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EU Trade Policy: The Exclusive versus Shared' Competence Debate

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Introduction

As the European Union enters the new millennium, it will face institutional and policy challenges that might destabilize its fragile institutional status quo. The Amsterdam Treaty can be interpreted mostly as a stop-gap compromise, which postponed major institutional reforms that will, at some point, become unavoidable. This is particularly true in the case of trade policy—the oldest, and one of the most successfully integrated policy sectors in the EU.

From its very creation, the European Community had spoken in international trade negotiations with a single external voice.¹ The principles of supranational competence over trade matters and unity of external representation in trade negotiations sharply distinguished the Common Market from other preferential trading arrangements, such as the European Free Trade Association. Recently, however, member states have started to question this transfer of sovereignty to the supranational level, especially with respect to the new trade issues of services and intellectual property. In 1994, the European Court of Justice introduced the caveat that the Community and the member states actually shared competence in these areas. The 1997 Amsterdam Treaty further reinforced these restrictions to transfers of sovereignty in the realm of trade by allowing member states to decide what competence to delegate on a case-by-case basis at the outset of a negotiation. This move could create the European version of the American fast-track procedure of delegation of trade authority, with all

¹ For an overview of the issue, see Meunier and Nicolaidis (1999) and Johnson (1998). This chapter directly builds on the arguments and historical narrative first presented in Meunier and Nicolaidis (1999).

the havoc and uncertainty, as well as political benefits, associated with it. It is worth asking whether this development is likely to serve the interests of the EU.

More generally, trade policy is a critical case of the risks, resistance, and reforms faced today by the European Union. It is in the area of trade that member states have accepted, for the longest time, to pool their sovereignty and delegate representation. The same reasoning should continue to apply today as the EU needs to deal with an ever-expanding trade agenda. If no reform of the institutions and decision-making procedures can be implemented in the realm of trade, then reform cannot be implemented anywhere. Yet institutional reform is crucial for the credibility and survival of the European Union as a world actor, especially in light of new EU commitments to a substantive Common Foreign and Security Policy. How can the EU be expected to start speaking with one voice in the controversial realm of foreign policy if it has stopped doing so in the traditionally easier realm of trade?

This chapter starts from the premise that the policy equilibrium established during the Amsterdam revision of the Treaty is unlikely to be sustainable in the face of several upcoming challenges. These include the relaunching of multilateral trade negotiations under the aegis of the World Trade Organization (WTO), including the unsuccessful start of the 'Millennium Round' in Seattle in November 1999; the expected enlargement of the EU to some of its Eastern neighbors; and the proliferation of bilateral and plurilateral agreements between the EU and its trading partners. In light of this new trade agenda, the EU's internal coordination and legitimation process is bound to become even more complex and demanding as new actors become concerned by trade negotiations. What risks will these challenges pose to EU trade policy? How should the trade policy-making process be reformed in order to address these challenges? What might be the consequences of failure to implement any institutional change?

Clearly, the institutional machinery associated with trade policy has always been geared towards striking a balance between member-state control and unity of representation. We argue that this balance should not only be maintained, but control by member states and participation by non-state actors should be strengthened, for normative reasons—democratic accountability remains at the national level for the foreseeable future—and for strategic reasons—the bargaining power of the EU decreases if outsiders believe the Commission, an unaccountable body, is free to agree to what it wants. At the same time, unity of representation *vis-à-vis* the outside world is more necessary than ever before. In order to square this circle, internal debates prior and during negotiations need to

be more transparent and binding for the Commission. As a *quid pro quo*, the Commission's authority should be increased at the ratification stage through systematic use of majority voting for *all* issues on the trade agenda.

The first section of this chapter presents the different modes of competence delegation in trade and examines the traditional rationales for sharing sovereignty over trade matters. Next, we explore the evolution of the delegation of trade competence in the EU from the Rome to the Amsterdam Treaties. The third section analyzes the upcoming challenges to EU trade policy institutions, with a special focus on the new multilateral negotiations and the Eastern enlargement, and hypothesizes on the potential consequences of failure to reform the institutions. In conclusion, we make some policy recommendations, while addressing the relationship between trade policy reform and democratic accountability.

Modes of Control and Allocation of Competence in Trade Policy

Who should speak for Europe? Our argument in brief is that the answer to the question depends on the stage of the negotiation and the kind of relationship established between the spokesperson and its principals. The debate over exclusive competence acts as a proxy for the real debate over such relationships. In examining the specific field of trade policy-making in the EU, we apply principal-agent theory to highlight and understand the stages of negotiation and respective modes of control, and the distinction between exclusive and shared competence in the EU.

Principal-Agent Theory and International Negotiations

The delegation of competence can be analyzed through the lenses of principal-agent theory (Pollack 1997a; Coghianese and Nicolaïdis 1998). This theory is relevant both to the why and how of delegation in any context where tasks are not conducted directly by their ultimate beneficiaries and shapers. Only recently has principal-agent theory been applied to the context of negotiations (Meunier and Nicolaïdis 1999; Mnookin *et al.* 1999). In short, delegation occurs when tasks are too complex or time consuming to be conducted by the principal, or when the presence of agents helps to make agreements stick. In the case of external EU negotiations, the 'why' question does not need much discussion. We are interested here in 'how' delegation occurs.

The theory starts from the premise that in any agency relationship, *agency costs* can be due to: (1) differences in interests between agents and

principals; or (2) information asymmetries which come from the fact that agents usually know more about their task than their principals do, while principals usually know more about what they want accomplished. In the context of negotiations, agency costs occur because the negotiator knows more about the constraints of external negotiations while the principals know more about their bottom line (Nicolaidis 1999). Agency costs also occur because the agent's interests might not be aligned with that of his or her principals, if for instance the fact of a deal matters more to the agent than its content. The prescriptive challenge is to create institutional arrangements to minimize such agency costs. This can be done through 'mechanisms of control'—for example, the different constraints under which agents must operate. It is important to note that such mechanisms are not neutral in the 'external game', as they can serve to signal to outside parties which concessions can be made. How these mechanisms operate is the key determinant for whether, or to what extent, the EU actually 'speaks with one voice'.

The Stages of Negotiation: Mandate, Representation, and Ratification

Any formalized negotiation involving agents negotiating on behalf of principals can be divided into four stages: (1) the design of a negotiation mandate; (2) the representation of the parties during the negotiations; (3) the ratification of the agreement once negotiated; and (4) the implementation and enforcement of the agreement once it is brought into force. Whether the Community is perceived to speak with 'one voice' is most relevant during the negotiations but is also affected by signals sent at the mandate stage and expectations created about the ratification stage. The agreement can of course still unravel at the enforcement stage, demonstrating that any apparent unity before that point was actually flawed, since one or several parties were not able to act on their commitment.²

What does this mean in the context of external EU negotiations? The conduct of trade policy in the EU can be seen as a two-tiered delegation, spelled out in Article 113, which was renumbered Article 133 by the Treaty of Amsterdam:

- (1) in terms of substantive authority: delegation from the individual member states and their parliaments to the assembly of European states, acting collectively through the Council of Ministers;
- (2) in terms of procedural authority: delegation from the Council of Ministers (principals) to the European Commission (agent).

² This situation has never occurred in the history of the EU, so we leave the enforcement stage aside.

Two fundamental questions emerge from this two-tier delegation of authority. How much control does each individual state retain over trade policy? How much control do the member states as a collective retain over its conduct by the Commission? At each of the stages of international negotiations mentioned above, the principals (in this case, the states, individually or collectively) use different procedures and mechanisms to bind or control their agent (the Commission) and limit its margin of manoeuvre throughout the negotiations:

Initial Mandate

The Commission has sole competence to elaborate proposals for the initiation and content of international trade negotiations. The key policy discussions take place in the 'Committee 113/133',³ which examines and amends Commission proposals on a consensual basis, before transmitting them to the Committee of Permanent Representatives (COREPER) and subsequently the General Affairs Council, which then hands out a negotiating mandate to the Commission. In theory the mandate is agreed upon by qualified majority. We will say that control is exercised at this stage by adopting a more or less *flexible* mandate. This depends in turn on the complexity and sensitivity of the issue, as well as the degree to which national positions have been already shaped prior to the negotiations.

Ongoing Representation

Commission officials represent the Union under the authority of the Commissioner in charge of external economic affairs and conduct international trade negotiations, within the limits set by the Council's mandate. Member states are allowed to observe but not speak in WTO plenary sessions, although they are of course involved in much of the 'informal diplomacy'. We will say that control is exercised at this stage by granting more or less *autonomy* to the Commission through formal and informal channels.

Ratification

At the conclusion of the negotiations, the Council approves or rejects the trade agreement, in principle by qualified majority. The European Parliament has little say in this process; it is informed on an informal basis and consulted before ratification upon initiative of the Commission. We will say that control is exercised at this stage by reducing the Commission's *authority* and thus *uncertainty* of the member states' vote.

³ 'Committee 113', named after Article 113(3), is composed of senior civil servants and trade experts from the member states as well as Commission representatives. It was renamed Committee 133 after the Amsterdam Treaty came into force.

TABLE 16.1. *The Four Stages of Delegation*

	Authorization (flexibility of the machine)	Representation (autonomy)	Ratification (authority)	Enforcement
Exclusive competence (Art. 113/133 and 235, EC Association Agreement)	113/133 Committee → Council (qualified majority)	Commission e.g. 'unity of representation' (ongoing informal consultation)	Council (formal: qualified majority); informal: veto at least by big states)	Commission (exclusive)
Mixed competence (Art. 113/133 EC in the WTO Arts. 113 and 235)	113 Committee → Council (unanimity) and member states	Commission (ongoing informal consultation) Some member- state involvement	Council (unanimity) and parliamentary ratification in each member state	Commission with delegated authority (in consultation)

Source: modified from Meunier and Nicolaidis (1999).

In sum, flexibility (at the mandate stage), autonomy (during the negotiations) and authority (over ultimate ratification) can be seen as the three fundamental characteristics of the Commission's role as an agent of the member states in the international arena (Nicolaidis 1999).

Exclusive versus Mixed Competence

The Commission negotiates on behalf of the member states under two types of legal framework: exclusive and mixed competence. In theory, the core difference between exclusive and mixed competence comes at the ratification stage. Mixed competence in trade simply means that delegation of authority is granted on an *ad hoc* basis for negotiation purposes rather than systematically. Individual member states retain a veto both through unanimity voting in the Council and through ratification by their own national parliament. Under exclusive competence, on the other hand, a qualified majority vote in the Council stands as ratification. So it would appear that exclusive competence implies that the EU speaks with one voice, that of the Commission, while mixed competence leads to a concert—or a cacophony!

In practice, the difference is more blurred. On one hand, exclusive competence does not guarantee a single voice. Powerful member states still

exercise an informal veto both at the mandate and the ratification stages, to the extent that the Luxembourg compromise extends to the trade area. Conversely, member states have managed to speak with one voice in areas of mixed competence or common foreign policy (as exemplified by 95 per cent of the decisions taken in common in the United Nations or the negotiations over association agreements with Eastern and Central European countries). The principle of unity of representation by the Commission is valid under both configurations, even while in both cases individual member states usually seek to reduce Commission autonomy to the extent tolerated by their partners. Nevertheless, the expression of dissent is dampened, the incentives for seeking compromise increased, and the role of the Commission enhanced in areas of exclusive competence.

Thus, when we ask 'who should speak for Europe' we need not assume that the answer is unequivocally linked to the technical issue of competence. The question arises whatever the configuration. But, as we will now see, this is how the debate has come to be framed in the last decade.

As we go through our historical narrative, we must differentiate between tiers of delegation. For the first tier of delegation from member states to the Union, formal competence does matter, as it determines national veto power at a minimum in the Council and at a maximum through national parliamentary ratification. For the second tier of delegation from the Council to the Commission, the core trade-off is between unity of representation during the negotiations and constraints imposed at the mandate and ratification stages. Conceptually, we need to think of flexibility, autonomy, and authority as variables that can be traded off irrespective of the formal competence arrangement. For instance, mandates handed down by the Council have traditionally been very flexible, not least because the resort to consensus has forced states to agree on the smallest common denominator. Some insiders argue that this is in part the root of the problem: it is because the Commission is so 'free' at the outset that it must 'pay' in terms of authority later. Similarly, if member states feel that they have lost control of the Commission during the negotiations, there will be a higher likelihood of difficulties at the ratification stage. It is with an eye to these trade-offs that we now turn to a historical overview of the issues.

The Evolution of Trade Competence in the EU

Trade policy came under supranational competence from the very beginning of the European Community, which was originally founded as a common market. Internally, it meant that barriers to trade between the

member states had to be abolished. Externally, it meant that trade policy had to be integrated—mostly through a common external tariff and a unified external representation.

Supranational Competence in Trade: From Theory to Practice

When the founders asked themselves 'Who should speak for Europe?' their answer was in theory straightforward, but in practice quite ambiguous. In theory the fact that external trade fell under the category of 'exclusive competence' seemed to mean that the Community would indeed speak with one voice. In practice, however, this is one area of exclusive competence where member states retained a great amount of control over the Commission. The member states initially 'won' that battle on two counts. For one, Committee 113 had a competitor at the outset, namely the trade incarnation of the COREPER, which would have meant that member-state input into trade negotiations would primarily be controlled by national delegates living in Brussels. Committee 113, on the other hand, was staffed by representatives from the capitals, less prone to 'capture' by Brussels 'ideology'. By the 1970, Committee 113 had established itself as the sole forum for trade decision-making, enshrining direct input from the capitals (Johnson 1998). Second, it was unclear at the outset who should chair and coordinate the meetings of the Committee, the member states (through the Council) or the Commission. In the end the former solution prevailed, again ensuring greater control of the agenda by the member states (Johnson 1998).

As with other areas of EU policy-making, the gap between theory and practice has been the greatest with regards to voting procedures. Although qualified majority is the official voting rule governing trade policy decisions, the *modus operandi* has proven more complex. First, unanimity was used during the initial trade negotiations in which the EC participated, the Dillon Round and Kennedy Round of GATT. According to the original Treaty, the Council of Ministers was to take trade policy decisions unanimously until January 1966, the end of the transitory period. Qualified majority voting would have been automatically instituted after this date, had De Gaulle's 'empty chair' crisis of 1965 not triggered the 'Luxembourg compromise,' according to which a state can veto a decision otherwise taken according to qualified majority if vital national interests are at stake. The 1985 Single European Act restored the primacy of majority voting. In practice, however, member states have always managed to reach consensus on a common text and at the ratification stage, as with most other areas of policy-making in the EU. But as we will see, it does matter that discussions are held in the Council 'under the shadow of the

vote'. It is worth noting that not only trade negotiations but also EU decisions on trade sanctions fall under qualified majority voting. The Maastricht Treaty explicitly formalized this in its revisions to Article 228.

Challenges to the EU's Exclusive Competence in Trade

During the two decades following the Treaty of Rome, the Commission successfully negotiated on behalf of its members two major trade rounds under GATT, as well as a host of bilateral trade agreements. The emergence of new issues onto the international trade agenda in the mid-1980s, however, prompted the member states to question the clear foundations of the Community's trade competence. The 1986 Uruguay Round was designed, in part, to negotiate over three categories of 'new issues': intellectual property rights, trade-related investment measures, and services.⁴ The question of trade delegation in the EU came to be framed as follows: who, of the Commission or the member states, was responsible for negotiating these issues? Several member states, reluctant to give up forever entire new sectors of their trade policy, insisted on being granted their own competences with respect to the 'new issues', arguing that these were not covered under the definition of trade given in the Treaty of Rome.

Were new issues actually covered by Article 113? If not, would this not mean they fell under mixed competence? And if they did, should member states not have a greater say in their negotiation? On one hand, the term 'commercial policy' was not defined in the Treaty of Rome, thereby suggesting a broad coverage. On the other hand, Article 113 provides illustrations of the 'uniform principles' on which the policy is to be based and many would follow Michael Johnson, former UK President of Committee 113, in arguing that 'these examples were understood early on as restricting the coverage of Article 113 to trade in goods and related issues such as the operation of industrial standards' (Johnson 1998).⁵ Examples include 'changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in . . . measures to protect trade such as those to be taken in the event of dumping or subsidies' (Article 113(1)). Indeed these all fit the trade-in-goods paradigm. But the list also includes 'the achievement of uniformity in measures of liberalization'—a term that would seem to encompass liberalization of imports of banking services as

⁴ Services in particular, ranging from telecommunications to professional accreditation, included areas that had traditionally fallen under domestic jurisdiction and where concerns about externalities and consumer protection were generally more acute than for trade in goods.

⁵ Johnson adds '(other) commercial matters such as finance and services were clearly understood to remain within the competence of the individual member states' (1998: 8).

well as typewriters! In short, anything could be read into the texts themselves.

The issue of competence was not resolved at the outset of the negotiations, which led to a prolonged debate as to how negotiations should proceed. In the end, a compromise was found between negotiating and legal imperatives: it was agreed that the Commission should conduct the negotiations on all aspects of the round. Some have argued that the Commission had actually more margin of manoeuvre in the new issues because it was not bound by the traditional procedures laid out in Article 113. We believe that the Commission, indeed, managed to have a great deal of autonomy in these realms during the round, but only because the new issues were so 'new' and complicated.

Instead, the dispute over internal competence crystallized during the Uruguay Round over the EC-US 'Blair House Agreement' on agriculture. This was paradoxical since this agreement had nothing to do with the 'new issues'. The Blair House deal was negotiated in November 1992 by an autonomous Commission after six years of deadlock in the agricultural talks (Woolcock and Hodges 1996; Meunier 1998). When US negotiators leaked details of the agreement, France denounced the Commission's abuse of power and declared its absolute opposition to the deal. After several months of intense lobbying, France eventually rallied several member states (including Germany) around its position. After difficult exchanges with the USA, the agreement was eventually renegotiated partially, with symbolic concessions to France's position. Nevertheless, the Blair House crisis represented a turning-point in the delegation of negotiating authority to the supranational representatives, seriously putting into question the informal flirtation with majority rule and increased autonomy of the negotiators that had started to prevail (Meunier 2000).

The issue of competence arose more formally during the Uruguay Round on two fronts. First, who would ratify the final agreement? After heated debates, both the Council President and the External Trade Commissioner signed the Final Act of the Round on 15 April 1994 on behalf of the Community, while representatives of each member state signed in the name of their respective governments. In a half-way house between mixed and exclusive competence, individual member states asserted their competence symbolically, but without requiring parliamentary ratification⁶ (Arnulf 1996). A second controversy erupted over the question of membership in the WTO, itself an outcome of the Uruguay Round.⁷ Again in a spirit of compromise, the Commission suggested that

⁶ Although some states chose to undergo such ratification.

⁷ This question constituted an unavoidable legal challenge for the EC, even though the rest of the world left it up to the Europeans to decide how this would be settled. The EC

the member states become contracting parties in the WTO, provided that they accepted the principle of unitary EC representation and thus reaffirmed exclusive competence. The member states all but agreed that they should be the members, but they were now wary of giving the Commission free rein during the negotiations.

In order to solve the competence dispute, the Commission decided to bring the issue to a head. If member states were not going to compromise politically, perhaps their objection could be overruled legally. This decision was not without controversy inside the Commission, where Legal Services and the Directorate General for External Affairs (DG 1) had differing assessments about their chance of success in the legal sphere.⁸ The 'optimists' prevailed, however, and in April 1994, the Commission asked the European Court of Justice for an 'advisory opinion' on the issue of competence. The optimists believed that the judges would back the Commission's stance and confirm that the scope of exclusive competence extended to new issues.

The Council and eight member states opposed the Commission's reasoning.⁹ As we have argued elsewhere, member states picked their sides in the competence debate as a function of their preferences along two dimensions, economic interest and ideological bias (Meunier and Nicolaidis 1999). France was at the helm of the 'sovereignty' camp mostly for ideological reasons, with new concerns over national sovereignty in the wake of the almost disastrous referendum on the ratification of Maastricht in 1992 and a growing mistrust *vis-à-vis* the Commission as a result of the Blair House episode. The United Kingdom, traditionally one of the most pro-liberalization states in the EU, opposed the formal expansion of Community competence to the 'new issues' in trade out of a traditional ideological bias against any expansion of supranational authority. Germany resisted transfers of sovereignty on ideological grounds, mostly because German regulators were highly protective of their powers. It can also be argued that Germany was less secure about its competitive position regarding services than France and the UK and therefore less supportive of the liberal stance taken by the Commission. Finally, countries

had never formally substituted the member states in GATT, whose creation preceded that of the Community. Since the GATT was only an 'agreement' with signatories but no members, the question of Community membership never formally arose (Denza 1996). For all practical purposes, therefore, the EC—represented by the Commission—had been accepted by the other GATT partners as one of them. Moreover, formally replacing the member states by the EC could have a cost, since the individual voting rights of member states in GATT would give way to a single vote. Since GATT operated by consensus, however, this had more symbolic than practical significance.

⁸ Private interview with EU Commission official, Apr. 1999.

⁹ These countries were: Denmark, France, Germany, Greece, Netherlands, Portugal, Spain, UK.

motivated by sectoral concerns, such as Greece (shipping) and Portugal (textiles), preferred to keep their sovereignty over the new trade issues. On the other side of the spectrum, irrespectively of their economic competitiveness in services, countries with traditionally pro-integrationist stances—for example, Italy, Belgium, and Ireland—strongly backed the Commission. These countries, especially the smaller ones, recognized that without the negotiating umbrella of the whole Community, they were always at the mercy of the EU's big trade partners.

The Court knew that this dispute over trade competence was going to be a test-case of its approach to European external relations, and more generally European integration, in the post-Maastricht era. In their November 1994 opinion, the European judges confirmed that the Community had sole competence to conclude international agreements on trade in goods.¹⁰ In a controversial move, however, they also held that the member states and the Community shared competence in dealing with trade in the 'new issues'.¹¹ More specifically, among these, only 'cross-border' trade in services, that is one of the 'modes of services delivery' according to the official jargon—counted as traditional trade.

Several legal scholars suggested that the judges could plausibly have gone the other way, ruling instead in favor of exclusive Community competence (Bourgeois 1995; Hilf 1995). We have identified elsewhere at least four arguments in favor of a more expansive reading of the Treaty of Rome (Meunier and Nicolaïdis 1999). First, the Court could have applied a requirement of consistency: external powers ought to be implied by internal powers. This had been the basis of its former jurisprudence.¹² With the application of the Single Market Program to the broadly uncharted field of services, the Single Act seemed to call for a similar scope expansion on the external front. Second, the Court could have argued in favor of adaptability, as it had in the past. Given the rapidity of changes in the world economy, not foreseen at the time of the Treaty of Rome, trade policy should retain a dynamic and evolutionary character. Third, on the substantive front, denying their character as trade issues stems from an

¹⁰ Including agricultural products and products covered by the European Coal and Steel Community and Euratom treaties.

¹¹ Court of Justice of the European Communities, *Opinion 1/94*, 15 Nov. 1994, I-123. (1) The Community has sole competence, pursuant to Article 113 of the EC Treaty, to conclude the multilateral agreements on trade in goods. (2) The Community and its Member States are jointly competent to conclude GATS. (3) The Community and its Member States are jointly competent to conclude TRIPs.

¹² In case No. 22/70. *Commission v. Council*, the Court concluded that 'whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection'.

outdated analytical understanding of the actual nature of services and intellectual property issues. In the post-Uruguay Round era it seems more than a little odd to deny the label of 'trade' to three of the four forms of services delivery across borders defined internationally in the General Agreement on Trade in Services (GATS) as constituting 'trade in services'. Finally, the fourth argument against the Court's judgment is a political one, appealing to the very nature of the European Union. By 1994, it could be argued, the Community had matured and acquired a real external personality. On the internal front, the Maastricht Treaty had created general expectations about the establishment of an international identity for the Union and a deeper coherence between external economic policies and foreign policy. On the external front, exclusive competence was consistent with the expectations of Europe's trading partners regarding its role and standing in multilateral negotiations. In short, the Court's opinion denied the EU a competence that the rest of the world already took for granted.

We see in this judgment one more piece of evidence that the ECJ's rulings reflect calculations over political acceptability (Rasmussen 1986; Weiler 1991; Burley and Mattli 1993; Alter 1998b). The European Court of Justice refrained from (re)establishing exclusive competence for new trade issues because of a change in its assessment of the weight given to sovereignty concerns by some member states in this area. The recapture of formal power by the member states was also part of a more general trend in the EU. In the aftermath of the Maastricht ratification debates, it had become clear that the member states were increasingly wary of further devolution of sovereignty to the supranational level. By making a ruling which respected the national governments' sovereign powers instead of promoting further European integration, the Court acted to preserve its own role in the EU's institutional edifice.

The extremely cautious wording of the decision leads us to believe that the Court was trying to suggest how trade policy could still be conducted efficiently under the status quo until politicians sorted out the issue themselves at a later time. In order to allow for the evolutionary nature of trade, the language of the Court was quite imprecise, leaving room for interpretation when future conflicts on 'new issues' arose. In effect, the Court sent the ball back to the politicians. To avoid future competence disputes, they would have to amend the treaty either by following the Court's opinion to enshrine this new sharing of sovereignty in the texts or by explicitly 'expanding' Community trade competence to include new issues.

The Court's ruling can be read as advocating the kind of trade-offs that we highlighted at the outset of this chapter. In effect, the Court reduced the authority of the Commission by creating uncertainty at the ratification stage. At the same time, however, the Court insisted that this conclusion

should not jeopardize the principle of unity of representation during the negotiations. To achieve this result, it encouraged the adoption of a code of conduct designed to govern relationships between the member states and the Commission. This would, on one hand, reassure the member states as to their input during the negotiation, but at the same time enshrine Commission *autonomy* as the sole legitimate voice for the Community as a whole. Such a code of conduct was discussed and elaborated in the subsequent presidencies.

The Amsterdam Compromise and the Current Policy Equilibrium

The Commission was determined to use the opportunity of the 1996 Inter-Governmental Conference (IGC) to revisit the ruling of the Court on 'mixed competences'. It expected some help in this endeavor from the significant evolution in national positions regarding trade competence in the two years following the Court's judgment. The 'sovereignty' camp had shrunk from a majority to a minority, consisting of France, the UK, Denmark, Portugal, and Spain. By contrast, the 'expansionist' camp had gained considerable support with the reversal of the German trade authorities, to whom it seemed to have become clear that Germany had more to lose than to gain in keeping future agreements captive to the protectionist demands of Portugal or Spain. Greece and the Netherlands had also changed sides, the former as it switched strategies simply to obtain an exception for shipping, and the latter as it came closer to the Commission while taking over the presidency. In addition, the three new member states (Austria, Sweden, and Finland) were all firmly with the expansionists. Despite their growing numbers, however, the expansionists failed to create any sort of operational alliance as they sought to retain power over other institutional issues during the Amsterdam conference. The revision of Article 113 was not their top priority. Moreover, it appeared unrealistic to waste political capital on an issue where France and the UK were decidedly on the other side.

As the IGC negotiations were coming to a close, the sovereignty camp became willing to contemplate a compromise over the scope of competence in exchange for extensive exceptions and guarantees. In a late draft, the Dutch presidency proposed to extend the Commission's exclusive competence *post hoc* to the areas of which it had been in charge during the Uruguay Round: further negotiations in the services sectors covered under the General Agreement on Trade in Services (GATS) and the Trade-Related Aspects of Intellectual Property Rights (TRIPs) code would also continue to be under exclusive community competence. In essence, the Community would have exactly the same powers in trade over existing ser-

vices that it had over trade in goods, with both the mandate and the adoption of the agreement being agreed to under qualified majority voting. At the same time, there would be no open-ended granting of authority for potentially new services sectors or new national measures that may become the object of external negotiations at a later stage. In addition, some member states insisted on the explicit inclusion of a series of exceptions to the new scope extension. The protocol thus proceeded to exclude maritime and air transport services and to reproduce extensively the broad exceptions stated in the WTO charter.¹³

At the end of the day, the proposed compromise had become fraught with so many exceptions, caveats, and the introduction of cumbersome control procedures that the Commission itself persuaded the Presidency to withdraw it. Even though the proposal represented a limited success on scope expansion, the Commission preferred the status quo—better to keep options open and gamble on a better future political climate in the Court as in the Council. The member states eventually agreed to a simple and short amendment to Article 113 (renumbered 133), allowing for future expansion of exclusive competence to the excluded sectors through a unanimous vote of the Council. The newly adopted paragraph 5 states that: 'the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraph 1 to 4 to international negotiations and agreements on services and intellectual property insofar as they are not covered by these paragraphs'.

Interpreting the Amsterdam Compromise

If anything, the Amsterdam compromise is simply a stop-gap measure—a recognition that in practice and in the long run, the Community will have to find a consistent basis for its negotiations in all areas of international trade. The result of future battles over competence is in no way predetermined, since, through the new Article 133(5), the scope of the Article can be extended permanently and generally, in relation to a named international institution or on a case-by-case basis. Organizations that deal with services and intellectual property issues are thus also covered. The Court could also review its opinion under better political auspices.

As it stands, everyone seems to agree that the Amsterdam compromise was a face-saver for the Commission. Members of the Commission tend

¹³ Exceptions ranged from activities connected with the exercise of official authority or the participation of member states in the International Monetary Fund to measures adopted to protect the stability of the financial system or regarding citizenship, residence or employment on a permanent basis of third country nationals.

to downplay the magnitude of their defeat by pointing out that in practice they will continue to be the EU's single voice on all issues and that, whatever the legal basis, ratification always requires consensus. In the end, we believe that the Amsterdam compromise ought to be interpreted as a victory for the sovereignty camp. At a minimum, it is a statement that extension of Community competence should be the result of case-by-case political decisions rather than some uncontrollable spillover. It represents one among several examples of 'hybrid' decision-making procedures introduced at Amsterdam, falling between classical Community delegation and pure intergovernmental approaches (Moravcsik and Nicolaïdis 1998). These procedures need not be threatening if handled adequately.

Other interpretations view such 'ad-hocism' as a dangerous move towards multi-tier procedures and fragmentation in the external economic field. Legal scholars tend to view this result as anathema to the spirit of the Treaty since it allows for a broad-based expansion of competence without constitutional revision. Indeed, Community competence can now be extended to new issues (beyond those envisaged by the aborted compromise) without having to go through a formal revision of the Treaty. But is this such a bad result? It could be seen as a significant gain for the parties concerned with efficiency, such as the Commission, at least when compared with the situation prevailing under the Uruguay Round. In the most optimistic interpretation, this outcome could become an EU version of the American fast-track whereby member states decide at the beginning of a negotiation that the end result will be ratified on a qualified majority basis. This in turn gives added importance to the initial phase where the mandate is shaped. Discussions are likely to be more transparent, democratic, and broad-based since there is more at stake. The *flexibility of the mandate* may be reduced in such a context; but under our analytical framework, this may allow for greater autonomy and authority for the Commission down the road. Reasserting member-state control is quasi-impossible under permanent exclusive competence. This new provision may give greater flexibility to the Council, allowing it to revisit past decisions if necessary. Arguably, the very possibility of such flexibility—or the 'reversibility of delegation'—may make it more acceptable to delegate powers to the Commission in the first place (Coglianese and Nicolaïdis 1998).

In the end, the Commission can choose not to invoke the new provision under Article 133(5) and go into the negotiations without an explicit extension of exclusive competence, as it did during the Uruguay Round. In doing so, it would test the member states in their commitment to unity of representation. It would also signal its disapproval of the Amsterdam compromise. This approach might be playing with fire, but might be the only way for the Commission to keep the debate open.

Upcoming Challenges to Trade Policy Institutions

Does the institutional outcome reached in Amsterdam represent a stable policy equilibrium? The answer to this question depends in part on one's interpretation of the meaning of the reformed Article 133. Most importantly, however, it seems that a series of challenges might put the EU procedures for making trade policy, and more generally EU institutions, at risk if no serious reform is undertaken. We believe that upcoming challenges such as, in particular, the relaunching of multilateral negotiations under WTO and the future enlargement of the EU to its Eastern neighbors will put heavy pressure on the existing institutional mechanisms for trade policy-making in the EU. If these are not reformed, the EU faces the potential erosion of the international effectiveness that it has painstakingly acquired over four decades of existence.

Central Challenges to Trade Policy Institutions

The Relaunching of WTO Negotiations

The new Millennium Round negotiated under WTO auspices was supposed to be launched in Seattle in November 1999 at the initiative of Sir Leon Brittan, the former trade commissioner. The EU insisted on framing the trade negotiations in very broad terms, encompassing issues such as competition policy, labor standards, and food safety, in order to offer the world a 'managed' globalization. As an echo to the Rio Summit on Environment held in 1992, the EU also insisted that the round be based on the premise that negotiated rules over free trade ought to be compatible with sustainable development.

These negotiations pose a number of new challenges. First of all, the former 'new issues' have now taken a life of their own and a number of conflictual points need to be addressed. As one example among many, the rise of electronic commerce through the Internet forces a reappraisal of the scope and content of the GATS. Member states are likely to disagree strongly over the right solution. How, for instance, should 'virtual goods' such as CDs and videos downloaded across borders through the Net be classified? As goods or services? If they are considered goods, US demands for liberalization will be harder to resist unless the so-called audiovisual exception is extended to the realm of goods. There is likely to be some degree of disagreement between member states over such issues. But the fact is that an analytical question such as classification may be resolved on grounds that put one issue under shared competence and not the other. This does not seem very conducive to effective negotiations.

The 'new issues' that were tackled in Seattle and will be addressed in the next multilateral negotiations make the competence controversy more acute. These so-called 'trade and . . .' issues include trade and environment, trade and labor, as well as trade and competition law—although each of these topics may be taken up under different premises depending on how far along the discussions have progressed. These 'trade and . . .' issues have one characteristic in common: they engage policy and advocacy communities well beyond the trade arena, from environmental activists to trade unions and competition regulators. Given such a broad base of input, the need for one EU voice is all the more acute.

Overall, the EU offered a fairly united front during the Seattle conference. The European Parliament was more involved than in the past (still informally), with a delegation of Euro MEPs forming part of the EU delegation. A conflict over competence arose, however, between the member states and the Commission on the issue of biotech. Several states, as well as some members of the European Parliament, accused the EU negotiator, Pascal Lamy, of having exceeded his negotiating mandate by accepting the setting up of a biotechnology working group. This episode suggests that, as the topics discussed become more symbolic and domestically sensitive, any attempt by the Commission to overstep its mandate will be increasingly visible and publicly denounced.

The emergence of these new issues also creates a particular problem for the external representation of the EU. The question is no longer only 'who speaks for Europe', but also 'who speaks for the Commission'? The pre-eminence of the new Directorate General for Trade (formerly Directorate General for External Relations) is being undermined by the proliferation of the 'trade and . . .' issues. One exception to this pre-eminence was in the case of agriculture, whose DG has traditionally been the principal actor making the EU's external trade policy on agricultural matters. With the expansion of trade into so many new domains traditionally the '*chasse gardée*' of domestic politics, however, directorates in various parts of the Commission (such as on social and environmental affairs) can now legitimately claim involvement in the trade policy-making process. If intra-Commission disagreements exist (and they are bound to happen) and internal cohesion proves difficult to achieve, the trade policy process will be delayed. One consequence might be a reduced practical effectiveness of the Commission in international trade negotiations (Johnson 1998).

The Enlargement of the European Union

The institutional procedures for making trade policy were originally designed for a Community composed of six members. The more countries joined the EU, the more cumbersome and inadequate these institutional

procedures became. Several practitioners have argued that the sheer size of the reformed Committee 133 now impedes its work (Johnson 1998). The traditional practice of hammering out a consensual compromise over lunch, for instance, does not work smoothly when there are fifteen national representatives and their assistants around the lunch table. Moreover, one could expect the policy process to be delayed and rendered less efficient by the existence of potential vetoes in the hands of fifteen, and potentially more, member states.

Each enlargement brought along an expanding array of specific trade interests—'free market' pressures with the accession of Great Britain, new interest in the shipping industry with the enlargement to Greece, protectionism in agriculture with the joining of Spain and Portugal, etc. Along with an increased diversity in trade interests came an increased number of internal contradictions within the Community. The next enlargement will be no exception to the rule. This fragmentation of EU interests could lessen the external efficiency of the EU as an international trade negotiator.

Why is Institutional Reform Necessary?

Failure to reform the EU's institutional structures and implement change in decision-making procedures will have several consequences. First, it will affect the attitude and behavior of Europe's trade partners and negotiating opponents. Procedures for granting trade authority shape the expectations of Europe's partners, and thus its role in the global trading system. The uncertainties created by the system of mixed competence in the new issues tend to spill over into all other areas of trade negotiations, since issues are increasingly negotiated as package deals. Above all, contested authority tends to render third countries more reticent to conduct negotiations with, and make concessions to, Community representatives. The Blair House renegotiation debate was followed by other deals negotiated with a single voice by the Commission on behalf of the whole Community, only to be reneged on later by the member states.¹⁴ Because negotiations are an iterated game, the growing uncertainty that the concluded deal will hold through may weaken the long-term credibility of the Commission. Moreover, the EU might be hampered in its more frequent offensive endeavors by the constant threat of having one of its increasingly numerous member states break ranks (Meunier 2000). Foreign negotiators will attempt the 'divide and rule' strategy of seeking bilateral deals with 'friendly' member states when the supranational negotiating authority is

¹⁴ In 1997 the Council attacked trade deals with Mexico and Jordan. 'Trade deal debacles bring criticism of Union mandate', *European Voice* (10–16 July 1997).

contested. Indeed, US negotiators have already started to exploit these institutional uncertainties as bargaining leverage, for instance by contesting the legality of the negotiators' competence when the proposals are not in the USA's favor.¹⁵

Moreover, failure to implement institutional change in EU trade policy could have a significant impact on the nature of the international political economy as a whole. How the EU negotiates affects the world system, directly as the largest trader, and indirectly as a potential model for other regional systems. Fragmented actors facing each other in complex multilateral negotiations are less likely to be able to come up with packages of linked deals and more likely to heed internal protectionist forces. If the EU is presenting a less than unified front with competing competences when negotiating international trade deals, it could result in an increasingly protectionist pressure on the world economy: the collective position of the EU will be more easily captured by the most conservative member state and Commission negotiators, who have traditionally held a free-trade bias, will enjoy less negotiating autonomy (Meunier 2000). Since the EU has become the most consistent promoter of liberalization package deals in the wake of the Uruguay Round, such a shift would be bound to have profound repercussions on the dynamics of multilateral trade negotiations.

Conclusion: A Prescriptive Analysis of Trade Competence

The common commercial policy, cornerstone of the original Common Market, was initially conceived for six member states trading goods with a limited number of countries. Considering that membership is now fifteen countries, that trade now involves services, intellectual property, and a host of other new issues, and that more than 130 countries are now members of WTO, the EU's common commercial policy has been extremely resilient and adaptable. Nevertheless, as we have argued, the current institutional procedures need to be reformed in order to resist the challenges to be expected from the relaunching of multilateral trade negotiations and the next enlargement of the EU. The member states have included in the Amsterdam Treaty a timid revision of Article 113 which might open up the way for a more *ad hoc* approach to competence-sharing in the future. The Amsterdam policy equilibrium might not be very stable, however, and member states may want to revisit their decision-making procedures before the next institutional crisis explodes.

Which institutional arrangement should replace the existing policy mechanisms? The first arrangement that we can recommend is a pragmatic

¹⁵ Private interview with DG I official, Apr. 1997.

approach that would preserve member states' sovereignty while enabling the EU to reap the benefits of centralized negotiating power. Indeed, the member states have attempted for many years to draft a Code of Conduct designed to delineate practically the respective roles of each actor in the trade policy-making edifice. No Code of Conduct has ever been formally adopted by the Council, however, as the member states have never wanted to put down on paper an acknowledgment that the system of mixed competences is not a practical one.

Another avenue through which some reform of the EU trade policy-making process could be undertaken is a legal one. With its Opinion 1/94 the European Court of Justice paved the way for the current confusion of responsibilities with its recognition of a coexistence of competences in some non-goods cases. Perhaps the Commission can find a case to give the European judges another opportunity to set a precedent—a case in which goods and services are so inextricably linked that it becomes impossible practically to disentangle the respective competences.

The Amsterdam dynamics illustrated the tension between two options: carving out exceptions to exclusive competence or adapting the initial 'pure' system with the caveat of a code of conduct that would give more say to member states during the actual negotiations. If disgruntled states can neither easily question the autonomy of the Commission, nor easily assert the Luxembourg compromise at the ratification stage in areas of exclusive competence, their only recourse is to take back competence altogether. In the last four years, the shared competence battle served as a proxy for a redefinition of the mechanisms of delegation to the Commission in all of the common commercial policy. If the Commission did not seem willing to give up much of its autonomy during international negotiations, member states would seek to reduce the scope of its authority where they still could (for example, over new issues). This may imply that, if the Commission is willing to negotiate under a higher degree of scrutiny on the part of the member states, it may not have to leave ratification to the uncertainties of national parliamentary procedures. Conversely, the Commission could promote a US-like 'fast-track' approach where the battle would be fought mostly ahead of, rather than during, the negotiations. The Commission would negotiate as it wishes, under the important caveat that anything negotiated would be submitted to the Council for ratification. However, this kind of approach is unlikely to be appropriate for the EU. One of the challenges of EU trade policy-making is to make trade-offs between national as well as sectoral interests. Member states have traditionally been unwilling to let the Commission control such trade-offs (Woolcock 2000). The dispute will thus likely continue as negotiations are conducted. The Commission vehemently

opposed suggestions during the Amsterdam conference that the presidency of the Council be present during trade negotiations alongside the Commission. There is little doubt that Europe could no more effectively 'speak with one voice' under such a scenario. Instead, the Commission and the member states need to strengthen the Code's authority. As we have seen, there are pros and cons to each of these approaches. Both seem more effective, however, than the current situation, where not only trade authority but the procedures whereby it is granted constantly need to be renegotiated.

This chapter has highlighted some of the consequences that could derive from a failure to implement any institutional change in the common commercial policy. Change may be more difficult to implement today than at the time of the Amsterdam conference, however, while it also seems more necessary. The public demonstrations in Seattle showed that trade policy is now a 'hot topic', with many citizens openly concerned about the effects of trade liberalization. In some sense, the discourse against the WTO echoes the discourse against the EU. The Seattle failure represents a serious risk, not only for the multilateral trading system, but also for the EU. If the EU trade policy-making process does not answer public expectations about democracy and accountability, this might pose risks for the credibility and legitimacy of the EU as a whole. Also, Europe is increasingly endorsing, willingly or not, a leadership role in the multilateral trading system. It stands to lose more from multilateral failures than the USA, and therefore cannot let its own institutional defects and hesitations prevent it from playing this leading role in liberalizing world trade. In the face of these risks and challenges, how can a reform of EU trade policy be undertaken? While reform 'from above', such as a formal redistribution of competences, is ultimately necessary, we believe that in the short term increasing trust and communication are needed. There is little doubt that an attempt to expand exclusive competence to areas of domestic regulation, such as the environment, would provoke tremendous resistance from public opinion. Resistance to further transfers of sovereignty has clearly been demonstrated in recent cases, such as the French outcry against Brussels rulings in the British beef case and the growing awareness and opposition of NGOs to trade liberalization. Trade policy is both the oldest cement binding the EU member states together and one of the most pressing issues facing the EU today. How the EU manages to achieve a balance between negotiating efficiency, on one hand, and democratic legitimacy, on the other, will determine, to a great extent, how it can revive itself in all the other domains.

Flexibility or Renationalization: Effects of Enlargement on EC Environmental Policy

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Introduction

Eastern enlargement of the European Union poses a challenge to European Community environmental policy. In particular, Central and Eastern European candidate countries have great difficulties in adopting the environmental chapter of the *acquis communautaire*, the common body of Community legislation. The European Commission concluded in its *Agenda 2000* that 'none of the candidate countries can be expected to comply fully with the [environmental] *acquis* in the near future, given their present environmental problems and the need for massive investments' (Commission 1997a: 67). The Commission has made pessimistic statements of this kind on several occasions. So far it has only given such a bleak prognosis for the environmental sector.

Why is the Commission so pessimistic about the adoption of the environmental *acquis*? The second part of this chapter looks at the progress made so far by candidate countries in adopting EC environmental legislation. Against the background of the results of the Commission's 'screening' of the compatibility of the environmental legislation of five candidate countries with EC law in 1999 we discuss some of the difficulties which these countries face in the process of 'approximation'—the formal transposition of Community law into national law, its implementation and enforcement (Commission 1997b: 8). We particularly stress problems of implementation linked to financial and administrative constraints.

In chapter 1 above, Cowles and Smith point out that European integration 'is increasingly difficult to develop any 'grand theory' unifying the whole field of analysis' because 'there are a number of coexisting and often competing forces operating on the EU'. The history of integration is not one of absolutes but of balances and nuances. The forces driving the 'four