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Chapter 10

The Common Commercial Policy: From Nice to Lisbon

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Introduction

The Common Commercial Policy (CCP) is one of the oldest and most integrated policy areas of the European integration project. It was named in Article 3 of the Treaty of Rome as one of the main policies of the European Economic Community. As Member States were linked in a customs union, it was essential for them to draw up common policies regarding their commercial relations with the rest of the world. The Common Commercial Policy has thus been regarded a ‘logical corollary’ of the customs union set up by the EEC Treaty (Devuyst 1992; Eeckhout 1991). The Treaty of Rome was revolutionary in the sense that it granted the new supranational entity an external personality with the authority to set out, negotiate and enforce all aspects of trade relations with the rest of the world.¹ This was to be achieved through a common trade policy based on the principles of a common external tariff, common trade agreements with the rest of the world and the uniform application of trade instruments across the Member States.

The Common Commercial Policy is one of the policy areas where the Community has traditionally held exclusive competence. As the international trade agenda changed through time, it became disputed whether the Community has competence on issues going beyond those explicitly stated in the treaty, for example, trade in services, intellectual property rights and investment. Several Intergovernmental Conferences (IGCs) have tried to resolve the scope of (Community) competence. While the IGC leading to the Treaty of Maastricht failed to bring about any changes, the reform steps at Amsterdam were minimal and those at Nice still relatively modest. Only the Convention on the Future of Europe initiated substantial alterations regarding the governance of the EU’s external trade policy. This progress was very largely maintained during the negotiations that resulted in the Constitutional Treaty and the Treaty of Lisbon. To account for the outcome of the last treaty revision

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¹Although the European Coal and Steel Community (ECSC) had a number of external implications, there was no explicit treatment of policy-making for external economic relations at Community level in the Treaty of Paris.

process that began with the Convention and ended with the Treaty of Lisbon, I use a framework that draws on (1) pressures stemming from enlargement, (2) a more favourable negotiation infrastructure, (3) the enhanced role of the Commission and the European Parliament in the treaty revision process (4) and diminished domestic constraints. While most (of the few) accounts that have subjected CCP Treaty revision to (causal) analysis have tended to point to *exogenous* pressures (often related to the changing international trade agenda or the strengthening of the institutional framework of the WTO) as the main dynamics for change (e.g., Billiet 2006), my findings suggest that we need to focus particularly on *endogenous* factors in order to account for different outcomes in past treaty revisions.

The chapter proceeds as follows: in the first section, the development of the Common Commercial Policy and especially the provisions of the Treaty of Lisbon are described. The second section explains the considerable changes made during the last treaty revision. Section three assesses the impact of the Lisbon provisions on EU actorness. Finally, I draw some conclusions from my findings.

The Evolution of the Common Commercial Policy

The Development of the CCP and the Controversy Over the Scope of Article 113/133/207²

Before describing the evolution of the EU's external trade policy, its governance structure needs to be further elucidated. Article 133 (former Art. 113, now Art. 207) constitutes the centrepiece of the CCP. It provides that the Council will give a mandate to the Commission to open negotiations with third countries, in which the Commission acts as the sole negotiator. This mandate may include directives the Commission must respect in fulfilling its task. The Commission is 'assisted' during negotiations by the Article 133 Committee, which is not largely 'consultative', as the treaty provisions suggest, but also watches over the Commission's shoulder during negotiations (Meunier and Nicolaïdis 1999). The right to conclude the agreement rests with the Council acting in principle by qualified majority but in practice usually on a consensual basis (Westlake 1995). The role of the European Parliament has been very modest in this field. It has merely been informed by the Commission and the Council of the

² Article 113, after the renumbering of the Treaty of Amsterdam, became Article 133. With the Treaty of Lisbon, this then became Article 207. I will refer to Article 113 for the time until the entering into force of the Treaty of Amsterdam, and to Article 133 for the period during which the Treaties of Amsterdam and Nice applied, and also when referring to this article more generally (in a less time-specific manner).

conduct of external trade negotiations and may be voluntarily approached for its opinion before the formal ratification of an international agreement.

Several authors have pointed out that the Community's Common Commercial Policy was rather poorly drafted, especially regarding definition and scope (Bourgeois 1995; Ehlermann 1984). These critics deplore the fact that the Treaty of Rome only included a non-exhaustive list of examples of subjects belonging to the CCP but did not contain a clear definition of the boundaries of this policy. Consequently, the external trade policy has been subject to recurrent disputes among the Commission, the Council, Member States and the Parliament. In its case law, the European Court of Justice has been rather progressive, especially until the mid-1980s. Generally, it has interpreted the Community's external trade powers widely.³ However, the Court failed to settle the institutional controversies between the Commission and the Council in the 1980s, so that the Commission attempted to put an end to the permanent debate surrounding the scope of Article 113 during the Maastricht IGC. In its proposal, the Commission ambitiously, but unsuccessfully, aimed at an exclusive common policy in the field of external economic relations that, in addition to trade in goods, sought to include trade measures related to services, intellectual property, investment, establishment and competition (cf. Devuyst 1992).

In the course of the Uruguay Round (UR), the Commission and some Member States disagreed on who was competent on these 'new' trade issues, primarily services, intellectual property rights (IPRs) and investment. As a result, the Commission requested a ruling by the Court. In its Opinion 1/94, the ECJ ruled that both the Community and Member States are jointly competent to conclude international agreements of the type and scope of the General Agreement on Trade in Services (GATS) and Trade-Related Intellectual Property Rights (TRIPS).⁴ It did not rule on investment. A number of other questions were also left unsolved by the Court, for example, by demanding a duty of co-operation and unity of representation in matters where the Community and Member States are jointly competent, without however specifying how such unity was to be achieved. In the aftermath of the Court's ruling, negotiations between the Commission and Member States on a code of conduct

³ See, for example, the Court's ruling in the ERTA case (22/70) and its Opinion 1/78. Cf. Gilsdorf (1996).

⁴ However, the Court found that the Community has exclusive competence in the areas of cross-frontier services and measures prohibiting the release for free circulation of counterfeit goods (cf. Bourgeois 1995: 770–71).

also came to nothing.⁵ In light of this sequence of events, the Commission decided to submit a proposal for an extension of Article 113 within the framework of the Amsterdam IGC.

The Intergovernmental Conference 1996/97 and the Treaty of Amsterdam

Despite the ambitious nature of the proposal that was put forward by the Commission in July 1996 asking for an external economic policy competence going beyond trade in services, intellectual property rights and investment (Commission 1996b), the eventual outcome at Amsterdam was very modest. The result of the IGC negotiations was a new paragraph (5) in Article 133, which enabled the Council to extend the application of Article 133 to services and intellectual property rights by unanimity without having to go through another IGC (cf. Sutherland 1997). There has been some disagreement among legal observers as to whether competence could be extended permanently and generally, in relation to a named international body, or on a case-by-case basis (cf. Krenzler and da Fonseca-Wollheim 1998: 239; European Policy Centre 1997b). Overall, observers commonly agreed that the progress made during the IGC 1996–97 negotiations was minimal, regardless of whether the benchmark used for assessment was the *status-quo ante* practice, the different options on the table or the requirements of a changing multilateral trade agenda (Patijn 1997; Ludlow 1997: 39; Brok 1997: 45; Woolcock 2005a).

The Intergovernmental Conference 2000 and the Treaty of Nice

At the Nice IGC, external trade policy formed part of the broader issue of the extension of qualified majority voting. During the negotiations, Article 133 emerged as being one of six controversial QMV issues and remained a contentious item until about halfway through the summit of Nice. The Treaty of Nice brought some progress in terms of integration. The Community gained ‘explicit’⁶ competence for the negotiation and conclusion of agreements relating to trade in services and IPRs. Qualified majority voting applies to these areas. However, several important exceptions were also introduced where unanimity has still been applicable: (1) areas in which unanimity is required for the adoption of internal rules or where the Community has yet to exercise its competence; (2) where an agreement would go beyond the Community’s internal powers, notably by leading to harmonization in areas for

⁵ In the meantime, multilateral negotiations on ‘unsolved business’ (of the Uruguay Round) in the area of services were conducted under unanimity, with the Commission as the exclusive negotiator.

⁶ While competence in these areas was made ‘explicit’, legal scholars seem to agree that competences are still shared between the Community and Member States (Krenzler and Pitschas 2001: 302; Herrmann 2002: 13, 19).

which the treaty rules this out. Agreements relating to trade in cultural and audiovisual services, educational services, human health services have been explicitly excluded; (3) the negotiation and conclusion of international agreements in the field of transport.

The Nice provisions contained further important drawbacks: (1) FDI was not included within the scope of Article 133; (2) unanimity has still been required for the negotiation and conclusion of horizontal agreements, if one of the above derogation areas forms part of broader negotiations. Furthermore, ratification by the Member States was needed in such cases; (3) the European Parliament remained excluded from decision-making in the CCP and did not even obtain a formal right of consultation; (4) Member States were still allowed to maintain and conclude agreements in the fields of trade in services and commercial aspects of IPRs.

Overall, commentators both in the legal community and in the policy-making community have generally viewed the progress made as more substantial than the one achieved at Amsterdam, but still as rather modest, as regards the Community's capacity to act on the international scene (Duff 2001: 14; Brok 2001: 88; Krenzler and Pitschas 2001: 312; Leal-Arcas 2004: 13). In addition, many authors have lamented the complexity of the treaty text that failed to meet the growing demands for greater simplicity and transparency (Pescatore 2001: 265; Hermann 2002: 16; Leal-Arcas 2004: 13).

From the Convention to the Treaty of Lisbon

The Laeken European Council chose to depart from the more standard methods of preparing EU Treaty reforms and decided to convene a Convention on the Future of Europe. The CCP was identified in the Convention early on as an issue that required further discussion. Within the Convention Working Group on External Action, external trade was of secondary importance to the Common Foreign and Security Policy. The draft treaty that came out of the Convention was very close to the Constitution text. The CCP only played a subordinate role at the IGC 2003–04 where the provisions of the Draft Constitutional Treaty were watered down only insubstantially.⁷ The CCP provisions of the Constitutional Treaty were left unchanged in the subsequent negotiations that led to the Treaty of Lisbon.

⁷ Most substantially, a rather narrow derogation on social, education and health services was (re)introduced.

The treaty provisions on the Common Commercial Policy have substantially progressed. The following are the most important advances: (1) the European Parliament's role has been enhanced in three ways: It has obtained co-decision on legislative acts, i.e., for measures implementing the CCP. Its consent is required for most types of international agreements, including all trade agreements. And the EP's role has been augmented with regard to the process of trade negotiations. (2) Services, intellectual property and also investment (the latter had not even become an 'explicit' competence at Nice) now fall within the *exclusive* competence of the Community. (3) Exceptions for unanimity have been further narrowed. Unanimity in the external realm is still required on services, intellectual property and investment, where unanimity is required for the adoption of internal rules. However, the derogation regarding cultural and audiovisual services has been made subject to 'where these risk prejudicing the Union's cultural and linguistic diversity', and social, education and health services now also come under unanimity only 'where these risk seriously disturbing the national organization of such services and prejudicing the responsibility of Member States to deliver them' (Art. 207, 4b). (4) National parliaments are no longer needed for the ratification of future WTO agreements (involving the new issues). (5) The Common Commercial policy has been brought under the EU's external action heading and shall thus 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' (Art. 205 TFEU), which include respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.

Observers have in general concurred on the progressiveness of this latest CCP Treaty revision, certainly in comparison with earlier treaty revisions (Antoniadis 2004; Commission 2004; Cremona 2006; Krenzler and Pitschas 2006; Dimopoulos 2010). The impact of the Lisbon provision of EU trade policy-making will be further assessed in the final section before the conclusion.

Explaining the Outcome Leading to the Treaty of Lisbon

My analysis starts off from a multiple causality assumption, suggesting that the same outcome can be caused by various combinations of factors. In order to arrive at causal inferences, allowing for some degree of positive causality, a number of methods are employed: comparative analysis, advancing

alternative explanations, process tracing and triangulation across multiple data sources, including about 20 interviews.⁸

The few accounts in the literature that have addressed treaty revision in the area of EU external trade policy, have tended to point to *exogenous* pressures as the main dynamics for change (cf. Billiet 2006; to a lesser extent, Nicolaidis and Meunier 2002). The factors at play here are changes in the world economy, such as the increasing importance of trade in services, intellectual property rights and foreign direct investment, issues which have begun to feature much more prominently on the multilateral trade agenda since the Uruguay Round (UR) as well as the strengthening of the institutional framework of the WTO. Several actors, including the Commission, have traditionally argued that the scope of Article 113/133 needs to be interpreted in a dynamic way. As trade policy changes and trade in goods loses its importance, the Community powers under the CCP become gradually eroded.

As pointed out above, shared competence applied to services and IPRs (while the Court had remained silent on investment). What were the perceived implications of mixed competence for the Community in international negotiations? Most important, unanimity applies to the conduct and conclusion of negotiations. In the case of horizontal agreements like a comprehensive multilateral trade round, which the EU was advocating at the time of the Amsterdam IGC (and also later on), discussion of any one mixed competence item would expand this legal basis to the entire agreement (Krenzler and da Fonseca-Wollheim 1998: 229). Mixed competence and unanimity have, among other factors, been associated with lowest common denominator agreements and the potential abuse of the veto option. Cases in which the trade partner is closer to the status quo, the EU's bargaining power tends to be low, and it is susceptible to 'divide-and-rule' games. However, in cases where the collective EU position is closer to the status quo than that of the negotiating partner, unanimity tends to increase the Community's negotiating power (cf. Meunier 2000).

The second important implication of mixed competence is that, legally speaking, the Commission is not the sole negotiator for the Community and Member States. In theory, the latter can

⁸ On the above methods, see, e.g., Ragin (1987), George (1979).

intervene throughout negotiations, either individually or as represented by the presidency. In practice, the Commission and Member States have sought to avoid this. The emergence of this issue coincided with the beginning of the Uruguay Round and was not solved by the Court in 1/94. After the conclusion of the UR negotiations, agreement on a code of conduct was reached on the post-UR negotiations on services, according to which the Commission should continue to negotiate on behalf of the Community and the Member States (see Council 1994). Negotiations on a general code of conduct for participation in the WTO had failed on several occasions. However, the Spanish Presidency proposal of December 1995 (according to which the Commission acted as the sole negotiator) was taken as a basis for negotiations. Some Member States claimed that the Commission's role as the sole negotiator is undisputed, thus rendering an extension of Article 113 unnecessary (interview 1999). The Commission, in contrast, emphasized during the Amsterdam IGC that the situation had become worse since the UR. Member States threatened to act independently in the WTO if their positions were not fully covered by the Community (cf. Krenzler and da Fonseca-Wollheim 1998: 231). According to one Commission interviewee, 'it is quite clear that as far as the WTO is concerned, legal confirmation of what is today only a *de facto* situation, subject to be questioned at any time, would significantly improve the standing of the Commission as a sole negotiator' (interview 1998; internal Commission document 1997).

It can and has been argued that the broadened international trade agenda increased the number of instances that shared competence applied to EU external trade negotiations.

Explanations focusing on exogenous factors place emphasis on the fact that important future trade negotiations thus exert pressure towards a reform of the CCP. It is acknowledged here that such exogenous pressure constitutes a substantial dynamic for revision. However, I argue that variation on the strength of this variable has been fairly minor since the mid-1990s, so that it cannot (in itself) convincingly explain change from the Amsterdam IGC to the Convention/Lisbon Treaty. Although trade in services, the importance of IPRs and investment increased in economic terms after the 1996–97 IGC,⁹ all of these issues were squarely and prominently on the table since the UR and were also considered during the Amsterdam IGC talks (cf. Krenzler 1996; Young 2002: Chapter 2, cf. Kuyper

⁹ For example, the share of services as part of overall EU trade increased from approximately 26 per cent in 1995 to 30 per cent in 2002 (cf. Krenzler 1996; Lamy 2002).

1995). My series of interviews in Brussels and several national capitals suggests that the perception of the above-mentioned exogenous pressures did not increase through time. Interviewees mostly/predominantly emphasized with regard to the evolving multilateral trade agenda and the strengthening of the institutional framework of the WTO that ‘this was clear since the Uruguay Round’ (interview 2002), ‘the nature and significance of these issue remained basically unaltered over time’ (interview 2004) and that ‘increases in services and investment had been expected and did not really push us more at a later stage [than during the 1996/1997 IGC]’ (interview 2004). In addition, judged on the basis of official documents and media reports, exogenous rationales, if anything, featured more highly in the discourse during the Amsterdam IGC than in the two subsequent treaty revisions (cf. Niemann 2006: Chapter 3).¹⁰

Closely related, prior to the conclusion of the Amsterdam IGC, the Commission and the Member States had already gained substantial experience with negotiating under mixed competence in the post-UR services negotiations on basic telecommunications services and the movement of natural persons. Important negotiations on financial services were to be advanced and concluded shortly after the 1996/97 IGC. It was also clear from the General Agreement of Trade in Services that the GATS agreement would be revised after five years at the beginning of 2000, eight months after the coming into effect of the Amsterdam Treaty. Also, from 1996, the EU took the lead within the WTO to argue for a comprehensive new (millennium) round of trade negotiations (Woolcock 2005a: 241). Hence, considerable experience with negotiating under mixed competence was present, and important additional trade negotiations under shared competence were already on the (immediate) agenda during the 1996/97 Intergovernmental Conference.

Exogenous pressures are also insufficient in explaining the divergence in reform regarding different issues across the last few IGCs. Perhaps most strikingly with regard to the purpose of this chapter, reduced exogenous FDI pressures coincided with an increase of competence on that issue during the Convention and 2003/04 IGC (when the CCP provisions that appear in the Lisbon Treaty were settled). Before and during that period annual FDI decreased, both worldwide and also

¹⁰ During the IGC 1996–97, the exogenous rationale was furthered by Community institutions (e.g., Commission 1996c), opinion leaders and think tanks (e.g., Sutherland 1997; European Policy Centre 1997a), and a number of Member governments (e.g., Belgian government 1995).

concerning EU FDI capital flows. In addition, negotiation of investment during the Doha Round became increasingly questionable, if not unlikely, after considerable resistance to negotiate on this issue was encountered at the Doha Ministerial Conference of 2001, before the issue was formally abandoned by the EU at the Cancun Ministerial Conference in September 2003 (cf. Young 2007). Thus, exogenous pressures do not shed sufficient light on why investment – which was not included in the Nice reforms – became one of the issues on which Community competence was augmented during the Convention and 2003/04 IGC.

Finally, the broadening of the international trade agenda as an external rationale for adjusting Community competences (accordingly) must (also) be viewed with caution. The only substantial broadening of the international trade agenda after the UR (and during the Amsterdam IGC) was through the so-called Singapore issues that were agreed at the WTO Ministerial Conference of December 1996. These as well as a comprehensive trade agenda for the Doha Round were most vigorously advocated by the EU¹¹ (and especially the Commission) – hardly an exogenous pressure. It has also been noted that the explicit inclusion of foreign direct investment in the Draft Constitutional Treaty came at a time when the Commission worked very hard on getting the issue onto the Doha agenda (Billiet 2006: 908). In addition, and more generally, it has been argued that the EU's trade policy is to a large degree driven by its own internal *aquis* and the single market project. The international trade and investment regime emerging in the WTO framework was sought to be compatible with common internal rules not least because these were difficult to agree upon in the complex EU decision-making system (Woolcock 2005b; Young and Peterson 2006). Hence, endogenous processes and rationales seem to explain the comprehensive agenda promoted by the EU. More generally speaking, the preceding analysis has suggested that exogenous pressures cannot adequately explain the policy changes towards the last CCP Treaty revision. We thus have to look to endogenous factors to gain a fuller understanding of this development.

Enlargement

¹¹ On this point see, e.g., de Bievre (2006); Hay (2006: 28); Woolcock (2005b: 391).

There have been growing pressures stemming from the decision concerning Eastern enlargement, taken at various European Councils since Edinburgh in 1992. Although an exogenous event, enlargement gradually became an internal policy goal and an endogenous source of pressure for reform of EU decision-making rules. Once enlargement became an internal objective, problems/tensions were created (anticipated) in terms of decision-making and co-ordination among the Member States under unanimity (exerting pressure for an extension of QMV in trade matters). Unanimity was already regarded as problematic with 15 delegations by some players. This logic of anticipated problems was argued in various Commission papers on the modernization of Article 113 already during the Amsterdam IGC (cf. Commission 1996a; Krenzler 1996: 6). However, at the time, this argument never gained much strength. As was pointed out, there was a ‘lack of urgency’ since ‘no enlargement is foreseen before 2003–2005’ (Patijn 1997: 38; also cf. Devuyt 1998: 626; Moravcsik and Nicolaidis 1999: 78, 82).

Thereafter, these pressures further increased with the launch and confirmation of the enlargement process at the Luxemburg European Council of 1997 and the Helsinki European Council of 1999 respectively (Commission 1999; cf. Galloway 2001: 108). However, integrative rationales stemming from enlargement only became really pressing, urgent and unavoidable at the time of the Convention. The Seville European Council of June 2002 expected the Accession Treaty to be signed in spring 2003 and anticipated the participation of new Member States in the 2004 EP elections. Therefore, decision-making in the Council with 25 Member States – and the corresponding diversification of interests and increased heterogeneity of political cultures – was now an imminent reality, which put substantial pressure on those trade policy issues subject to unanimity (and thus prone to paralysis). Enlargement became a frequent rationale used to substantiate the need for further CCP reform (e.g., Lamy 2002).

Negotiation Infrastructure

Prior to the last treaty revision, the (IGC) negotiation infrastructure had been rather unfavourable for reforming the Common Commercial Policy. There are several aspects to that: (1) Partly due to the large number of issues on the IGC agendas in 1996/97 and 2000, there was simply not enough time available to engage in an extensive reasoned debate on external trade policy (cf. Gray and Stubb 2001:

20). As one official has noted, ‘when we discussed external policy for an hour, we spent 55 minutes on CFSP and five minutes on Article 113’ (interview 1999). (2) The fact that the Representatives Group, which constituted the main negotiating arena of the Nice IGC, only met about 30 times and had a life span of less than a year did not allow for the development of very intense socialization processes (interview 2004). The Representative Group during the Amsterdam IGC existed for a year and a half. While there is some evidence for the development of a certain *esprit de corps* in that negotiating forum, on balance, it does not compare to that in other (more permanent) Council fora (interview 1997; cf. Niemann 2006: Chapter 3). (3) The nature of the subject area, along with the background of negotiators, was detrimental for making progress through argumentative debate. Neither the IGC representatives, nor foreign ministers, nor heads of state and government, who dealt with the CCP issue at Amsterdam and Nice, had the requisite knowledge and expertise to engage fully in a sensible discussion on this fairly complex subject (cf. Beach 2005: 11). (4) Tight, inflexible and sometimes competing instructions resulting from the demands of various national ministries in the IGC context hampered genuine exchange on the pros and cons of more Community competence. As one official put it, ‘any emerging consensus achieved on the merits of the problem of unanimity in services was to be destroyed by yet another “input” of some national ministry’ (interview 2004). (5) Also related to the negotiation infrastructure in a broader sense, ‘underlying the debate about thin dividing lines between Community and national competencies was a basic distrust by some Member States of the role of the Commission in representing the Community in international negotiations and keeping the Member States abreast of what is going on’ (Patijn 1997: 39; also Ludlow 1997: 52; Meunier and Nicolaidis 1999). The reason for this basic distrust of the Commission can be found in a number of events in the past when the Commission negotiated without the necessary transparency vis-à-vis Member States, as happened, for example, in the negotiations leading to the ‘Blair House Agreement’.¹² Hence, as the above analysis suggests, during the Amsterdam and Nice IGCs, the negotiation infrastructure structurally favoured those actors that sought to keep the status quo and hampered efforts to arrive at a (substantially) more progressive outcome.

¹² In November 1992, the Commission made a preagreement on agriculture with the US. The Commission was accused by France of having been too accommodating at Blair House, especially on the issue of oil seeds.

One of the more substantial changes from the previous two treaty revisions was the altered negotiation infrastructure during the Convention (which also very substantially determined the provisions of the Lisbon Treaty). This led to a more cooperative setting and enabled a more open discourse during which the more progressive forces had a better chance to get heard than during an Intergovernmental Conference. This was accompanied by several aspects: (1) The Convention started off with an initial listening and reflection phase during which expectations and visions could be freely stated. It generated a deeper understanding of other members' ideas and softened pre-conceived opinions (cf. Kleine and Risse 2005). (2) In the plenary and especially in the Working Group on External Action, there was, contrary to the IGC 1996–97 and 2000 IGC negotiations, actually sufficient time for substantial debate and a more thorough exchange of arguments and counterarguments concerning the merits of CCP reform (interview 2004). (3) The quantity of interaction – with more than 50 sessions that both the Plenary and the Praesidium held during a period of 18 months – also induced the development of an 'esprit de corps' and a strong sense of responsibility for a successful outcome (Göler 2003: 9; Maurer 2003: 6; interview with Klaus Hänsch 2004). (4) Convention members were in a position to act freely and were largely unbound by governmental briefs (Maurer 2003: 134). And in contrast to IGCs, bureaucratic resistances barely countered the deliberation process because government representatives did generally not have to go through the process of inter-ministerial coordination for the formation of national positions (Maurer 2003: 136; Closa 2004: 202). (5) The atmosphere, spirit and negotiating structure made it very difficult for members of the Convention to reject something without explanation, or without entering into a reasoned discussion where arguments would become subject to scrutiny (Closa 2004: 201).

In such an environment, well-founded substantiations and good arguments, validated on the basis of accepted criteria, could register more easily and were thus more likely to prevail in the discussion. Hence, the strong rationales for an extension of Community competence now had a better chance to be taken up by actors and unfold their logic. As one official put it, 'we had had good arguments for the extension of Article 133 all along. However, for the first time, we had the feeling that people were really considering these points and their implications' (interview 2004). In such deliberative process, negotiators tended to concur more fully on the common results. A reasoned

consensus rather than compromise was reached. My interviewing suggests that the CCP Convention outcome was largely perceived as such (interviews 2004, 2005). This also, albeit to a lesser extent, applies to the Draft Constitutional Treaty as a whole, which increased the weight and impact of the Convention text and made it difficult for negotiators at the subsequent IGCs to depart considerably from this consensus (Closa 2004; Göler and Maurer 2003; Göler and Marhold 2005), not least because Member States were very much part of it. In addition, there was a general feeling that the Convention had done a good job. The dominant discourse suggested that the Draft Constitutional Treaty should be kept as much as possible (*Frankfurter Allgemeine Zeitung* 16/6/2003, *Guardian* 14/3/2003). Due to the substantial bonding strength of the Convention text, it also became the basis for further negotiations on most issues (including external trade) at the subsequent IGCs. In a way, the text turned into the default setting (Beach 2005: 199). As a result, the 2003–04 and 2007 IGCs hardly reopened debate on the CCP.¹³ It can be assumed that when issues have already been discussed without (much) success in a bargaining-like setting, like during the Nice and especially Amsterdam IGCs, and can be advanced in a more discursive setting, the negotiation infrastructure did contribute to the more progressive outcome. At the IGCs following the Convention, the negotiation infrastructure, for once, was favourable for the more pro-integrative actors because the IGC setting facilitates defending the status quo, here the progressive one reached during the Convention.

The Role of Supranational Actors: The Commission and the European Parliament

During the Convention the role of supranational actors – here focused on the European Parliament and Commission – was enhanced to that of previous IGCs (cf. Niemann 2006: Chapter 3). As far as the Commission is concerned, the background conditions for its engagement and assertion were considerably more favourable than at IGCs. Its two representatives enjoyed informational advantages – not least due to their very substantial infrastructural backing – and were considered ‘first-tier’ members of the Praesidium (Beach 2005: 200). Despite problems of coherence between the official Commission opinion and the so-called ‘Penelope’ paper initiated by Prodi (Norman 2003) – which however contained no contradictions on external trade policy – the Commission played a leading role

¹³ The only issue cluster on which CCP discussions resumed during the 2003/2004 IGC was social, education and health services. The 2007 IGC did not bring about any (further) changes. The acceptance of CCP provisions of the Constitution into the Lisbon Treaty without substantial discussions has also been attributed to the bonding strength of the CCP Convention text (interview by telephone 2007).

during the Convention (Goulard 2003: 381). This is certainly the case for the CCP, mainly for two reasons: First, the Commission had strong support in the Praesidium, with 10 out of 12 members at least sympathetic to its views (cf. Norman 2003: 161–2), and a significant number of allies on the CCP issue in the Convention, most notably the European parliamentarians (Commission 2004: 25). The Commission also successfully cultivated contacts, most importantly with Jean-Luc Dehaene, who chaired the Working Group on External Action, but also by providing background information for interested conventionnels (Norman 2003: 162). Second, as pointed out above, the deliberative decision style in the Convention meant that the well-founded arguments of the Commission – for example on the changing trade agenda and the pressure of enlargement – were actually listened to and reflected upon. As one Commission official put it, ‘as opposed to the last IGCs, people at the Convention were eager to really discuss the pros and cons of more Community competence. [In this kind of environment,] we could finally influence the debate because the best arguments made the biggest impact’ (interview 2004; cf. Commission 2004: 25). For these reasons, along with the superior expertise of the Commission on the CCP, observers judged that the Commission played a leading role securing the progressive CCP outcome in the External Action Working Group (reference), and in defending its essence later in the Praesidium and Plenary (interviews 2004, 2006).

The European Parliament (also) managed to assert itself to a much greater extent than during previous treaty revisions. EP representatives who were, unlike during an IGC, equal participants at the Convention were influential for a number of reasons. First, apart from the small Commission delegation, the 16 representatives from the EP formed the most coherent and the best organized faction of the Convention. This is largely due to the fact that EP Convention members already possessed institutionalized and functioning working structures to prepare for meetings in the framework of the Convention (Maurer 2003: 137). As a result, amendments by one EP member were often backed by more than ten MEPs. Second, representatives of the EP constituted the most active faction in the Convention in terms of making proposals, participating in the debate and liaising with other Convention members (Duff 2003: 3). The mainstream of the EP delegation supported a far-reaching extension of Community competences accompanied by a substantial augmentation of Parliament’s involvement. On the latter issue, the EP was successful for several reasons: in an open and reasoned

debate, Parliament's arguments were bound to make an impact. External trade was the only policy area in which the European Parliament had hardly any role. Given the Laeken declaration's emphasis on legitimacy, the EP's claim became even more convincing (interview 2004). Moreover, in view of the fact that public health and consumer issues were increasingly discussed at WTO level, a role for the EP was all the more important. Also, despite its virtual exclusion from the making of the CCP, Parliament had shown an active interest in trade policy during many years and generally had taken a constructive approach (Bender 2002). When Convention President Giscard d'Estaing sought to redraft the progressive CCP provisions of the Working Group report, the chairman of the Working Group Dehaene, decisively backed by EP representatives in the Praesidium Brok and de Vigo, as well as Commissioner Vitorino, made sure that the external trade provisions were not (decisively) watered down (interview 2004). In the dying days of the Convention, the EP turned into the strongest supporter of the Convention text and thus contributed to its bonding strength with regard to the subsequent IGC negotiations (Beach 2005: 209).

During the IGCs that followed the Convention, the Commission and the European Parliament were among the actors that (successfully) defended the status quo reached during the Convention. The Commission particularly cultivated relations with the German and Dutch governments who became allies in preventing the CCP from being watered down during the IGC (interview 2004). Overall, it can thus be said that the European Parliament and the Commission, as supranational actors with an inherent interest in fostering further integration, contributed to the progressive outcome concerning external trade policy in the Treaty of Lisbon.

Domestic Constraints

So far we have looked at the potential dynamics of integration. On the other side of the equation, we especially have domestic constraints stemming from the political arenas of (and political conflicts within) the Member States, impacting on the decision-making process. During the IGC 1996–97 and the IGC 2000, domestic constraints were rather substantial. The new trade issues such as issues of tariffs and quotas do not stop at the border but extend behind borders into the state and thus concern domestic laws. As a result, these issues also became more politicized, which made the transfer of competences to the Community more difficult (Smith and Woolcock 1999: 440–41; Rollo and Holmes

2001). In addition, the intrusion of the new trade issues into domestic spheres close to the heart of national sovereignty had increased the sensitivity in terms of delegating powers to the Community on these issues. As convincingly shown by Meunier and Nicolaïdis (1999: 485–7), several governments, including the French and the UK, came out against an extension of Community competence, contrary to their national interest, and joined the ‘sovereignty camp’, largely on (domestic) ideological grounds.

During the Convention, domestic constraints emanating from the Member States were much weaker than during an IGC. Due to the absence of inter-departmental coordination, government representatives were not curbed by the influence of various functional ministries. Bureaucrats, who have been identified as important agents of sovereignty consciousness and as a principal source of domestic constraints, were thus largely shut out from the process. Second, although the members arrived at the Convention with certain domestic or institutional socializations and frames guiding their behaviour, all in all, they were able to negotiate freely without significant restrictions (Maurer 2003: 134–7). As a result, domestic factors – while constituting important sources of information and feedback mechanisms – were far less constraining for members of the Convention than for negotiators in an IGC. As for external trade policy, the strongest countervailing pressures during the Convention were domestic constraints faced by (and through) French members on the issue of cultural diversity. This pressure mounted when the draft texts of spring 2003 did not provide for a French cultural exception (*Le Monde* 16/05/2003). Largely as a result, the Praesidium decided after the Thessaloniki European Council to include the cultural exception, as otherwise it would have been difficult for the French government to support the Draft Constitutional Treaty.

The reduced domestic constraints also had an impact, beyond the Convention, on the entire treaty revision exercise. Due to the considerable bonding strength of the Convention described above, the results of the Convention had a much greater significance than normal IGC preparation exercises. They turned the Draft Constitutional Treaty into the default setting, which was easier to defend than to change (Beach 2005). When the IGC formally began in October 2003, domestic constraints, emanating particularly through national ministries, gathered greater strength. As far as the CCP is concerned, these had little chance to register as the Convention text on external trade was, by and large, the result of a strong and genuine consensus, of which either foreign ministers (themselves) or

representatives of heads of state and government had been part. Moreover, bureaucratic resistances were also less intense, as the IGC was largely conducted on the political level and partly because of its relative short duration. As a result, it was more difficult for departments to have their voices heard in the formation of national positions (interview 2004). During the 2007 IGC that led to the Treaty of Lisbon, the CCP package was not reopened due to the above rationale.

The strongest countervailing pressure during the 2003–04 IGC on the CCP issue came from the Swedish and Finnish delegations. They sought (and obtained) a narrow exception to QMV in the field of trade in social, education and health services. The two delegations argued that their domestic high-quality provisions concerning these services could be prejudiced by an international agreement in these areas. The Swedish and Finnish reservations to QMV can be explained by a mix of sovereignty consciousness and domestic constraints and diversities. The issue of trade in ‘public’ services was raised by many national parliamentarians (from different parties) in the Finnish Parliament during the Convention and IGC and thus effectively tied the hands of the government, which needed to go through Parliament to ratify the treaty. The Swedish situation was similar. The issue of public services became part of the Swedish IGC paper and was approved by the Swedish Parliament. In addition, the (ideological and sovereignty conscious) maxim that public services should remain in state control was widely accepted in the Swedish government (less so by the Conservative opposition). In addition, the new Finnish government led by the Centre Party was perhaps less Europhile than the Lipponen government, certainly with regard to the issue of external trade competences, and thus took a more sovereignty cautious approach (interview 2005).

The Potential Effects of the Lisbon Treaty

My analysis concerning the impact of the Lisbon Treaty on the Common Commercial Policy will focus on the EU’s ‘actorness’ in international trade. Overall, the EU’s role as an actor has been strengthened by the treaty. Moving services, intellectual property and also investment within the exclusive competence of the Community has reduced the need of mixed trade agreements (Pollet-Fort 2010: 15). Such agreements have created confusion among the Community’s trading partners and also within the EU (Woolcock 2010: 9). In addition, horizontal agreements (such as the Doha Round), possibly involving services, intellectual property and investment, may now also be more easily

decided by QMV (Krenzler and Pitschas 2006: 40). More generally, the scope for unanimity has been further narrowed. The explicit derogations in the areas of cultural, social, education and health services have become narrower, and the burden of proof to invoke these exceptions lies with those Member States that wish to apply them (Norman 2003: 314). As a result, intra-EU decision-making should become faster (Woolcock 2010: 15) and should be less characterized by lowest common denominator agreements, in which the least ambitious Member State can jeopardize far-reaching EU initiatives. Closely related, the scope for possible abuse of the veto option resulting in disproportionate demands by veto-countries will be reduced. In addition, the potential for third parties to play ‘divide-and-rule’ games will be limited (cf. p.7 of this chapter). All in all, the move towards greater exclusive Community competence, along with its implications for trade policy decision-making, ‘contribute to the streamlining of the trade policy conduct and a coherence of the EU trade policy’ (Pollet-Fort 2010: 15).

Through the introduction of co-decision on legislative acts, the requirement of EP consent for all trade agreements, and its greater involvement in the process of intra-EU negotiations, the role of the European Parliament has been substantially enhanced in the CCP. Parliament may use this power to demand a more prominent position in external trade policy-making. The EP’s traditionally stronger concerns (relative to the Commission, and especially the Council) with regard to non-economic goals such as human rights or environmental and social standards, could contribute to a greater politicization of EU external trade policy (Pollet-Fort 2010). It is difficult to foresee what impact this may have on EU actorness. On the one hand, such politicization could lead to uncertainties and delays and more generally hamper policy-making processes within the EU. While withholding its consent for a large multilateral agreement, like that concluding the Doha Round, can be considered rather unlikely, the EP’s willingness and ability to do so has been considered a realistic scenario for bilateral agreements (Woolcock 2008: 5–6). On the other hand, the European Parliament could be conveniently used as a bargaining chip in two- or three-level games (cf. Putnam 1988). The EU could strengthen its bargaining position in international negotiations by referring to the requirement of EP consent, as practiced by US negotiators with regard to Congress.

The last point that I would like to discuss in this context concerns the CCP's inclusion under the EU's external action heading. The Treaty of Lisbon links the Common Commercial Policy to principles and objectives, such as the promotion of democracy and human rights. This indicates that more 'normative' goals may be taken into account in the negotiation of future trade agreements (Bungenberg 2010: 128). This provision is important because it 'makes explicit what is already the case: that trade policy can be used in order to attain other, non-economic objectives, that links can be made between trade policy and the Union's principles and values, and it therefore also provides a basis for the use of conditionality in trade policy' (Cremona 2006: 30). This, in turn, could prompt further politicization of EU trade policy with its, so far, incalculable implications for EU actorness. The inclusion of trade under the common head of external action is supposed to enhance the overall coherence of EU external policy across policy areas. As a result, trade policy may, to some extent, become an instrument of other policy goals pursued by the Union, such as development or environmental policy. The desire for greater coherence across external policies could lead to more extensive and conflicted inter-departmental consultations both within the Commission and the Member States. Hence, the influence of other external policy goals on trade may have certain adverse effects for EU trade-policy decision-making (cf. Woolcock 2010: 15).

Conclusion

The external trade policy provisions that made it into the Treaty of Lisbon were very largely decided upon during the Convention on the Future of Europe. The treaty provisions on the CCP have been substantially advanced during the last treaty revision with services, intellectual property and also investment now unambiguously falling within the exclusive competence of the Community, the European Parliament having obtained co-decision on legislative acts along with its enhanced role in the ratification of trade agreements, national parliaments no longer needed for the ratification of WTO agreements (involving the new issues), the exceptions for unanimity further narrowed, and horizontal agreements involving the new issues now more easily decided by QMV.

While most (of the few) accounts that have subjected CCP Treaty revision to (causal) analysis have tended to point to exogenous pressures as the main dynamics for change, this chapter has argued that we need to focus particularly on endogenous factors in order to account for different outcomes in

past treaty revisions. All in all, my (mainly endogenously-based) framework seems to have provided a robust account for an analysis of the treaty revision leading to the Lisbon Treaty. During the last treaty revision, the dynamics for further integration were considerably strong. Functional rationales, particularly through enlargement, provided an important structural pressure (along with continuing exogenous pressure). These two structural pressures could register with actors and unfold their strengths more easily because of stronger socialization, deliberation and learning processes. Such processes, as a result of which actors concurred with the results, can also largely explain the bonding strength of the Convention text. These dynamics were further reinforced by the stronger role played by supranational institutions. Largely due to the Convention framework, countervailing forces were (substantially) weaker than at the Amsterdam and Nice IGCs. This facilitated the stronger ignition and dissemination of integrational dynamics.

The impact of the Lisbon provisions on EU trade policy actorness are not yet entirely clear, given the short time span since the treaty came into force. Overall, it seems that the EU's role as an actor in trade policy-making will be enhanced through the new arrangements. However, a lot depends on the implementation of the Lisbon provisions, especially with regard to how the European Parliament will exercise the newly acquired powers.

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