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INTERPRETATION AND "SOFT INTEGRATION" IN THE ADAPTATION OF THE EUROPEAN COMMUNITY'S FOREIGN ECONOMIC POLICY

Alasdair R. Young
Centre on European Political Economy
Sussex European Institute

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by the **Sussex European Institute**
University of Sussex, Arts A Building
Falmer, Brighton BN1 9QN
Tel: 01273 678578
Fax: 01273 678571
EMail sei@sussex.ac.uk

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INTERPRETATION AND "SOFT INTEGRATION" IN THE ADAPTATION OF THE EUROPEAN COMMUNITY'S FOREIGN ECONOMIC POLICY

Abstract

The legal scope of the European Community's Common Commercial Policy has changed very little since 1957. The EC, the nature of international economic interaction, and breadth of the international trade agenda, however, have changed dramatically. I argue that the EC's foreign economic policy has been able to adapt to and largely cope with these challenges through the **(re)interpretation** of the existing treaty framework and the adoption of non-legally binding modes of cooperation beyond the treaty obligations, **"soft-integration."** These processes have been propelled by persuasion. I illustrate my argument with an overview of crucial developments in the EC's foreign economic policy.

INTRODUCTION

The treaty base of the European Community's[1] Common Commercial Policy (CCP) has changed very little in substance since it was agreed in 1957. The EC and the nature of international economic interaction, on the other hand, have changed dramatically. The EC's membership has risen from six to 15 and it has, to a significant degree, become a truly common market. Trade in goods has been complemented by other forms of economic exchange, most notably foreign direct investment (FDI) and trade in services. In addition, new trade-related issues — particularly those relating to environmental protection, working conditions and competition — are coming to the fore of the international agenda. Despite only limited formal changes, however, the EC's foreign economic policy has adapted substantially and has largely coped with challenges for which its treaty base is not technically equipped.

I argue that this has occurred because of two processes: (**re)interpretation** of the existing treaty framework and **"soft integration,"** the adoption of non-legally binding modes of cooperation beyond the treaty obligations. These processes have been possible because the European institutions and EC member governments have tended to prefer political pragmatism to legal purity and because of a fairly high degree of compatibility in their interests. Both of these factors are underpinned by membership in the EC. Within the largely consensual, essentially non-coercive, milieu of the EC, these processes are propelled by persuasion, principally between the European Commission and the member governments, but also engaging non-governmental actors.

As a result of interpretation and "soft integration," the EC's informal institutions have changed. These changes have contributed to alterations in the norms and expectations regarding "appropriate" responses to external challenges and cooperation.

This paper argues that within the EC the likelihood and form of cooperation are products of the interaction between the European institutions, broadly defined, and the member governments' preferences. This implies both that there are a wide variety of forms of cooperation short of common policies and that informal institutions matter. It also suggests that integration within a policy sector can be a gradual, although not steady, process.

After situating my argument in the literature on the EC's external economic relations I shall contrast the changes in the global economic environment with the relative inertia of the EC's treaties. I shall then elaborate my argument, which draws heavily on new institutionalism, and illustrate it with a brief overview of the development of the EC's foreign economic policy. For reasons of space, I will discuss only crucial turning points and particularly illustrative examples. I will also focus on the tensions within the EC and not on the substance of the negotiations with third parties. I will conclude by drawing out some broader implications of my argument.

THE LITERATURE

Lawyers (Footer, 1998; MacLeod et al, 1996) pay the most attention to the allocation of competences between the Community and member states in external economic relations. Rich though this literature is, its focus, understandably, is on the law and its legal implications, rather than on the political forces seeking to shape the rules and to adapt to them. With relatively few and fairly fleeting exceptions (Meunier, 1998; Smith, 1994), political scientists tend to neglect the tension over competence within the EC. They focus on

[1] As my concern is with matters falling within the first pillar, I use the term European Community throughout.

the liberalising/protectionist tension with respect to the traditional components of trade policy (e.g., Hanson, 1998; Hayes, 1993); on the EC's performance in a particular negotiation (e.g., Devuyst, 1995; Woolcock and Hodges, 1996); or on the EC's relations with a particular partner (e.g., Peterson, 1996).

In addition, this article also draws attention to European Court of Justice (ECJ) judgements as valuable research resource. The ECJ, particularly in its recent opinions, provides information about the decisions taken to launch subsequently disputed negotiations and summarises submissions made to it by the European institutions and the member governments regarding the appropriate allocation of competences. It thus provides relatively hard, although usually incomplete, information about these actors' interpretations of key aspects of the treaty.

LIMITED FORMAL RESPONSE TO A CHANGING ENVIORNMENT

The Changing Global Political Economy

The global political economy has undergone dramatic changes since the late 1950s, when the EC was established. Then trade in goods was the predominant form of economic exchange. Now, although it is still very important, both trade in services and foreign direct investment have gained in prominence, particularly in the past two decades.

In addition and in parallel, the international commercial agenda has changed. In the late 1950s the principal concern was with tariffs. Only in the 1970s did the global trading system begin to turn its attention to non-tariff barriers to trade, including quotas, technical barriers to trade and other "behind-the-border" trade issues, such as public procurement. The Uruguay Round of General Agreement on Tariffs and Trade (GATT) negotiations further widened the scope of the international trade regime to encompass agriculture, services, intellectual property, and trade-related investment measures. On-going discussions in the World Trade Organisation (WTO) are taking the agenda even wider to embrace environmental protection, competition policy, and investment.

The Relatively Static Treaty

The treaty basis of the CCP, however, has not kept up with this changing environment. The core of the CCP is laid down in Article 113 of the Treaty of Rome (EEC), which confers exclusive competence on the EC. The scope of the CCP, however, is open to interpretation as Article 113 provides only an indicative list of policies that fall within it (see Box 1). Other, more general, treaty articles, such as Article 5, which establishes a general obligation to cooperate to ensure the realisation of treaty objectives, also have bearing on the conduct of the EC's foreign economic policy and play an important role in explaining its adaptability.

Subsequent changes to the CCP, however, have been modest (see Box 1). The Single European Act (SEA), despite providing the institutional impetus for the completion of the single market, did not amend the CCP, although it did authorise the EC to enter into international agreements concerning research and development and environmental matters. The Maastricht Treaty on European Union (TEU) did make some modifications to the CCP, but none, despite the Commission's efforts, that substantially affected its scope. The TEU also bestowed express powers of the EC in the context of monetary union and of development cooperation. The Treaty of Amsterdam, to which I will turn in greater detail below, amended Article 113, but only so far as to establish a mechanism whereby the scope

of the CCP could be extended to international negotiations and agreements on services and intellectual property, insofar as they are not already covered by the CCP.

Box 1: Amendments to the Scope of the CCP (Art. 113)

1. ~~After the transitional period has ended, t~~The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.

   ...

3. Where agreements with ~~third countries~~ one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations.

   ...

5. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property insofar as they are not covered by these paragraphs.

Notes: Stuck through and underlined text represent amendments made by the TEU. Bold text was added by the Treaty of Amsterdam.

The treaty base has changed so little while the global economy and the EC have changed so much for the simple reason that some member states, particularly the larger ones, have been reluctant to cede broader competence to the EC (Bourgeois, 1987; Hayes, 1993). There are several reasons for this. First, there is concern that, because of the need to find agreement among the member governments, the EC might be unable to act, while the member governments would be prevented from acting individually, thus producing paralysis. Second, if the EC does have competence and does act, a member government might find itself in the minority. The need for unanimous support for treaty changes compounds institutional "stickiness." Only one government needs to be opposed for progress to be stymied.

THE ARGUMENT

Despite the growing gap between the changing demands made on the EC and its formal institutional capacity, the EC, as its performance during the Uruguay Round illustrates, has, for the most part, managed quite well. The core of my argument is that this is because the EC's foreign economic policy has developed informally, supplemented and complemented by ECJ jurisprudence. This development can be understood as the result of the dynamic interaction between the compatibility of the preferences of the member governments, the European Commission and economic interests through the medium of the EC's institutional framework, broadly defined. This interaction involves how actors interpret existing institutions and the role that the institutional framework plays in persuading the member governments to seek collective solutions, even outside the formal requirements of the treaties.

The likelihood and form of cooperation on any given issue is depicted in Figure 1.

Figure 1: Propensity to Cooperate

robustness of institutions/ degree of preference congruence	low	moderate	high
high	collective approach	collective policy	common policy
moderate	coordination	cooperation	common policy
low	unilateral action	limited unilateral action	policy paralysis

Institutions

The importance of the EC's institutions in shaping policy is well established (Armstrong and Bulmer, 1998; Bulmer, 1998; Peterson, 1995; Pierson, 1996; Sandholtz, 1996; Wallace, 1996). The core of the EC's institutional framework is the *acquis communautaire*, which is composed of the treaties, ECJ judgements, and secondary legislation. The institutional framework, however, also encompasses informal institutions, conventions, norms and symbols embedded in the institutions (Armstrong and Bulmer, 1998; Hall, 1986; Thelen and Stienmo, 1992).

The impact of the EC's institutional framework on whether the member governments cooperate can vary widely between issues (Armstrong and Bulmer, 1998; Wallace, 1996). It is greatest where the EC has exclusive competence, such as in the CCP (the right-hand column in Figure 1). In such circumstances the member governments are precluded from taking unilateral action; only the EC may act. The institutional framework is much less robust where the member states retain competence (the left-hand column). In such circumstances, unilateral action might be possible and the case for collective action would have to be sold and bought.

The conduct of the EC's foreign economic policy, however, is not shaped only by the internal institutions. The international arenas in which negotiations take place also influence cooperation. Within the GATT/WTO context there is a long established, and largely accepted, practice, related to the common external tariff, of the EC speaking with one voice (Johnson, 1998). This requires a common position. In other international fora, such as the Organisation for Economic Cooperation and Development and the United Nations' subordinate bodies, such practice is not so established, and agreeing to act collectively has proved more difficult.

Preferences

The member governments' preferences (defined here as preferred policy options for realising specific interests) are not static and are the product of a complex interaction of decision-makers' interests and the interests of domestic non-governmental actors mediated through domestic societal and political institutions (Garrett and Lange, 1995; March and Olsen, 1984; Thelen and Stienmo, 1992). External circumstances — such as increased economic competition, greater economic interdependence, and the extension of the *acquis* — can lead actors' preferences to change; new challenges arise, old policy options are foreclosed or rendered ineffective, or new policy possibilities are created.

Significantly, countries do not need to share the same preferences in order to cooperate; their preferences need merely be compatible (Axelrod and Keohane, 1985; Wallace, 1996). For cooperation to occur in new areas of policy, however, their preferences must be compatible in two dimensions: the substance of the policy and the level of governance at which it is considered most appropriate to act (Wallace, 1983).

At which level of governance policy should be pursued is influenced by what March and Olsen (1998: 8) have called the "logic of appropriateness," in which the identities and aspirations of actors affect which rules are considered most appropriate. Institutions (including, in this instance, membership in the EC) help to define accepted and legitimate modes of behaviour (March and Olsen, 1998; Risse-Kappen, 1996; Thelen and Stienmo, 1992). On issues in which the EC has exclusive competence (right-hand column of Figure 1), the "logic of appropriateness" is moot; only EC action is possible.

Significantly, there has tended to be a quite high degree of congruence in the member governments' preferences with respect to foreign economic policy. This congruence is due to several factors. First, decision making is generally by consensus, which enables each member government, within limits, to safeguard its vital interests. Second, there is a general recognition of the benefits of a common position in external negotiations, even if on occasion that position is not exactly what a member government would have chosen if acting independently (Johnson, 1998). Third, participation in the EC is valued in and of itself (Sandholtz, 1996), and thus so is constructive engagement. This is best demonstrated by the German government, which at least until the early 1980s, tended to make concessions in trade policy for the sake of Community solidarity (Hayes, 1993).

There are and have been several issues on which the member governments' preferences have not been compatible, including agriculture and textiles during the Uruguay Round and civil aviation. The EC's ability to act effectively in such circumstances is heavily influenced by the robustness of its institutional framework.

"Soft integration"

Where the EC's institutional framework is weak, but member governments' preferences converge (the shade area in Figure 1), the member governments are likely to engage in extra-treaty cooperation. In such situations the member governments and the Commission often resort to non-legally binding arrangements — including codes of conduct and Council Resolutions — which set down common standards of behaviour and thus facilitate cooperation.

A number of scholars (Armstrong and Bulmer, 1998; Cram, 1997; Matthews and Mayes, 1994; Wellens and Borchardt, 1989) have identified the importance of such "soft law" arrangements in EC policy-making. Such non-legal approaches are particularly used in new areas of policy (Cram, 1997), but over time become part of the "policy inheritance," which frames policy in a particular area (Armstrong and Bulmer, 1998: 72). I use the term "soft integration" to refer to such non-legally binding arrangements between the member governments, rather than between public and private actors or among private actors.

Although such "soft law" arrangements are not themselves legally binding, they can lay the groundwork for future, legally binding measures (Armstrong and Bulmer, 1998; Cram, 1997). In part this occurs because such cooperation might become accepted as "appropriate" behaviour. In addition, certain actors might seek to use previous instances of extra-treaty cooperation as precedents for legal binding measures.

A Dynamic Interaction

As the previous discussion suggests, membership in the EC involves iterated interaction. Figure 1 is essentially a static depiction; a snapshot of a single instance of cooperation/non-cooperation. Iteration implies that there is a dynamic element that links discrete instances of cooperation. This interaction can contribute to both greater institutionalisation and closer congruence of member government preferences.

A shift to the right in Figure 1 represents increasing integration, which can occur as the result of a treaty change or a (re)interpretation of existing institutions. Because institutions affect preferences, such a shift might also contribute to an increase in the congruence of the member governments' preferences. The congruence of the member governments' preferences might also increase as cooperation becomes accepted as the "appropriate" response to external challenges. Processes of persuasion are important both in reinterpretations of existing institutions and in defining what is appropriate behaviour.

Interpretation

Although in the EC context institutional change occurs most obviously in the periodic amendments to the treaties agreed at intergovernmental conferences (IGCs), the EC's institutional framework is also constantly evolving. This can occur formally (as a result of an ECJ judgement); "automatically" (as socio-economic changes lead to latent institutions becoming relevant (Thelen and Stienmo,1992)); or informally (as actors' agree on new uses for existing institutions).

All three processes have been evident in the adaptation of the EC's foreign economic policy. The ECJ's judgements have been extremely important (MacLeod, et al, 1996; Weiler, 1991), because it has tended to interpret broadly, rather than literally, the provisions of the treaties conferring powers on the EC. This process has been facilitated with respect to foreign economic policy by the "open nature" of the CCP (ECJ, 1994: I-5271). The ECJ's interpretation of the CCP has also taken account the changing nature of global economic interaction (MacLeod et al, 1996; Pescatore, 1981). The ECJ's judgements, however, particularly because they address only a specific case, need to be interpreted and applied by other actors for them to have more general political effect (Alter and Meunier-Aitsahalia, 1994).

Most significantly for the allocation of competence, the ECJ's jurisprudence (described below) has established the doctrine of implied powers; which implies that as internal competences increase and expand, external competences are also enhanced and extended (Smith, 1994). Thus there is a degree of "spillover" from the internal to the external. As a consequence, the acceleration of internal regulatory alignment under the single market programme has had profound implications for the conduct of the EC's foreign economic policy, without any changes to the institutional framework itself.

There have also been occasions on which the member governments have agreed to use the mechanisms of the CCP to pursue extra-treaty policies. These include using the "new commercial policy instrument" to defend intellectual property rights abroad and Article-113-like procedures to negotiate the EC-US steel agreement in the early 1980s (see below).

Persuasion

Persuasion processes are particularly important when actors are trying to decide whether to pursue objectives collectively (Majone, 1989; March and Olsen, 1998; Risse-Kappen, 1996).

They thus plays an important role in determining the willingness of actors to accept a new applications of existing institutions or extra-treaty forms of cooperation.

Precedents, the ways in which different but analogous issues were addressed in the past, are often invoked in the persuasion process. If a precedent is accepted as valid, the associated past practices, habits of cooperation and previous experiences become relevant to determining the likelihood and form of future cooperation. The extensive experience of cooperation within the EC among a relatively small group of specialist officials, therefore, helps to create a fertile environment for further cooperation (Johnson, 1998; Interview, 24/3/98).

Armstrong and Bulmer (1998: 72) argue that each EC policy area reflects a unique "inheritance," which is composed of the gradual accumulation of non-policies (i.e., soft law) and past policy decisions. Foreign economic policy is no exception. The Commission has sought to use precedents to buttress its case for extending competence in external economic relations by citing previous Council Declarations in one policy area to support its proposals for common action in other areas and by seeking to use implied competence in one area as a precedent for acquiring competence in another (ECJ, 1994; Smith, 1994). This might be called "intellectual spillover." Consequently, member governments are cautious about engaging in extra-treaty cooperation in case doing so sets a precedent that they might later regret (Interview, 24/3/98).

Persuasion, however, is not only about communicative processes; it can also have a sharp edge. Actors, particularly the Commission, can create incentives for or against pursuing collective policies (Schmidt, 1997; Wallace, 1996). On several occasions, the Commission has used its role as guardian of the treaties and power to implement competition policy to create default options that are unattractive to the member governments if they fail to agree to common policies. By doing so, it enhances the relative attractiveness of cooperation (Schmidt, 1997).

THE ADAPTATION OF THE EC'S FOREIGN ECONOMIC POLICY

The persistent tension between member state and Community competence has focused on three distinct, but related, issues: voice, competence and legal base. The issue of voice concerns whether or not the EC and its member states will speak as one in international negotiations. This, obviously, requires that they agree a common position. As mentioned above, the issue of voice is not particularly troublesome within the GATT/WTO context even when the EC does not have exclusive competence (Johnson, 1998). In fact, the member governments adopted a common position during the Dillon Round of GATT negotiations (1961-62), which took place well before the establishment of the common external tariff required them to do so (Johnson, 1998). When issues for which the EC is competent are at stake, the EC and its member states must negotiate with one voice.

As alluded to above, however, the EC frequently does not have exclusive competence. The allocation of competence has often been the subject of disputes between the Commission and the member states (see further below). Some of the sting has been taken out of the issue through the use of so-called "mixed agreements," in which both the EC and the member states participate. This helps them to avoid divisive arguments over the precise allocation of competence (Commission, 1985). Mixed agreements do, however, require the support of all of the member governments, not just a qualified majority, which can have implications for the common position adopted. On numerous occasions, including the Uruguay Round, the EC has negotiated mixed agreements with one voice. Interestingly, there is no provision for

such agreements in the Treaty of Rome (EEC), although there is in the Treaty of Rome (Euratom).

To the extent that the EC is competent to conclude an agreement, the legal base is significant. This because some treaty articles, notably Article 113, bestow exclusive competence on the EC. Although other articles, due to the doctrine of implied powers, can also bestow exclusive competence on the EC, they are more open to interpretation and thus are less threatening to the member states as precedents.

The Role of the Court

During the 1970s there was a "mutation" of competences in foreign economic policy (Weiler, 1991: 2431), the keystone of which was the ECJ's 1971 *ERTA* judgement (Case 20/70). The case was brought by the Commission, which objected to the member governments having negotiated the European Road Transport Agreement on the grounds that, as the agreement involved a matter arising out of the common transport policy and governed by EC law within the member states, only the EC could participate in the negotiations. Although the negotiations were conducted by the member states, they had coordinated their positions in the Council of Ministers.

The central question was the allocation of competences between the EC and the member states, and the Court's answer has had profound implications for the adaptation of the EC's foreign economic policy. It ruled that:

> each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules ... the Member States no longer have the right ... to undertake obligations with third countries which affect those rules or alter their scope (ECJ, 1971: 264).

Thus, even though it rejected the Commission's submission on practical grounds, the Court established the doctrine of implied powers.

Several other pivotal cases during the 1970s further clarified (and extended) the content of the EC's express and implied powers in foreign economic relations. The Court built upon *ERTA* in its Opinion 1/76 (*Rhine Navigation)*, in which it ruled that despite the absence of internal rules or express provisions, the EC has authority to enter into international commitments necessary for attaining specific objectives created by EC law. Opinion 1/78 on the *Draft Agreement on Natural Rubber* clarified that Article 113 implies exclusive EC competence; that the EC may develop common policies aimed at the regulation of world trade as well as its liberalisation; and that the essential objective of an agreement should be considered when assessing whether it fits within the scope of Article 113 (Bourgeois, 1981).

The Tokyo Round

Although the scope of the CCP had expanded considerably during the 1970s, it was still tested by the Tokyo Round of GATT negotiations, which were concluded in 1979. Specifically, the Round went beyond addressing tariffs and quotas and began to grapple with technical barriers to trade.

Initially the negotiations did not pose any particular problems for the EC. The Council issued a negotiating directive in February 1975, and the Commission, in consultation with the Council's 113 Committee, conducted the negotiations, periodically returning to the Council for the modification of the directive.

The allocation of competence did not become an issue until two months before the negotiations were due to conclude (Bourgeois, 1982). The agreements on TBTs were the sticking point. Some member governments questioned the EC's competence to conclude agreements on TBTs at all, while others considered that at least some of the agreements did not fall within the scope of Article 113 (Bourgeois, 1982).

The substance of the agreement was not at issue. In April the Council accepted the results of the negotiations and gave the Commission the go-ahead to initial the texts on behalf of the EC. By the autumn, however, the competence issue had become acute.

The nature of the debate changed, however, following the ECJ's Opinion 1/78, which was issued on 4 October. In the light of the judgement, the Council's lawyers and some member governments, at least, accepted the Commission's view that Article 113 conferred on the EC the necessary powers to conclude all of the agreements (Bourgeois, 1982; Pescatore, 1981).

The British and French governments, however, were not convinced. They were particularly concerned that the member states should also conclude the codes on standards and civil aircraft. After "arduous" discussions in the Council and its subordinate bodies and faced with a US imposed deadline[2] for acceptance, a compromise was reached on 20 November (Bourgeois, 1982: 21). As a consequence, with the exception of the protocol on tariffs relating to European Coal and Steel Community (ECSC) products, all of the agreements were concluded by the Commission. The standards and civil aircraft codes, however, were also concluded by the member states. Thus the tool of a "mixed" agreement was employed to settle an awkward issue. In addition, an internal procedure was agreed which permitted member governments to take national safeguard measures against third countries that did not offer concessions regarding the certification of products (*Agence Europe*, 22 Nov. 1979). The Commission, as it made clear in its written answers to parliamentary questions (*Official Journal*, C105/31 and C137/36, 1980), was dissatisfied with this solution and stuck by its position that the EC was competent to conclude all of the agreements save the protocol on ECSC products.

The EC-US Steel Agreement

As the solution to the competence question in the Tokyo Round illustrates, ECSC products have a special place in the EC's external trade relations. This is due to coal and steel being subject to a separate treaty base: the 1951 Treaty of Paris. The Treaty of Paris confers few express external trade powers on the European institutions and states expressly (Article 71) that beyond those provisions it does not affect the member states' powers with respect to commercial policy. The contrast between the Treaties of Paris and Rome with respect to external economic relations contributed to some legal uncertainty and some "rather untidy" practice with regard to trade policy in coal and steel (Benyon and Bourgeois, 1984: 339).

This awkward internal situation was put to the test by a spate of anti-dumping and countervailing duty (CVD) cases brought by the US steel industry against EC exporters in the early 1980s. These measures threatened the EC's plans for restructuring its own steel industry, which was suffering from over capacity. Initially the Commission raised the anti-dumping and CVD cases with US officials in its regular high-level consultations and it reported to the Council as if operating under the CCP (Benyon and Bourgeois, 1984). After talks aimed at resolving the situation through "suspension agreements" failed, the

[2] Under the USA Trade Agreements Act, if each major industrial country had not also accepted certain agreements before 1 January 1980, the US implementing legislation would not enter into force.

Commission requested and got a Council Decision empowering it to negotiate on behalf of the EC.

This was an extra-treaty response to a difficult situation. The authorisation was granted by the Council, as if under the Treaty of Rome (EEC), rather than by the representatives of the member states, as under the Treaty of Paris. Further, the authorisation was for an agreement by the Community as a whole, in contrast to the "suspension agreements," which would have just affected the four targeted member states (Benyon and Bourgeois, 1984).

The negotiations were concluded with the EC agreeing to restrict its exports to the US in exchange for the US steel industry agreeing to withdraw its requests for contingent protection and pledging not to file new petitions during the period of the arrangement. The Commission, however, still had to sell the agreement to the member governments.

Despite its efforts to avoid antagonising the member governments by not treating the whole agreement as falling under Article 113 (Benyon and Bourgeois, 1984), the Dutch and British governments wanted to ensure that the member states' prerogatives regarding external trade in ECSC products were protected (*Agence Europe*, 9 Oct. 1982). In particular, they objected to the implication that part of the agreement was being adopted by the ECSC and not by the member states (Benyon and Bourgeois, 1984). Their concern was this would set a precedent for future agreements. The Commission, however, held its ground regarding the legal base, but agreed to include in the preamble of the its Decision (2871/82/ECSC) a statement that the Decision did not affect the commercial policy powers of the member states (Benyon and Bourgeois, 1984). Thus the potential of the arrangement to act as a precedent was constrained.

Matters of substance proved the final sticking point. The German government was unhappy that the internal allocation of quotas would unduly hurt German steel producers, which were not subject to the US anti-dumping and CVD investigations (*Agence Europe*, 16 Oct. 1982). Following some last minute, largely internal, concessions, under pressure from the US Commerce Department's imminent decision to introduce protective measures, and in the name of Community solidarity, the member governments unanimously approved the arrangement (Benyon and Bourgeois, 1984).

The Uruguay Round

Many of the awkward issues discussed above were revisited and amplified upon in the Uruguay Round of GATT negotiations, which began in 1986. These negotiations embraced a far wider range of issues than had been considered before in multilateral trade negotiations. Agriculture, services, intellectual property and investment measures were all brought under the GATT rubric. All but the first (agriculture) of these new issues raised competence questions for the EC.[3]

The member governments, however, used to negotiating collectively and aware of the increased negotiating leverage that a collective position would bring, agreed to negotiate with one voice even in areas of mixed competence (Johnson, 1998; Woolcock and Hodges, 1996). The minutes of the meeting at which the Council approved the Punta del Este declaration launching the Uruguay Round, however, state that the decision authorising the Commission

[3] There was a disagreement between the Commission and the member governments regarding whether Article 113 alone was an adequate legal base for adopting the agreement on agriculture or whether it should be based on Article 43 as well.

to open the negotiations "does not prejudge the question of the competence of the Community or the Member States on particular issues" (quoted in ECJ, 1994: 5282).

The fact that competence was mixed in some areas, however, did not impede the conduct of the EC's negotiations. This was because the member governments maintained close scrutiny of the Commission during the negotiations and because of the broad support among the member governments for the positions being pursued, particularly with respect to trade-relate intellectual property issues (TRIPs). Cooperation in services was facilitated by the adoption of internal measures as part of the single market programme and by the positive-list approach adopted under the General Agreement on Trade in Services (GATS), which enabled the EC's schedule of commitments to be a compilation of national schedules.

The Post-Uruguay Round Negotiations

Although the Uruguay Round negotiations were formally concluded in December 1993, the participants felt that progress on certain key issues related to the GATS — the movement of natural persons supplying services, financial services, basic telecommunications, and maritime transport — had not been satisfactory and they agreed to continue negotiations. These issues involved mixed competences. In addition, without the broader sectoral coverage of the Uruguay Round, in which the weight of EC competence was greater, the issue of the division of competence was more pressing and the means of negotiating less clear. These issues were addressed by a code of conduct drawn up between the member governments, the Council and the Commission and agreed at the General Affairs Council in May 1994.

The code of conduct, without settling the distribution of competences, enabled the Commission to negotiate on behalf of the EC and its member states. There was, however, some difference of opinion regarding how negotiating positions should be reached. The Council specified that with respect to issues of national competence negotiating positions should be agreed by consensus, while the Commission declared only that "every effort should be made to reach consensus" (quoted in ECJ, 1994: I-5366). There were no explicit provisions concerning what happens in the absence of a common position.

In the end, because of the development of internal EC regimes in financial services and telecommunications and the positive list approach of the GATS, the code of conduct was not seriously tested.

Opinion 1/94

The competence issue really became pressing when it came to adopting the Uruguay Round agreement. Most of the member governments insisted, contrary to the Commission's position, that not all of the agreement could be ratified under Article 228 (*Financial Times*, 15 Sept. 1994). In April 1994 the Commission asked the Court for its opinion.

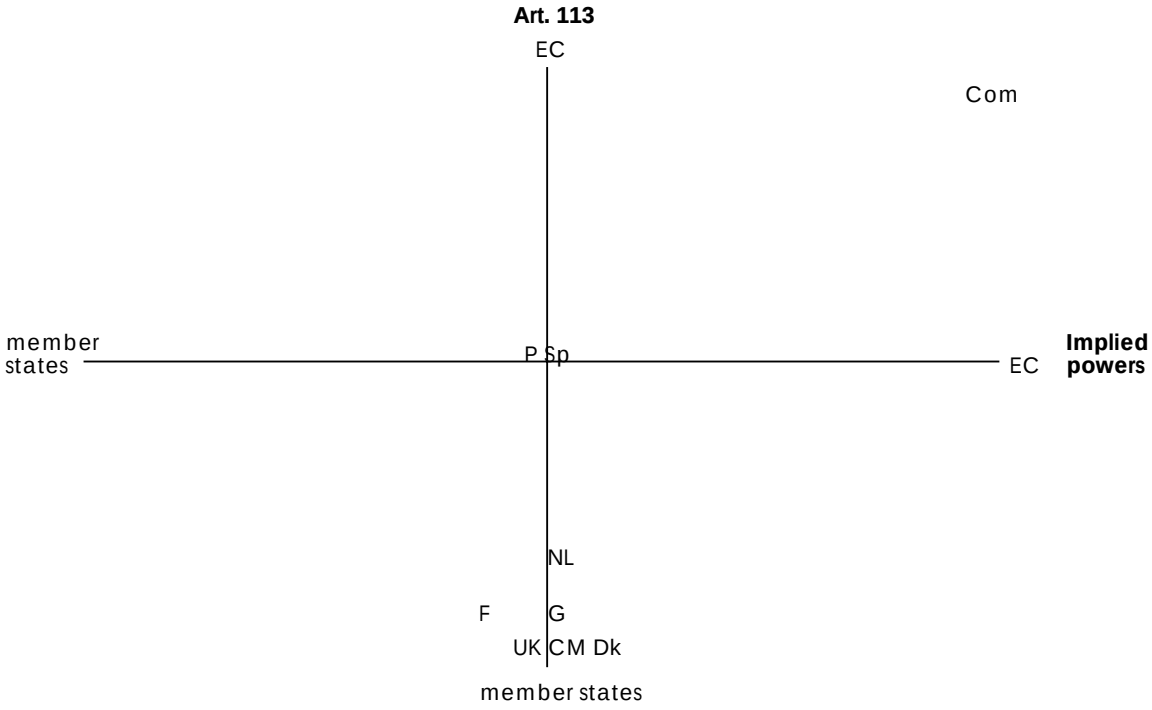
Concerned that the Court would deliver another integrationist judgement, the British, French and German governments sought to head off the ECJ's judgement by proposing a code of conduct to govern the behaviour of the Commission, Council and member states in the WTO (Devuyst, 1995). The proposed code took account of the Code of Conduct on Post-Uruguay Round Negotiations on Services and would have given the Commission the role of sole negotiator except in exceptional circumstances.[4] However, a formulation that satisfied

[4] From the German government's "Initial Draft Code of Conduct" quoted in *Inside US Trade*, 23 Sept. 1994.

all of the member governments, particularly Belgium's, and the Commission could not be found in time (*European Report*, 12 Oct. 1994), and the ECJ's hearing went ahead.

The Council and the British, Danish and French governments objected that by requesting the Court's opinion the Commission was seeking to implement, "by means of judicial interpretation," proposals which had been rejected in the 1991 IGC (ECJ, 1994: I-5306). The Commission claimed that the CCP gave the EC exclusive competence with regard to both the GATS and TRIPs. In the event that the ECJ did not agree with its interpretation of the CCP, the Commission argued that the EC had exclusive competence by virtue of the doctrine of implied powers (ECJ, 1994). Although there were some differences of opinion among the Council and the member governments that made submissions to the Court, all interpreted Article 113 and the extent of the EC's implied external powers much more narrowly than did the Commission. Figure 2 depicts the various interpretations of the allocation of competence under Article 113 and the doctrine of implied powers with respect to the GATS.

Figure 2. Interpretations of the Allocation of Competence with respect to GATS



Based on submissions reported in ECJ, 1994.

At least some of the member governments that did not make submissions to the ECJ may have been more sympathetic to the Commission's position. The Belgian government, for example, in a related and parallel case, argued that the CCP "could easily be transposed to the area of services" (ECJ, 1995: I-537).

Opinion 1/94, however, did not dramatically advance integration. Although not entirely negative for the EC, it represented a "step back" from the dynamic interpretation of the CCP and from the doctrine of implied external powers (Bourgeois, 1995: 779-80). The Court confirmed that although the cross-border supply of services falls within the scope of Article 113, the other modes of supply — consumption abroad, commercial presence and presence of natural persons — do not. Further, it ruled that the chapters of the treaty dealing with the right of establishment and freedom to provide services do not expressly extend that

competence to external relations and that the preservation of the single market does not justify the conclusion of the GATS by the EC alone. It also ruled that although the EC has competence with respect to harmonising intellectual property rights, it had not yet exercised them internally and so could not claim exclusive external competence.

The Court, however, stressed that in areas of mixed competence the need for external unity means that it is essential that there be close cooperation between the member states, Council and Commission during negotiations and in the conclusion and implementation of agreements. This is particularly so in the WTO context. Thus, non-treaty-specific forms of cooperation were advocated as the means of bridging the gap between competences and necessity.

HIGH POLITICS AND LIMITED CHANGE

Following the Court's Opinion the institutional foundation of the EC's foreign economic policy was more complicated than ever. Renewed calls for a code of conduct, however, came to nought, in part because the Commission and some of the governments of the smaller member states, including some of the new members, saw the 1996 IGC as an opportunity to clarify the situation.

The Commission, thus, rejoined the battle it had lost at Maastricht to radically reform the CCP. It argued that reform was necessary as Opinion 1/94 had rendered the it's previous "dynamic interpretation" of the CCP "obsolete," while "the structure of Community law [had] manifestly been over taken by commercial reality" (Commission, 1995: 58).

The majority of the member governments, however, were not enthusiastic. Some did not see the need for change as the Uruguay Round negotiations had demonstrated that the EC could negotiate effectively without institutional reforms. Others, while supporting strengthening the treaty and ensuring that the EC negotiate with one voice, opposed ceding additional competences (CRGMS, 1996).

The Commission, however, did have some support among the member governments. During the preparations for the IGC, some member governments advocated extending Article 113 to cover commercial policy as a whole, including services and intellectual property (Reflection Group, 1995). The Irish Presidency's draft treaty reflected this, amending Article 113 to extend the EC's competence to services, intellectual property and FDI within the WTO (CRGMS, 1996). The Dutch government, which took over the Presidency in January 1997, despite strong resistance from France and the UK, continued to propose the extension of Article 113. The scope of this extension, however, was steadily reduced during the spring, as an acceptable compromise was sought.

In the end the most reluctant member governments succeeded in limiting change. The Treaty of Amsterdam does not extend the scope of the CCP, but it does establish a mechanism under which the member governments can, by unanimous assent on a proposal from the Commission, amend Article 113 to include services and intellectual property without requiring an IGC. Such limited progress is not surprising given the need for unanimity and the other, bigger issues on the Amsterdam agenda. Rather the compromise reflected the most that some member governments were willing to accept at the time, while recognising that in the long-run the EC will have to find a consistent basis for negotiations in all areas of international trade (Johnson, 1998).

CONCLUSIONS

The EC's foreign economic policy has clearly adapted to the challenges confronting it. It has done so with very limited modifications to the formal institutions of the CCP. This paper argues that interpretation and "soft integration" have played an important part in that adaptation. Although this proposition clearly needs further, more detailed and systematic investigation, it suggests that the EC's institutions are more malleable than they might at first appear and that European integration is much more than a series of quantum leaps in intergovernmental conferences, but is a continuous, if uneven, process of institutional adaptation.

These processes may also have significant implications for the future conduct of the EC's foreign economic policy, because the allocation of competence and the content of policy are linked. How competences are allocated and how that allocation is managed shape the impact of the EC's institutions on how the member governments' preferences are aggregated, and thus whether they pursue a common approach, and if so what their position is. Further, the allocation of competence may also affect the EC's negotiating leverage (Meunier, 1998). By elaborating how the EC's institutional framework has adapted to cope with new trade issues, this paper, therefore, provides a first step towards understanding EC policy in non-traditional trade issues and how much impact it might have on the global trading system.

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