the member state governments were recognised and the Commission was only an observer. Today the EU remains a participant in the more fluid set of groupings that discuss trade, with the Commissioner for trade being the representative of the EU. In the case of trade formal, *de jure* recognition in international institutions has been less important for EU actorness than perhaps in other fields (Jupille and Caporaso, 1998). The EC has been a member of the WTO since its creation in 1995, and thus has legal personality.

The authority of the EC to negotiate for the member states is another important attribute of actorness and for simplicity we propose to include it here under the heading of recognition. The more authority the EU has for trade and trade-related topics, the more other countries will recognise it as the sole negotiator and the less they will seek out member state governments. As noted above, the Treaty of Rome granted exclusive competence to the EEC for the common commercial policy. As the international trade and investment agenda deepened new issues were added for

which the EC did not have exclusive competence. The member states' response to this situation was pragmatic in that they authorised the Commission to negotiate on behalf of the EC and the member states in order to maximise their collective influence. Thus on services and intellectual property and some investment issues, the Commission was recognised as having negotiating authority by the EU's negotiating partners. The picture in terms of recognition therefore is that the EC has both *de jure* and *de facto* recognition in international trade and trade-related topics. Where there has been no *de jure* exclusive competence for trade, the EC has still been recognised *de facto* because member states have backed the Commission as sole negotiator.

## CAPABILITY

EVEN WHEN THE EU is recognised as being a major actor in trade negotiations, there is still the question of how it uses its power and influence. This brings us to the rather more complex issue of capability. The existing literature on this has identified a number of elements that influence the EU's capability or ability to use its influence effectively. Here we shall focus on autonomy and cohesion (Jupille and Caporoso, 1998).

Whether the EU is an *autonomous* actor must be seen in terms of the nature of the principal – agent relationship between the member states and the Commission. In other words how much scope/autonomy does the Commission have in negotiations? The answer to this is not a great deal. As the member states are involved in decisions concerning negotiating strategies as well as the adoption of what has been negotiated by the Commission, one can conclude that it has less autonomy than its counterpart in the USA (Woolcock, 2009). On the other hand, all trade negotiators have limited autonomy and the trend appears to be towards domestic principals seeking to control negotiators more and more. Thus the US Congress has over the past 30 years steadily clawed back some of the control it had been willing to cede to the executive branch under the various 'fast track' laws. All we can conclude therefore is that, if EU actorness is limited by the limited autonomy of the Commission to negotiate, this is a limitation that all trade actors suffer from to a greater or lesser degree as is evidenced by the difficulties concluding the DDA.

Another test of autonomy is whether the EU is greater than the sum of the member state policies. If the EU has a distinct common policy this will give the EU negotiator(s) a reference point during negotiations that is European and not simply dependent on the various member state policies. In the early years of the EEC, trade policy was largely a question of balancing protectionist and liberal interests across sectors and member states. In this sense the EEC policy was the sum of the various national preferences, or indeed that EEC policy facilitated a form of preference concentration in which the most protectionist national policy could prevail, such as in the case of agriculture. Since the deepening of integration in the 1980s however, a much wider *acquis* means that trade and investment policy positions are more and more based on common EU policies. This is the case for the so called 'Singapore issues', such as competition and government procurement, but is more importantly also the case for subsidies, technical barriers to trade and services where the *acquis* has largely replaced national policies.

*Cohesion* is clearly also an important attribute of an actor. Again cohesion can vary from case to case, but Jupille and Caporoso (1998) suggest that the existence of established rules of the game in terms of decision making can be seen as a measure of cohesion in that these facilitate the definition of common interests and positions. Here the historical evolution of EC trade policymaking over 50 years has created a solid set of rules and precedents that impose real disciplines on individual member state behaviour in the Council and clearly meet the first criterion. In terms of output, there have been times when member state differences could only be accommodated in a common

position with some difficulty<sup>3</sup>, but the number of cases in which differences have seriously damaged EU credibility in trade has probably decreased over time.

Reaching a common position is not the same as being effective as an actor in international trade. *Effectiveness* here implies an ability to make use of the attributes of an actor (market power, autonomy and capability) to further EU interests and bring about changes in other countries' trade policies. In this context, one is concerned with the ability of the EU to show both an ability to be proactive and to respond to developments in negotiations<sup>4</sup>. As Meunier (2000) has pointed out, the institutional framework of decision making in the EU has been used effectively to defend the status quo. As the record of trade in general in the 1970s and agricultural trade negotiations in particular shows, the EC was successful in defending its interests. There is also evidence from the Uruguay Round that the EC was also effective in pursuing its offensive interests in services, government procurement and other topics. As noted above the EU has not succeeded in its objective of shaping a comprehensive multilateral trade agenda in the 2000s, but this needs to be distinguished from the effectiveness of the EU decision-making process, which reached agreement on the EU's offensive aims. The lack of success could be attributed either to ineffective negotiating, for example in the run up to and during the Cancun WTO ministerial in 2003 that determined the agenda of the DDA, or to more structural explanations related to the opposition from relatively powerful emerging markets.

So on capability the picture is less clear cut. There are questions about the EU's autonomy in trade and perhaps also about its effectiveness in negotiations. But all major WTO members are under similar constraints, so it seems fair to conclude that the EU is as capable an actor as any WTO member and considerably more capable than many.

## NORMATIVE POWER

It has been argued that the EU is a *normative power* in that it promotes certain common values and norms or provides a model for other regions on how to regulate integrating markets more generally. Here the EU shows the attributes of an actor through the support for shared interests or values among the member states. If the EU norms or approaches to regulation are distinctive this also helps provide the EU with a distinctive identity in the field of trade and investment. In the early decades of EC trade policy, shared values were rather narrowly based on the tariff preference and the Common Agricultural Policy (CAP). In time, however, and especially with the single market programme the *acquis communautaire* codified more and more shared norms and standards (Young and Peterson, 2006). This codification has been achieved through sometimes laborious intra-EU deliberations and it represents a significant and clear example of shared interests. The *acquis* is of course not complete. As the 2007-9 financial crisis showed, there remain important differences in financial regulation and corporate governance as well as other fields, such as services. But by the 2000s, the *acquis* provided a broad basis for common EU external policies in trade and trade-related topics. It was also distinctive enough from the previously dominant US norms to create difficulties in transatlantic negotiations.

In addition to the detail of the *acquis*, the EC has provided the model for regional integration efforts over the past 40 years. Integration efforts in Latin America, Africa and Asia were partly inspired by the EC. Indeed, regional integration as a means of market liberalisation in order to reap the economic benefits, whilst maintaining a regulatory framework that defends shared social or environmental norms, could be said to represent a distinctive European approach to trade and to international relations in general. In the trade field therefore the EU clearly has the attribute of possessing shared norms and standards<sup>5</sup>.

## LEGITIMACY AND ACCOUNTABILITY

FINALLY, PUBLIC AND parliamentary support has been proposed as an attribute of an actor (Juppille and Caporoso, 1998). Effective implementation could be included under this heading as it requires the ratification of agreements by legislatures (previously the EP and member state parliaments but now through the EP). EU international trade policy has never been seen as especially marked by explicit parliamentary or public support. Formal legitimacy for EC trade policy was ensured by national governments adopting the results of negotiation in the Council. Many member state governments have preferred to keep trade policy insulated from detailed interference from national or European parliaments for fear that these would be captured by protectionist interests. As late as the Maastricht Treaty on European Union in 1991 the member states made a conscious decision to keep the EP out of trade policy. Most member state parliaments have never been able - or perhaps interested enough - to provide effective scrutiny of EC external trade policy as they are at two steps removed from the real negotiations. At the EC level, discussions within the Council and Article 133 Committee were opaque, with no detailed feedback from national ministers and no public minutes of the meetings. As the debate at the EC level determines the consensus and thus the EC negotiating position, national parliaments had little say on what goes on except in the shape of reports from national officials or ministers.

Globalisation has resulted in more interest groups becoming more aware of - and thus interested in - shaping trade and investment policies. In response the EP was consulted more by the Commission and Presidency, especially after the 1999 WTO Ministerial meeting in Seattle and various other manifestations of NGO opposition to trade and investment liberalisation at the end of the 1990s. The Commission also started to organise a Consultation Forum with NGOs at around the same time. Notwithstanding these increases in consultation, the basic technocratic character of EC trade policymaking did not change. The core of decision making remained the interaction between senior national and Commission officials, and EC trade negotiations still conducted by the Commission in consultation with national officials. In short the attribute of legitimacy, or perhaps more accurately parliamentary control of policy, was not very well established in the EC before the ToL.

To sum up, before the ratification of the ToL the EC has clearly been seen as an actor in trade policy, due to its market power, exclusive EC competence and adequate capabilities. But the EC could be said to have fallen short in some of the attributes of 'actorness' suggested in the literature, such as with regard to effective parliamentary control, a factor that is important when one considers the sustainability of 'domestic' support for EU policy. It could also be argued that in the EC there was at least a debate about EC capabilities, even if the EC was not much different to major trading powers such as the USA when it comes to the autonomy of negotiators.

After discussing how policy has functioned to date and then the content of the ToL on trade and investment, the final section of the paper will assess how these various attributes of actorness are likely to be affected by the ToL.

### 3. THE PRE LISBON TREATY ARRANGEMENTS

THE ESTABLISHED PROCEDURES for decision making and negotiation in the field of EC external trade policy have been comprehensively discussed and described elsewhere. (Woolcock, 2009; Young and Peterson, 2006; Meunier and Nicholaidis, 2006) The purpose of this section is to provide a brief overview for those unfamiliar with the EC policy process in trade. EC external trade policy has been conducted broadly in line with what is generally called the 'Community method'. In other words the Commission has drafted a negotiating mandate after consulting



the member states and various interest groups. The member states in the Council, ultimately the General Affairs and External Relations Council (GAERC) have then authorised the Commission to negotiate trade agreements 'in consultation' with the member states. Formally such authorisation could be by a qualified majority vote on issues covered by EC competence, in other words trade in goods and agriculture and most services, except services trade that did not affect cross border trade in services within the EC and intellectual property. In practice the Council has decided by consensus. 'In consultation' has meant that the Commission has cleared all policy and important negotiating positions with the member states in the shape of the Article 133 Committee composed of high level national trade officials, or on big policy or very sensitive issues in the shape of the GAERC.

The Commission, in reality the trade Commissioner for all but agriculture and the Commissioner for agriculture on detailed aspects of agricultural negotiations, has then led the negotiations for the EC. As noted above, the Commission has also negotiated on topics that were not exclusive EC competence. Member state representatives would often sit in the room during negotiations, and have always been present at important WTO negotiations, but only the Commission has spoken in negotiations.

Decisions on whether to adopt an agreement have been taken by the member states in the Council, ultimately in the GAERC (there is no trade Council). As for authorising negotiations, the formal basis for adopting agreements for which the EC had exclusive competence has been a qualified majority of the member states. But the practice has always been to work by consensus. A single member state, even a large one, has not generally been able to block adoption of a trade agreement acceptable to all the other member states. The established rules of the game in trade policy have been that the Council works until an agreement is reached that all can accept. For issues, such as some services trade or intellectual property, for which the EC did not have exclusive competence before the adoption of the ToL, there has been a formal requirement of unanimity. In practice, however, it has been divergent interests rather than a lack of competence that has threatened the cohesion of EC policy most. For example, there have been far more tensions over agriculture, a policy in which the EC has exclusive competence, than services or IPR which were shared competence.

The EP has not played a very significant role to date. In certain circumstances the assent of the EP was formally required for trade agreements, such as when these necessitated changes in EC domestic legislation adopted by co-decision of the Council and the EP, when there were budgetary implications or when new institutional arrangements were established. The EP also had to give its assent for Association Agreements, which meant for most bilateral or region - to - region agreements. Leaving aside the legal powers of the EP, both the Commission and Council have in recent years increased the degree to which they consult the EP and its specialist International Trade Committee (INTA)<sup>6</sup>. For political rather than legal reasons any major trade agreement has therefore been presented to the EP for its assent even before the ToL. In other words a conclusion of the DDA or any bilateral free trade agreements negotiated by the EC, such as the EU- Korea agreement or the Economic partnership Agreements (EPAs) with the African Caribbean and Pacific (ACP) states would have been presented to the EP for its assent, by a simple majority of MEPs. Under pre ToL conditions, however, there was never really any likelihood that the EP would not give its assent to an agreement accepted by the member states and the EC's negotiating partners. A lack of legal powers and limited ability to provide close scrutiny of the EC's negotiating position has meant that the formal EP veto power has never been credible.

Most national parliaments have not been much involved in EC trade policy for the reasons men-

tioned above. With a few notable exceptions, such as Denmark and to some extent Germany, France and the UK, national parliaments have not concerned themselves with EC external trade policy except on a few limited and often populist topics, such as those concerned with human or animal rights (e.g. bans on imports of seal products from Canada). The national parliamentary ratification of parts of agreements based on mixed or member state competence therefore tended to be mostly a formality. The power to ratify mixed competence agreements was only used to delay EC ratification and thus gain political leverage on other internal EU issues, rather than to influence the content of EC external trade policy.

#### 4. CHANGES WITH THE TREATY OF LISBON

There are three main changes resulting from the ToL in the field of EU trade policy.

##### CLARIFICATION OF EU COMPETENCE

THE ToL STREAMLINES EU<sup>7</sup> trade policy by confirming that all key aspects of external trade will henceforth come under exclusive EU competence. This dispenses with almost all of the mixed elements in trade agreements that have created confusion both within the EU and among the EU's trading partners.<sup>8</sup> The treaty brings all services and trade related aspects of intellectual property (IP) into EU competence. This therefore concludes the long-standing debate on competence for these issues that began prior to the Maastricht intergovernmental conference (IGC) and continued through the Amsterdam (1996) and Nice (2001) IGCs and the Constitutional Convention. The inclusion of all services and trade-related aspects of IP in EU competence will not bring about any radical change however. Many services already fell under EC competence and the Commission has negotiated for the EC on all services and IP for many years. The change will be that a member state that is not content with what the Commission has negotiated will no longer have the formal right to seek unanimity.

Although all services come under EU competence, the ToL includes provision for the use of unanimity in some politically sensitive sectors. Pressure from a number of member states, backed by public service unions in the health, education and social services sectors, led to special provisions in article 207 (4) (ex Art 133 TEC) of the ToL on audio visual, health, education and social services.<sup>9</sup> Article 207 (4) ToL provides for unanimity in EU decision making when agreements are being negotiated in the field of culture and audio visual services, where these "risk prejudicing the Union's linguistic and cultural diversity." There are similar unanimity rules for social, education and health services in Art 207(4)(b) ToL. In this case unanimity would be required if an agreement "risks seriously disturbing the national organisation of such services and prejudicing the responsibility of member states to deliver them". At issue here could be whether one or more member states will insist on unanimity before any liberalisation commitments are made on health or education in the WTO General Agreement on Trade in Services (GATS), or any bilateral trade agreement that could result in increased competition in these sectors. Such increased competition might be interpreted as seriously disturbing national health care systems. On the other hand the ToL may be interpreted as providing the right for a member state(s) to raise concerns that an agreement risks seriously prejudicing national policies, but does not provide an unconditional veto. There is a broad consensus in the EU that there should be no commitments in the GATS that might threaten public health, education and social services. So in the current round of negotiations the access to unanimity for member states is unlikely to be tested.

By far the most important extension of EU competence is the inclusion of foreign direct invest-

ment (FDI) in exclusive EU competence (Art 207(1)) ToL. To date investment has been mixed competence. The EC has negotiated agreements covering investment in services, such as in mode 3 (establishment) of the GATS agreement, and some other aspects of investment liberalisation such as GATT Trade Related Investment Measures (TRIMs) agreement that prohibits investment performance requirements, such as local content. Individual EU member states have however, negotiated their own bilateral investment treaties (BITs) to provide protection for fund repatriation and against unfair or uncompensated expropriation. Unlike major countries such as the United States, the EU has not negotiated comprehensive investment agreements covering liberalisation and investment protection, or included such agreements as part of wider free trade agreements.

Again there remain some questions about the impact of this inclusion of FDI in EU competence. The distinction between investment protection and liberalisation and the existence of national BITs covering the former, could be used by some member states to argue that only investment liberalisation should be included in EU competence (such as agreements that provide for pre-establishment national treatment) and that investment protection should remain covered by the existing member state BITs. A more convincing interpretation is, however, that the reference to FDI in Article 207 (1) covers both liberalisation and investment protection. If investment covers investment protection, the existing member state BITs have been illegal under EU law as of 1<sup>st</sup> December 2009. Given the danger of litigation challenging the legality of member state BITs, some action is likely to be needed to re-establish legal certainty. This could well take the form of EU legislation 'grandfathering' existing member state BITs. In line with the new arrangements this legislation would be adopted by means of the Ordinary Legislative Procedure OLP (i.e. co-decision of Council and European Parliament) -see below.

If EU exclusive competence covers both investment protection and liberalisation, the EU will need to address the question of an EU model agreement to be applied in any future EU BITs or investment chapters in free trade agreements.<sup>10</sup> The EU has been developing a common platform on investment for some time and has concluded a number of FTAs with investment chapters. For example, the EU - CARIFORUM EPA of 2008 includes a chapter on liberalisation of investment based on a positive listing of coverage, protection for current payments and capital movements related to foreign direct investment and some provisions on investor behaviour. Investor behaviour provisions include, for example, obligations to comply with any International Labour Organisation (ILO) core labour standards ratified by the host state. In other words EU investors in a CARIFORUM state will be required to comply with core labour standards ratified by the host state. The EU will also need to find a balance between an approach to investment that leaves it with sufficient right to regulate within the EU in policies such as the environment, whilst ensuring the protection for EU investors is no worse than that provided by member state bilateral BITs. This will not be an easy balance to find, especially given the history of opposition to some aspects of investment rules in the EU<sup>11</sup>. Another complication is that member state governments may see BITs as providing a competitive advantage for their investors<sup>12</sup>. Any agreement, whether in the shape of an EU BIT or an investment chapter in future FTAs, will require the consent of the EP - see the following section. Reaching common positions on investment is therefore likely to take some time, and it may be that some flexibility is needed in the short to medium term. The speed with which the EU moves to establish EU model investment provisions will no doubt depend on negotiations on FTAs with investment chapters and pressure from third countries that favour the replacement of multiple BITs with individual EU member states by an EU- wide BIT.

## AN INCREASED ROLE FOR THE EUROPEAN PARLIAMENT

THE FORMAL POSITION of the EP in EU external trade policy is enhanced in three main ways through the ToL. These concern the co-decision making powers with the Council for trade legislation, a greater say in negotiation and the power to grant its 'consent' to the adoption of all trade agreements negotiated by the EU.

First, ToL 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 the common commercial policy'* (i.e. external trade). The OLP is the new term for co-decision making. This provision means that the EP now shares powers with the Council to adopt regulations on topics such as anti-dumping, safeguards and the Trade Barriers Regulation (TBR). It will also share legislative powers with the Council when it comes to legislation modifying autonomous trade measures such as the EU's Generalised System of Preferences (GSP) schemes. Before the ToL, such EC trade legislation was adopted by the Council with very little involvement of the EP. The consultation procedure used before the ToL provided for the EP to give its opinion on proposed regulations, but the Council was only obliged to take them into consideration and in most cases the EP was not involved at all.

The new powers of the EP relate to the legislative framework not to the detailed application or implementation of trade policy. Due to review processes in most trade agreements there is often a need to make regular detailed amendments to tariffs or other provisions. In order to avoid the EP having to deal with a mass of such detail there is provision in the ToL (Art 218(9)) for powers to be delegated to the Commission.

Trade policy also involves the day-to-day implementation of commercial instruments, such as anti-dumping provisions, safeguard measures and countervailing duties. For such commercial instruments the EP will henceforth have powers to adopt the legislation, but not to be involved in the implementation of EU legislation. When it comes to implementing EU trade policy instruments, such as anti-dumping measures in particular, the Commission will continue to determine the margin of dumping and injury and Community interest. Under Article 291(2) on legal acts of the Union, the Commission is granted implementing powers for legally binding acts. To have the Council (in the shape of the Anti-Dumping Committee) implement definitive dumping duties, as it did by a majority vote before the ToL, therefore appears to run counter to the thrust of the treaty<sup>13</sup>. On the other hand, Article 219(3) states that the EP and Council shall lay down how the member states control the Commission when it exercises these implementing powers, and the member states can be expected to press for some means of controlling the Commission. But the EP can be expected to do the same.

The second area in which the *powers of the EP are enhanced concern the process of negotiation*. Prior to the ToL the EP had very little say in the EU's negotiating aims. All it could do was to produce own initiative reports or make its views known to the Commission through other means. Unlike the US Congress the EP had no powers to authorise trade negotiations based on set objectives. These have always been determined by the Council. This has severely constrained the ability of the EP to have anything like a credible veto over any trade agreement. Although the EP has been asked to grant its assent for most trade - and all association agreements - this has only happened once the agreement concerned has been agreed by the member states in the Council and all the EU's negotiating partners. In these circumstances a negative vote by the EP has simply not been a credible option.

The main means by which any legislature controls trade policy conducted by an executive is by indicating, during the course of negotiations, when the executive strays too far from the negotiat-

ing aims set out at the start. As the EP has had no power to influence the aims of any negotiation by authorising negotiations it has not been able to impose any kind of conditions on its ultimate assent. The ToL does *not* grant the EP powers to authorise the EU to engage in trade negotiations. Articles 207 (3) (ex Article 133) and 218 (2) ToL (ex Article 300 TEC) clearly state that the Council on a proposal from the Commission retains power to authorise the opening of negotiations. So there is no US Congress-like power for the EP to authorise and thus set the objectives of trade negotiations.

In the future there may, however, be some scope for the EP to make known its views on the negotiating objectives to the Commission and Council. In its opinion on the EP's role and responsibilities implementing the ToL, the EP's International Trade Committee (INTA) argued for a means of establishing preconditions for granting the EP's consent through a revision of the Inter-Institutional Framework Agreement between the Parliament and the Commission<sup>14</sup>. Article 19 of the 2004 Framework Agreement provided for the Commission to inform the EP (principally the INTA) during all stages of negotiation including the preparation and negotiation of agreements. The framework agreement set out the aim of ensuring that the EP could make its views known in good time. In return the EP undertook to ensure confidentiality of information so as not to advertise the EU's negotiating positions to its negotiating partners. When a new inter-institutional framework agreement is negotiated, the EP is likely to press for equivalent if not stronger wording that will allow it have some influence on negotiating objectives.

With the ToL the Commission will also be legally obliged to provide the EP with information on the conduct of the negotiations. Article 207 (3) ToL requires the Commission to *report* regularly to the special committee of the European Parliament (INTA) on the progress of negotiations as it does to the special committee appointed by the Council (what has been the Article 133 Committee and will become the Trade Policy Committee).<sup>15</sup> The wording of the treaty does not, however, appear to grant the EP the same status as the Trade Policy Committee, which will continue to fulfil the role played by the Article 133 Committee of *assisting* the Commission in negotiations. The ToL largely codifies existing practice here in the sense that the Commission has already been providing the INTA with written briefs on negotiations on a par with those provided to the Article 133 Committee. So it remains to be seen how the role of the EP and INTA will grow. Having the same information does not mean that the INTA will be able to engage in negotiations in the same detail as the Trade Policy Committee, which has more expertise, institutional memory and meets every week rather than once a month as in the case of the INTA, but there is the potential for INTA to play a much more important role than it has in the past.

A third change with the ToL will be that the EP will have an *enhanced role in ratifying trade agreements*. Article 218 (6) (a) (i) to (v) sets out the criteria in which the consent<sup>16</sup> of the EP, by a simple majority of MEPs, is required before the Council can adopt a decision concluding a trade agreement. These are similar to the cases requiring EP assent before the ToL and include, association agreements, agreements establishing a specific institutional framework, and agreements with budgetary implications. A further criterion states that the EP's consent will be required for agreements covering fields to which OLP applies. As trade is now covered by the OLP this appears to make clear that the EP must give its consent before all trade agreements are adopted.

By itself then the power of the EP to grant consent does not give it much say over trade policy. For most trade agreements the EU has had the power to grant its assent for some time. As in all systems in which a legislature has powers to approve international agreements negotiated by an executive, the EP will only have much traction if it can influence the course of negotiations. In recent years the Commission has begun to take consultation with the EP more seriously. The

creation of a specialist International Trade Committee (INTA) in the 2005-9 EP also indicated the EP was moving to strengthen its scrutiny of EC trade policy in anticipation of the treaty changes. Much will now depend on how the INTA functions as to whether it can begin to have a real influence on detailed aspects of trade during the course of negotiations.

## INCLUSION OF TRADE UNDER THE COMMON HEADING OF EXTERNAL ACTION BY THE EU

A THIRD AREA in which the ToL will bring about potential change is in the Article 205 (Part Five, External Action) provisions of the ToL that bring EU trade policy under the same EU external action heading as other elements of EU external policy. Trade policy is henceforth to be conducted within the 'context of the framework of principles and objectives of the EU's external action' (Article 207(1)). This raises the question as to whether there will be any increased tendency for the EU to use trade policy as an instrument of other policy objectives pursued by the EU under external action, such as foreign policy, environmental or development policy. To date EU external trade policy has of course, served broad foreign policy or strategic objectives, such as through the negotiation of association agreements with the EU's near neighbours in order to promote economic and thus political stability within the wider European security area. The EU has also made use of trade agreements to strengthen relations with specific countries or regions. But trade has been used less in the pursuit of specific short term foreign policy objectives. In the case of sanctions the EU has, for the most part, been limited to those supported by the UN.

External trade is included under the Part V External Action provisions of the ToL and Article 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, rule of law and human rights as well as the slightly more specific aims of 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), the progressive improvement of the environment and sustainable management of global resources and good global governance. The question is how the ToL will change the way the EU coordinates external trade policy with these other objectives in the search for coherence across the various policy areas<sup>17</sup>.

Article 218 of the ToL covers the procedure to be followed when negotiating all international agreements. Article 218(3) envisages either the Commission or the HRFSP will negotiate for the EU. Art 218(3) states that the negotiator will be nominated by the Council. For cases in which the agreement relates exclusively or principally to common foreign and security policy this would clearly be the HRFSP, but what about trade? Article 218 (1) states that the procedures set out in that article are without prejudice to the specific provisions laid down in Article 207, which deals with external trade and states that the Commission will negotiate. Consequently, one must expect that the Commission will continue to be the EU's negotiator on the substance of trade.

Just what role the HRFSP will play in shaping the balance between trade and other objectives will depend on how the relationship develops between the HRFSP, the EEAS, the Commission and the Council. The Commission staff working on trade will remain in DG Trade and not move to the EEAS, so it would appear that the institutional memory and technical expertise that is central to trade policy will remain in DG Trade. The long established decision making procedures involving close cooperation between the Commission and member states in the Trade Policy Committee, with growing involvement of the INTA Committee, therefore seem likely to continue to shape the substance of the EU trade policy. The HRFSP and the Council can of course still make key

political decisions, such as when to authorise the Commission to negotiate, where (multilateral or bilateral) and with whom, but this is something the Council has always done in the past.

## 5. THE IMPACT OF THE TREATY OF LISBON ON THE EU AS AN ACTOR IN INTERNATIONAL TRADE AND INVESTMENT POLICY

It is now possible to assess the potential impact of the ToL on the EU as a trade actor. Not just in terms of the letter of the treaty and formal procedures, but how the changes are likely to result in real changes and when.

In terms of *market power* it has been argued that the EU has faced an erosion of its relative power over recent years, due to the growth of other actors and the fact that the EU has negotiated away much of its leverage in reciprocal trade negotiations. By inclusion of investment in EU exclusive competence the ToL might go some way to countering this, but the EU is already open to investment so adding it to EU competence will streamline policies rather than adding a great deal to market power. Even more economic growth is unlikely to add much to the EU's relative market power, given that many EU markets are already largely open. It must therefore be expected that the EU will face a continued erosion of its relative position. This relative decline in EU market power is likely to be a factor favouring the continued use of bilateral trade agreements in which the EU can make more use of any asymmetry in economic power relative to other countries. But there are other factors favouring multilateral approaches, such as the fact that the EU is by its nature multilateralist and has a vital interest in maintaining the credibility of multilateral institutions.

Turning to the related question of *de facto* and *de jure* recognition of the EU as an actor, the extension of exclusive EU competence to include all trade and investment will have the effect of strengthening the EU as an actor. The EU is already recognised as a leading actor in trade and one whose support is indispensable for any multilateral initiative to succeed. This will remain despite some relative loss of market power. Investment is a vital element of the globalisation process, so the inclusion of FDI in EU exclusive competence and in time the emergence of a common EU policy in investment is likely to add considerably to the *de facto* EU recognition. The *de jure* recognition of the EC will simply become recognition of the EU so this seems unlikely to affect the legal status of the EU in the WTO. *De jure* recognition will be extended through EU bilateral investment agreements.

As discussed above there is more room for debate about the degree to which the EU has the *capability* attribute of an actor. It has nevertheless been argued that the EU is not much weaker than many other actors that also face the challenge of balancing effectiveness and accountability or ensuring coherence between trade and investment and other related policies. The ToL does little to change the fundamentals of EU trade policy decision making and negotiation. In the medium to long term, the EP role can be expected to increase. The shift to OLP for the adoption of trade legislation means the EP will have more power, but this could have the effect of enhancing the EU's autonomy in the sense that it will tend to reduce the member states' powers rather than weaken the Commission's ability to shape policy, because of the scope for the Commission and EP to work together. Greater power for the EP does, however, enhance the *democratic control* of EU trade and investment policy and thus goes a considerable way to filling the democratic deficit that previously existed with the technocratic decision-making process. Greater democratic control should enhance the EU's role as an actor in trade and investment.

Nor is there a fundamental change in the institutional arrangements within the EU. Consensus

will remain the basis for decision making in the Council and its working groups. The extension of exclusive competence will perhaps add something to effectiveness by removing some of the member states' ultimate power to use unanimity. The end to most mixed competence and thus the need for member state parliaments to ratify agreements should also enhance the *efficiency* (in terms of speed of decision making) of the EU in implementation. This should strengthen the EU as an actor, as its negotiating partners will view the risk of non-ratification as even less likely than under the pre ToL arrangements.

The *efficiency* of EU policy might be affected in two other ways. First, there is the possibility that in the longer term the increased powers of the EP could result in a reduced efficiency in the sense that political debate in the EP could delay and/or complicate decision making. Here it is important to consider that the increased powers of the EP give it co-decision powers with the Council on trade legislation and an opportunity to have more say in trade negotiations, as opposed to any direct involvement in negotiating or implementing trade policy. So 'political' intervention from the EP, in the relatively effective technocratic processes that shape EU policy today, will depend on whether the EP can bring about a shift in the *de facto* balance of influence. This seems to be unlikely in the short term. In the medium to long term (i.e. over the life of the new EP and beyond) much will depend on how INTA works and the degree to which the EP becomes a channel for interest group lobbying.

Another potential source of inefficiency lies in the influence of other external policy objectives on trade. For better or worse, EU trade policy has been relatively consistent in its pursuit of progressive trade liberalisation on the basis of reciprocal trade concessions. A greater desire for coherence across external policies (foreign, environmental and developmental) could result in more extensive and conflicted inter-service consultations. The greater member state powers in foreign policy, and to a lesser degree in environmental and development policies, could also complicate efforts to ensure vertical coherence between EU trade policy and member state policies in other areas. It is difficult to make any judgement on this topic as everything will depend on how the HRFSP and the EEAS function with DGTrade. But again for the short term, DGTrade seems likely to remain in the driving seat on the substance of trade policy if not the when and with whom.

The ToL adds little in terms of the EU as a *normative power* in the short term despite the codification of a number of general EU objectives. The addition of foreign direct investment should in time lead to the adoption of an EU model investment agreement that could have considerable impact.

## 6. CONCLUSIONS

THIS ARTICLE HAS ASSESSED the impact of the Treaty of Lisbon on EU decision making in external trade. It has done so by looking at the implications of the treaty changes on institutional balance of EU policy. EU external trade policy is of course also affected by the particular interests involved in any given trade issue. An understanding of specific trade issues therefore requires an assessment of sector and vested interests and how they interact in the EU decision-making process in each specific case.

In terms of the impact on the EU decision-making processes, it has been argued that the changes in EU external trade policy resulting from the ratification of the ToL will not bring about radical changes in the short or perhaps even the medium term. The degree to which the established, predominantly technocratic EU policy process centred on the Commission and the member states in the Trade Policy Committee will change in the longer term will depend on how the role of the



INTA Committee - and that of the EP in general - develops and the degree to which the desire for horizontal coherence across external policies changes established practice.

The ToL should enhance the role of the EU as an actor in international trade, but this seems unlikely to be enough to compensate for the decline in the EU's relative market power due to structural changes in the international economy.

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## ENDNOTES

1. The author is grateful to the Swedish Institute for European Policy Studies SIEPS for supporting this research. Parts of the paper draw on a paper 'The potential impact of the Treaty of Lisbon on EU trade policy' SIEPS Working Paper, July 2008.

2. See Betterton and Vogler (2006) for a summary of the literature.
3. See Hodges and Woolcock (1999) on agriculture in the Uruguay Round for example.
4. In their discussion of EU leadership in environmental policy Gupta and Ringius (2001) distinguish between structural leadership resulting from relative power, as in market power discussed above, directional leadership resulting from the exercise of normative power, which is discussed below, and instrumental leadership in negotiations themselves.
5. The degree to which EC norms in trade and investment are distinctive is something that goes beyond the scope of this paper. A historical assessment of the evolution of the EU acquis, shows that much has been the product of a broader international debate in which the US approach to rules and regulations has played an important role. See Woolcock (2008).
6. INTA was established in 2004, before this external trade was dealt with in a committee covering industry, external trade, research and energy. So the EP was in a sense already moving to gear up its input on trade because of the proposals in the Constitutional Convention that pointed to an increased role for the European Parliament.
7. With the ToL the EU would formally replace the European Community, so that in future one must refer to European Union and not European Community competence for external trade and other policy areas.
8. Mixed agreements are those that combine EU competence with member state competence. In the past this has been the case for some services and intellectual property provisions. Mixed agreements require ratification by the member state legislatures. The ToL does not remove all mixed elements, however, since transport and non-trade related aspects of intellectual property rights are not covered by exclusive EU competence. In practice what is likely to happen is that the EU will ratify and provisionally apply those aspects of any trade agreement that come under exclusive EU competence, leaving any small elements of mixed competence to be implemented after member state ratification.
9. All references to the ToL articles are to the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Official Journal C 115 9 May 2008/2008/C 115/01
10. Member state BITs have generally been based on model agreements. The US has also used a model BIT, dating from 1982, as the basis for its BITs and for the investment chapters in bilateral FTAs.
11. A report by a French MEP Catherine Lalumière contributed to the collapse of the Multilateral Investment Agreement (MAI) in 1998 on the grounds that investment protection provisions combined with investor – state dispute settlement encroached too far into national sovereignty (right to regulate) but did not go far enough in obligations on investors (i.e. on environment and labour standards).
12. The actual competitive advantage is likely to be low given that most national BITs have very similar provisions. The research that has been undertaken on BITs also fails to show any clear correlation between BITs and investment flows. In other words there is no clear evidence that national investors gain from BITs.
13. The Commission can already adopt temporary dumping duties for a limited period in order to ensure that EU industries are not injured by dumped imports during the process of assessing the margin of dumping and injury.
14. European Parliament 2008/2063(INI) 27th May 2008.
15. The INTA Committee was only established during the 2004-9 Parliament, before this trade was covered by a broader committee whose responsibilities included industry, energy and research. INTA was established with the prospect of a greater role for the EP in trade in mind, but as a new committee with hitherto limited powers it has remained a rather junior committee, which has hampered its effectiveness up to now.
16. In the ToL the term 'consent' is used, where previously the EP gave its assent.
17. The issue of coherence has featured in literature on EU foreign policy and some policy fields such as development and increasingly the environment. Coherence has been less prominent in the discussion of EU external trade policy. This is probably because there is less difficulty achieving vertical coherence (between the member state and EU levels) given the exclusive EC competence for much of trade. The question of horizontal coherence between trade and other policies, (e.g. development, climate change) is however, becoming more important.