International Seminar

The Role of the EU Member States after Lisbon

11 March 2010 Aula Notari 9:00am-12:00pm

Welcome Address
Angelo Cardani Università Bocconi

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Giorgio Sacerdoti Università Bocconi

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Chair: Giorgio Sacerdoti Università Bocconi

Economic Relations of the EU with Third Countries: The Common Commercial Policy after Lisbon
Michael Berger Commercial Consul of Austria in Milan

Roundtable: International Trade and the EU after Lisbon
Giorgio Sacerdoti Università Bocconi
Laurent Manderieux Università Bocconi
Angela Lupone Università degli Studi di Milano

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Economic Relations with Third Countries: Bilateral, EU and Other European Programs for Industrial and IP Promotion
Delfina Autiero IPI, Rome

Towards an EU Foreign Affairs Office? The Relations Between EU and National Foreign Affairs Services
Jean-Michel Despax Consul General of France in Milan

Concluding Remarks
Laurent Manderieux Università Bocconi
The Common Commercial Policy after Lisbon

Europe is the world’s largest exporter of manufactured goods and services, and is itself the biggest export market for more than one hundred countries and the first investor abroad. The EU has the largest share of the world market in merchandise - almost 20% in value terms. This is significantly higher than the US (13%) or Japan (9.5%). The importance of intra-EU trade lies around 20% of world trade. Compared to its size, the EU is one of the most outward-oriented economies in the world. European trade in goods and services accounts for 15% of EU GDP. This is 3 points above the US or Japan.

Because the 27 member states of the European Union share a single market and a single external border, they also have a single trade policy.

The drafters of the Treaty of Rome had recognized that the Community should be granted powers in the field of external trade in goods in order to represent the European Community (EC) as a customs union. The creation of a common, uniform tariff for all products imported from third countries and the administration of tariff policy at a centralized level was a necessary step for the proper functioning of the customs union. Consequently the Common Commercial Policy reflected internal market imperatives.

The need to avoid distortion of free internal circulation or of competitive conditions was an imperative for extending the Common Commercial Policy (CCP) to all regulatory aspects of trade in goods with third countries, such as customs valuation and charges of equivalent effect.

This constellation led to policy being determined by the Community process: The Commission proposed and the Council adopted legal acts and negotiating mandates, the Commission negotiated agreements in consultation with the Article 133 Committee and the Council approved the results by qualified majority (QMV).
These provisions did in most cases (exceptions) not formally require the consultation of the EP on CCP legislation and measures or the conclusion of trade agreements. The practice however proved to be different and external trade policy has mostly been decided by consensus and the EP was regularly informed and voiced its opinion. (Framework agreement on relations between EP and EC)

Mixed agreements that covered topics under exclusive EU competence, such as tariffs or agriculture, as well as topics that were shared or national competence, such as investment, also required ratification by Member State parliaments. For many years it was discussed whether all trade in services and trade related aspects of intellectual property rights (TRIPs) on which the EU negotiates in multilateral and preferential agreements should come under exclusive EC competence.

In the Maastricht, Amsterdam and Nice Intergovernmental Conferences (IGCs) there were only minor changes made to the treaties, so that services and TRIPs remained mixed competence, in other words part EC and part member State competence. This led to a gradual increase of EU competence: the Commission has developed a strong institutional capacity and detailed knowledge of trade topics and Member State governments have tended to cede more de facto competence to the Commission on many of the less contentious external trade topics.

**Changes in the Lisbon Treaty**

**Clarification of EU competence**

The Lisbon Treaty entered into force on 1.12.2009. It streamlines EU external trade policy by stating that all **key aspects of trade are exclusive EU competence**, which means that the formal basis for decision making is the Ordinary Legal Procedure: Qualified Majority Voting in the Council and Simple Majority in the EP for adopting the measures shaping the framework for implementing the CCP. Member States will still have recourse to unanimity when negotiating and adopting agreements covering the few remaining politically sensitive service sectors such as audiovisual, health and education services.
Art 207 TOL brings all **services and trade related aspects of intellectual property** into **EU competence**. This puts an end to mixed agreements and the long standing debate on competence in these fields.

The most important extension of EU competence is the inclusion in Art 207(1) of **foreign direct investment (FDI)**. Before investment has been Member State or mixed competence. Individual EU Member States have negotiated their own bilateral investment agreements to provide protection for fund repatriation and against expropriation. The Commission has negotiated agreements covering investment in services, such as in Mode 3 of the GATS agreement, but no general investment liberalization.

Although FDI is clearly listed as EU competence, it is not yet clear whether this includes **investment protection as well as investment liberalization**. If this was the case most existing member state bilateral investment treaties (BITs) would be illegal under EU law from the entry into force of the TOL. Although some may argue that only investment liberalization is covered, a more realistic interpretation is that both liberalization and protection are covered. Underlying the guiding principle of legal certainty and in view of possible legal action challenging the legality of member state BITs it will be necessary to clarify the matter by EU legislation, which would “grandfather” these existing member state BITs.

In the medium term the EU will also need to develop an EU model investment agreement to be applied in any future EU - BITs or investment chapters in free trade agreements. The EU has been developing a common platform on investment for some time and has concluded a number of FTAs with investment chapters. But a comprehensive EU approach will require more. It will have to find a balance between investment protection to match the existing member state BITs and enough scope for an EU right to determine policies such as environment or labor protection. This will not be an easy task and is therefore likely to take some time. (agreements currently being negotiated, such as the EU-Canada, EU-Singapore FTA negotiations, even the EU-ASEAN or India negotiations)
An increased role for the European Parliament (EP)

The most important change brought by the TOL with regard to decision making in the field of CCP is the establishment of the EP as co-legislator on a nearly equal footing with the Council. The formal position of the EP in EU external trade policy is enhanced in following main points:

First, Article 207(2) means the Council will now have to share powers with the EP under the Ordinary Legislative Procedure (equivalent to the old co-decision making) to adopt measures that define the framework for implementing the common commercial policy (EU legislation concerning external trade). From now on autonomous or internal trade measures such as Generalized System of Preference (GSP) rules or legislation on trade defense instruments and the Trade Barrier Legislation (TBR) will have to be adopted jointly by the EP and Council. The EP does not, however, have any direct role in implementing trade instruments. (See below)

Second, Art 207(3) improves the ability of the EP to influence the Commission during trade negotiations. The International Trade Committee (INTA) of the EP will be provided with information on the same terms as the Council’s Trade Policy Committee (the former Art 133 Committee). However the TOL does not grant the EP powers to authorize the COM to engage in trade negotiations and the COM is only required to report to the INTA committee on the progress of negotiations. Arts 207 (3) and 218 (2) TOL clearly state that the Council, on the proposal from the Commission, retains power to authorize the opening of negotiations which shall be conducted by the COM in consultation with the Council’s Trade Policy Committee. The Council and the COM shall be responsible for ensuring that the agreements negotiated are compatible with internal EU policies and rules.

Therefore, in contrast to the role of the US Congress, the EP is not empowered to authorize and consequently mark the objectives of trade negotiations. The EP is, however, seeking a greater say in shaping the negotiating aims by setting some preconditions for its ultimate consent. This is likely to feature in the new Inter-Institutional Framework Agreement that is presently under elaboration.
Third, the TOL enhances the EP’s role in ratifying trade agreements. Arts 218 (6) (a) (i) to (v) adds a further criterion requiring the EP to grant its consent by simple majority before the Council can adopt a decision by QMV if an agreement covers fields to which OLP applies. As it has been established that this is the case for trade one can say that the TOL makes it clear that the EP must give its consent before all trade agreements are adopted.

Fourth, with regard to economic, financial and technical cooperation measures with third countries other than developing countries, including assistance, in particular financial assistance Art 212 provides that measures shall be adopted by the Council (acting by QMV) after consulting the EP. Such measures shall be consistent with the development policy of the Union and shall be carried out within the framework of the principles and objectives of its external action. The Union’s operations and those of the Member States shall complement and reinforce each other.

Implementation of Trade Defense Instruments:

As said before, under the TOL the EP will share powers with the Council on trade legislation, but Article 291 (2) grants the Commission implementing powers for legally binding acts. This is currently the case in the sensitive area of anti-dumping and anti-subsidy. The Commission is responsible for determining the dumping margin, the level of subsidy, injury and causality as well as the so-called Community interest, and can impose preliminary anti-dumping or anti-subsidies duties. But the Council (in the Anti-dumping Committee) votes on the adoption of definitive dumping duties by a simple majority of member states voting.

This appears to be an area of probable contention between the Council and the EP. Article 219 (3) states that the EP and Council shall lay down how the member states control the Commission when it exercises its implementing powers. The question is whether the member states are willing to give up some power and whether the EP gains some say in how trade defense instruments are implemented. This issue will have be addressed at the latest when the existing anti-dumping regulation comes up for revision. This will happen as soon as one of the countries mentioned in the EU Basic AD Regulation 384/96 Art 2 (7) (a) and (b) will be granted market economy status (MES). The EP is therefore pressing for a timetable for revised legislation because it wishes to exercise its joint powers.
Inclusion of Trade under the Common Heading of External Action by the EU

Article 205 (ToL) (Part Five, External Action) brings EU trade and investment policy under its unified European external action together with development, environmental and foreign policy, as well as humanitarian assistance thus promoting greater coherence across the range of EU external policies. Art 207 underlines that “the CCP shall be conducted in the “context of the principles and objectives of the Union’s external action”. 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 and the integration of all countries into the world economy.

Article 218 (3), which provides a common basis for negotiating all external policies, gives the Council the authority to nominate either the Commission or the High Representative of the Union for Foreign Affairs and Security Policy (HRFSP) as EU negotiator. The HRSFP can of course seek to influence and the Council can adopt key political decisions, such as with which countries the EU should negotiate free trade agreements. In the past trade has been used less in the pursuit of specific short-term foreign policy objectives. The question is whether the ToL will mean trade becomes more of an instrument of EU foreign policy. In practice the HRFSP will probably negotiate foreign policy issues and the Commission will continue to negotiate trade agreements.

Just what role the HRSFP will play in shaping the balance between trade and other objectives will depend on how the relationship develops between her and her staff and the Commission and the Council. In this context it is noteworthy that the trade officials who hold the EU’s institutional memory and expertise on the substance of trade policy will remain in DG TRADE and not move to the European External Action Service (EEAS) that will serve the HRFSP. According to the latest news from Brussels DG TRADE will also continue to nominate their experts to the EU Embassies to be in charge of trade and commercial matters. These however will work under the authority of and report to the Ambassador.
Conclusion:

First the TOL clarifies that all important aspects of trade are exclusive EU competence including trade in services TRIPS and FDI. Second the TOL establishes the EP as co legislator with the Council for EU legislation concerning external trade. The EP has no mandate to grant or shape negotiation mandates for international trade agreements but has to be informed regularly on the progress of negotiations. But the EP has to give its consent before all trade agreements can be adopted and has to be consulted in regard to cooperation measures and assistance.

However a number of questions remain open and will have to be clarified by legislation, jurisdiction, inter-institutional agreements and current practice.

Recent events have already proved that the EP is eager to take its new role seriously and would not allow to be excluded from its legislator role. As a matter of fact during the March 2010 plenary session in Strasbourg the EP voted a resolution (P7 TA (2010)0058) “on the transparency and state of play of the Anti-Counterfeiting Agreement (AFTA)” where it expresses its concern over the lack of transparency and information on the conduct of these negotiations and calls on the COM and the Council to grant public and parliamentarian access to ACTA texts in accordance with the treaty. At the same time the EP makes it clear that, unless it is immediately and fully informed at all stages of the negotiations, it would take suitable action, including bringing the case before the EU Court of Justice in order to safeguard its prerogatives.