

**What Game? By Which Rules?
Adaptation and Flexibility in the EC's Foreign Economic Policy¹**

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INTRODUCTION

Whatever its shortcomings in foreign and security policy, the European Community is now generally accepted as an international actor in economic affairs. Despite an extensive literature, however, how this international organisation functions as an international actor is still poorly understood. I argue that the failure to come to grips with the complexity and subtlety of the EC's role as an international economic actor stems from an insufficiently nuanced application of Robert Putnam's (1988) two-level game metaphor.

This lack of nuance has been sustained because most studies of EC foreign economic policy focus narrowly on trade in goods and only on specific international negotiations. By broadening the scope of investigation beyond trade in goods and by situating it in a historical context, this chapter reveals a much more dynamic process in which the EC's dual nature as an international organisation and international actor plays a central role. Although it may seem like stating the obvious to point out that the EC is an international organisation, many analyses, while acknowledging that fact, fail to engage fully with the implications for the EC's foreign economic policy.

By depicting the EC as a flexible framework for cooperation, this analysis helps to explain why the EC is a more effective international actor across a broader array of issues than a narrow focus on formal institutions would suggest. This chapter, also, raises implications for how the multilevel-game metaphor might be better applied to the EC and, by extension, to other political systems.

I begin with a brief exposition of the multilevel-game metaphor and its popularity in analyses of the EC's foreign economic policy. I then address two shortcomings in the literature: not adequately problematising cooperation; and understating the impact of interdependencies between EC member states on the power relations among them. I illustrate these criticisms with a focused overview of the development of the EC's foreign economic policy. In the light of this assessment, I discuss the most recent and most significant change to the EC's formal foreign economic policy institutions -- the 2001 Treaty of Nice. I conclude by reflecting on how best to understand the EC's capacity as an international economic actor and on how to better apply the multilevel-game metaphor.

THE MULTILEVEL GAME AND ITS POPULARITY

Analyses of international cooperation tend to focus on either structural (international) factors (e.g., neo-realism, interdependence theory) or on domestic factors (society-centred, state-centred or state-society) (Gourevitch, 1978; Moravcsik, 1993). In the international approaches the reactions of states to particular problems are driven by their places in the international system. In the domestic approaches, state behaviour is explained by domestic politics. The two-level-game metaphor provides a framework for analysing the interaction between domestic and international factors on international bargaining (Evans, et al, 1993; Putnam, 1988; Milner, 1997).

In the two-level game the negotiator operates on two ‘tables’ at once: the domestic and the international. Diplomatic options, therefore, are constrained by what the other negotiators will accept and what domestic constituents will ratify. The range of possible outcomes that would command sufficient domestic support for ratification is referred to as the ‘win set.’ The worse the alternative to international cooperation (the higher the cost of no agreement), the larger the domestic win-set is. Any international agreement must fall within the win-sets of all of the participating governments (see Figure 1). One implication of this is that within these constraints, the negotiator has autonomy in choosing the outcome that (s)he prefers.

[INSERT FIGURE 1 NEAR HERE]

Recent analyses of EC external economic relations draw, either explicitly or implicitly, on Putnam’s metaphor. Most often the EC is treated as a third level between the international and national levels (Collinson, 1999; Meunier, 1998; Odell, 1993; Patterson, 1997). Some authors (Devuyst, 1995) treat the EC itself as the ‘domestic’ level in a two-level game.

Treating the EC’s participation in international negotiations as a three-level game actually means linking two two-level games at the EC level (see Figure 2). In one game the EC is the international level (Level I in the parlance) at which the member governments representing their domestic interests (Level II) seek to find a common position. In the second game the EC is the domestic level (Level II) and the Commission (or the Council presidency) negotiates at the international level (Level I). Level I in the first game and Level II in the second game are the same game on the same level, but looking in opposite directions.

[INSERT FIGURE 2 NEAR HERE]

One implication of this double two-level game is that, all else being equal, one might expect the EC’s win-set to be smaller than those of other governments. This is due to the EC’s win-set being the product of a pre-negotiation among (currently) fifteen governments before negotiating with other partners. In some circumstances, at least, this lends the EC enhanced negotiating leverage (Meunier, 1998), but contributes to it being a rather unwieldy negotiating partner.

As the subsequent discussion will illustrate, the fact that the EC is an international organisation raises additional implications for the application of the metaphor: who is the negotiator? what are the mechanisms for overseeing the negotiator? what are the rules of ratification? None of these implications invalidate the metaphor’s application to the EC, but they do suggest that care is needed when applying the metaphor.

SHORTCOMINGS OF THE PREVAILING APPROACH

Although conceptualising the EC’s participation in international negotiations as a three-level game is valuable, its application has been insufficiently sophisticated (Young, 2001). First, cooperation among the EC’s member governments is treated as the only option; a three-level game is the only game in town. Under certain circumstances, however, the member governments have a choice about whether to cooperate in international negotiation or to participate unilaterally (a choice between three- and two-level games).

Second, the influence of the EC's institutional framework tends to be reduced to the impact of qualified majority voting and the Commission's role as negotiator on whether EC policy is protectionist or liberal (see, for example, Bilal, 1998; Hayes, 1993; Johnson, 1998; Meunier, 1998; Meunier and Nicolaïdis, 1999; Wolf, 1983). When the member governments do not have to cooperate, but choose to, they have to decide who will negotiate on their behalf and how they will structure their cooperation. In addition, whether cooperation is required or not, the high level of interdependence among the member governments shapes their preferences regarding international negotiations and the power relations among them (Hanson, 1998; Smith, 2001).

The shortcomings in the prevailing analysis have been obscured by the empirical focus on trade in goods within the scope of the EC's common commercial policy. Such a focus is understandable as only since the mid-1980s have other trade issues – such as trade in services, foreign direct investment, competition policy, environmental policy – gained a heightened degree of prominence on the international agenda. When negotiating on issues within the common commercial policy, the member governments must cooperate and the procedures for cooperation and ratification are well established. Such traditional at-the-border measures affecting trade in goods, however, have never been the sole subject of international trade negotiations and have become even less so since the mid-1980s.

This narrow substantive focus has been compounded by the narrow temporal focus of most analyses. The tendency to look at only a specific negotiation, while understandable, means that the development of the EC's foreign economic policy over time is missed. In such snap shots the EC's institutional framework appears fixed. Extending the focus over time, however, reveals significant adaptation.

By broadening the empirical focus beyond trade in goods and by exploring the evolution of the EC's foreign economic policy since its inception, this chapter illuminates these shortcomings.

THE DYNAMICS OF EC FOREIGN ECONOMIC POLICY

The picture of EC foreign economic policy depicted in this chapter is both messier and more adaptable than is usually presented. The crux of the argument is that because the EC is an international organisation, the power relations between the member governments and the EC as such and among the member governments profoundly shape the EC's capacity as an international actor. These relationships are in tension and, over time, new equilibria are established until accumulated tension makes them not longer adequate. The result is an uneven and sporadic process of political and institutional adaptation.

Limited Treaty change

The EC is the world's most highly institutionalised international organisation. The most fundamental impact of the EC's institutional framework, known collectively as *acquis communautaire*,² on foreign economic policy is in determining whether authority (competence in EC parlance) for particular issues resides with the EC, the

² The EC's treaties, European Court of Justice judgements, secondary legislation and the norms and principles embedded in them.

member states or both. In other words, the *acquis* determines whether the member governments must participate in international negotiations through the EC or if they can choose to participate unilaterally. Where exclusive external competence resides with the EC (as is the case with trade in goods), the member governments cannot pursue unilateral policies. In such circumstances the *acquis* establishes clear procedures, and decision rules facilitate collective participation in international negotiations. Where competence resides with the member states, the governments can choose whether or not to cooperate at the European level in order to influence international negotiations. If they choose to cooperate, they must also agree on how to cooperate.

Disputes about the allocation of competence between the EC and its member states have been a persistent feature of EC foreign economic policy since the signing of the Treaty of Rome in 1957. The keystone of the EC's foreign economic policy, the common commercial policy, was the product of two cross-cutting tensions: liberal versus protectionist; strong Commission role versus strong member government role (Lindberg, 1963; Moravcsik, 1998). The ensuing compromise included an open-ended definition of the scope of the common commercial policy (see Box 1). It provided only an indicative list of commercial policy instruments, leaving open the question of precisely where the boundary between EC and member state authority lies. This indicative list reflected the main preoccupations of the time — tariffs and quantitative restrictions — but meant that the policy did not include many elements that later became the subject of multilateral negotiations. The scope of the common commercial policy in the Treaty was not altered until the February 2001 Treaty of Nice (to which I return below).³

[INSERT BOX 1 NEAR HERE]

The creative tension of adaptation

The EC's member governments and the European Commission have repeatedly agreed to cooperate beyond what is strictly required by the legal allocation of competence. Such 'soft' cooperation has been facilitated by non-binding arrangements — 'soft' institutions — which clarify who will negotiate and how common positions will be agreed. Significantly, the frequent disagreements over the allocation of competence have tended to come after the internal cooperation has succeeded and the external agreement has been concluded.

The European Court of Justice (ECJ), in passing judgement on the compatibility of the resulting arrangements with the Treaty's provisions, changes the institutional backdrop against which cooperation in the next international negotiation must be decided. Yet it is up to the member governments and the Commission to interpret and apply the implications of the Court's judgements.

The following history of the EC's foreign economic policy focuses on five pivotal negotiations conducted between the creation of the customs union and the agreement of the Treaty of Nice. Each required cooperation beyond what was strictly required by exclusive EC competence. Each involved the agreement of 'soft' institutions to structure the participation of the EC and its member states. And almost all altered the context in which subsequent cooperation would be considered.

³ The 1997 Treaty of Amsterdam introduced a procedure under which the scope of the common commercial policy could be extended without an intergovernmental conference, but this mechanism was not deployed.

The European Road Transport Agreement

The 1970 European Road Transport Agreement was one of the first examples of 'soft' cooperation in European foreign economic policy. In 1967 the members of the United Nations' Economic Commission for Europe (ECE), including the then six EC member governments, sought to conclude a Europe-wide agreement on lorry drivers' hours. The EC as such, however, was (and is) not a member of the UN, although there were mechanisms for its participation in the ECE, and the Commission did not advance proposals for an EC negotiating position (ECJ, 1971). Nonetheless, the member governments agreed to pursue a common negotiating position and to be collectively represented by the government of the country holding the six-month rotating presidency (ECJ, 1971). Thus, although each member government would adopt the ensuing agreement individually, they chose to participate in a three-level game, structured by 'soft institutions' and using existing procedures.

The Commission objected to the ECJ, especially as the EC had just adopted a common policy on lorry drivers' hours. Although the Court upheld the agreement on practical grounds, it held that the EC, as such, should have negotiated the agreement. In doing so, the ECJ advanced the 'doctrine of implied powers.' According to this doctrine, in addition to the enumerated powers bestowed on the EC, the EC's power is co-extensive with its internal powers (Emiliou, 1996). The Court thus established parallelism between the internal development of the EC and its exclusive external competence. In doing so, this judgement had profound implications for the balance of power between the EC and the member states in subsequent international negotiations.

The International Rubber Agreement

In May 1976 the United Nations Conference on Trade and Development, of which the EC's member states, but not the EC, were members, agreed to seek to achieve stable conditions in commodity trade. The Commission asserted that only the EC was competent to participate in the negotiations on the basis of the common commercial policy and proposed negotiating guidelines. Some of the member governments, however, considered that aspects of the negotiation, particularly the funding of the buffer-stock system, fell within the member states' competence. Agreeing to cooperate nonetheless, the member governments responded to the disputed allocation of competence by adopting a 'soft' institution, a so-called 'formula,' to structure their cooperation (ECJ, 1979).

Under this formula the EC and its member governments were represented in the negotiations by a joint Community delegation and nine national delegations. The joint delegation was composed of the Commission and the President of the Council plus one official from each of the then nine member governments. Negotiations would be based on a 'common standpoint' agreed in advance. Where the EC was competent, the Commission would be the negotiator. On issues outside Community competence, but of 'particular interest to the Community' the Commission representative would 'usually' act as the joint spokesperson for the EC, and views expressed by the member governments had to be in line with the common standpoint (quoted in ECJ, 1979: 2878). This cooperation was explicitly without prejudice to the legal arguments about the allocation of competence. Again the member governments had chosen to engage in a three-level game and had agreed non-binding procedures ('soft' institutions) to structure their cooperation.

The Commission, whose opinion on how to proceed had been ignored, challenged the ‘formula’ before the ECJ, requesting an opinion on the extent of the EC’s powers to negotiate the agreement. Although this legal challenge coincided with the start of the negotiations, the intra-EC cooperation during the negotiations proceeded essentially along the lines outlined in the ‘formula’.

The Court’s ruling, in Opinion 1/78 (ECJ, 1979), broadened the scope of the common commercial policy, stating that it was not restricted to the use of instruments intended to affect only traditional aspects of trade. This, in turn, built upon an earlier judgement concerning an agreement within the Organisation for Economic Cooperation and Development (OECD) — Opinion 1/75 (Re: OECD Local Cost Standard) (ECJ, 1975) — which clarified that the EC has exclusive competence under the common commercial policy and that the content of the common commercial policy is the same as that in the national context.

The Tokyo Round

Although the scope of the common commercial policy had expanded considerably during the 1970s as the result of ECJ jurisprudence, it was still tested by the Tokyo Round of General Agreement on Tariffs and Trade (GATT) negotiations (1973-79), which embraced issues, notably technical barriers to trade (TBTs), that fell primarily within the member states’ responsibility (Commission, 1973). Nonetheless, the member governments approached the negotiations pragmatically, treating them like previous GATT negotiations. Although the EC was represented at the September 1973 Tokyo Ministerial Summit by a joint delegation and the nine national delegations that participated, the Commission conducted the negotiations on the basis of directives from the Council as if under the common commercial policy (Bourgeois, 1982).

The allocation of competence, however, became an issue just as the negotiations were due to conclude (Bourgeois, 1982). The sticking point was whether the EC alone should conclude the agreements on TBTs. It was at this stage the ECJ issued its Opinion 1/78 on the Natural Rubber Agreement. In the light of the ECJ’s opinion that the common commercial policy could not be restricted to just those instruments intended to have an effect on only the traditional aspects of external trade, the Council’s lawyers and some member governments accepted the Commission’s view that the common commercial policy conferred on the EC the necessary powers to conclude all of the Tokyo Round agreements (Bourgeois, 1982; Pescatore, 1981).

The British and French governments, however, were not convinced. After ‘arduous’ discussions, and faced with a US-imposed deadline for acceptance, the member governments agreed that the Commission, on behalf of the EC as a whole, would conclude all of the agreements, except for the protocol on tariffs relating to coal and steel products,⁴ and that the member governments would also conclude the codes on TBTs and civil aircraft (Bourgeois, 1982: 21). Thus the tool of a ‘mixed’ agreement — one concluded and ratified by the EC and the member states and which is not provided for in the Treaty of Rome — was employed to settle the disputed allocation of competence.

⁴ Coal and steel have a special place in the EC’s external trade relations because they are subject to the 1951 Treaty of Paris, which confers few express external trade powers on the European institutions and states

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, except the protocol on coal and steel products. It did not, however, challenge the outcome before the ECJ.

The Uruguay Round

The Uruguay Round of GATT negotiations (1986-94) addressed an even wider range of issues than the Tokyo Round. Agriculture, services, intellectual property and investment measures were all brought within the multilateral framework for the first time. All of these new issues, except for agriculture, raised competence questions for the EC.

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 member governments, however, noted that the decision to authorise the Commission to open the negotiations did ‘not prejudice the question of the competence’ on particular issues (quoted in ECJ, 1994: I-5282).

The fact that competence was mixed in some areas, however, did not seriously 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-related intellectual property issues (TRIPs) (Devuyst, 1995; Woolcock and Hodges, 1996). Intra-EC cooperation in the services negotiations was helped by the adoption of internal measures as part of the single market programme and by the relatively unambitious aims of the General Agreement on Trade in Services (GATS) negotiations, which sought only to ‘bind’ existing levels of ‘domestic’ liberalisation (Hoekman and Kostecki, 1995).

The allocation of competence did become a problem when it came to signing and ratifying the agreement because the Commission asserted that only it should sign the agreement on behalf of the EC as a whole — essentially an assertion of exclusive EC competence across the full breadth of the agreement. The member governments insisted on also signing the agreement. The Commission referred the matter to the ECJ. Pending the ECJ’s opinion, the Commission and the member governments signed the Uruguay Round Agreement on 15 April 1994 in Marrakech.

The Commission claimed that the common commercial policy gave the EC exclusive competence with regard to both GATS and TRIPs. It argued that if the ECJ did not agree with its interpretation of the common commercial policy, the EC still had exclusive competence by virtue of the ‘doctrine of implied powers’ (ECJ, 1994).

explicitly that beyond those provisions it does not affect the member states’ powers with respect to commercial policy.

Most of the member governments interpreted the common commercial policy and the extent of the EC's implied external powers much more narrowly than did the Commission. While some were willing to accept that cross-border services (but only cross-border services) fell within the common commercial policy, others restricted the common commercial policy to only those services intrinsically related to the sale of goods, such as after-sales service.

When the Court ruled in November 1994 it held that although the cross-border supply of services falls within the scope of the common commercial policy, other modes of supply do not. Further, it judged that the preservation of the single market did not justify the conclusion of the GATS by the EC alone. The Court also ruled that although the EC has competence with respect to harmonising intellectual property rights, it had not yet exercised it internally and so could not claim exclusive external competence for TRIPs. Thus Opinion 1/94 resulted in a very limited broadening of the scope of the common commercial policy.

The post-Uruguay Round negotiations

Although the Uruguay Round negotiations were formally concluded in December 1993, some participants felt that progress on certain key issues related to the GATS — the movement of natural persons supplying services, financial services, 'basic' telecommunications services, and maritime transport — had not been satisfactory and agreed to continue negotiations starting in May 1994. All of these issues fell within the area of disputed competence that was before the ECJ at the time. Pending the Court's opinion and 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 procedures for negotiating less clear.

Nonetheless, the member governments again agreed to engage in a 'three-level game'. The awkward issues of cooperation were addressed by a non-binding code of conduct (a 'soft' institution) drawn up between the member governments, the Council and the Commission and agreed by the General Affairs Council in May 1994 (ECJ, 1994: I-5366). The code of conduct, without settling the distribution of competences, enabled the Commission to negotiate on behalf of the EC and its member states as it had done during the Uruguay Round. The code, however, did institutionalise the member governments' participation in the negotiations as observers and underline the Commission's duty to keep the member governments fully informed of developments.

Adaptation and the changing playing surface

The preceding discussion illustrates the variety of forms and formulations of cooperation that the member governments and the European Commission have adopted in order to facilitate their participation in international negotiations outside the disputed scope of the common commercial policy. These forms are summarised in Table 1.

[TABLE 1 NEAR HERE]

The preceding discussion also illustrates how, in the absence of formal amendments to the Treaty, judicial interpretation played a crucial role in adapting the EC's institutional structure to the changing demands of the international political economy (Commission, 1995, 1996). The accumulation of the ECJ's rulings in disputes

between the member governments and the Commission has amounted to a 'mutation' of competence in European foreign economic policy, shifting authority for a wide range of issues from the member states to the EC (Bermann et al, 1993; MacLeod, Hendry, Hyett, 1996; Weiler, 1991: 2431). This mutation occurred along two dimensions: broadening of the scope of the common commercial policy itself; and establishing parallelism between the internal development of the EC and its exclusive external competence through the 'doctrine of implied powers'. In most of the cases brought before it the Court interpreted the Treaty as giving the EC more authority than at least some of the member governments wanted (Young, 2000).

EXPANDING COMPETENCE AND CHANGING PREFERENCES AND POWER

The extension of EC competence has shaped the member governments' preferences and relative power by curtailing some unilateral policies. By foreclosing some forms of unilateral action, the *acquis* can change how member governments view cooperative solutions. This effect is clearest with regard to international trade in goods, where the member governments have ceded exclusive competence to the EC and can no longer act individually. Constraints exist on unilateral action with regard to other areas of European foreign economic policy as well. The ECJ Opinion 1/94, for example, implied that, had the member governments not already been doing so, they would have had to cooperate on some aspects of the post-Uruguay Round 'basic' telecommunications services negotiations (Young, 2002).

The willingness of the member governments to cooperate with each other is also influenced by the potential effectiveness of those unilateral policies that they can still pursue. Here the EC being an international organisation is critical. The *acquis*, particularly as a result of the single European market programme -- which reinforced the principles of free circulation of goods, services, people and capital -- has progressively reduced the member governments' capacity to insulate themselves against the policy decisions or business practices of their EC partners.

In areas where there is no common external policy, this intra-EC interdependence can translate into indirect extra-EC interdependence, in parallel with more conventional (external) interdependence. The impact of intra-EC interdependence is greatest on those member states with policies more protectionist than those of their partners (Hanson, 1998). Thus if a common position is pursued, the member governments that can pursue effective national policies (if only because they are liberal), will exercise greater leverage in shaping that common position (Hanson, 1998; Young, 2002). For example, it is no coincidence that the member governments whose airlines least exposed to competition from the airlines of other member states that have blocked an EU-US 'open skies' air service agreement (Young, 2002).

THE EC'S CAPACITY AS AN INTERNATIONAL ECONOMIC ACTOR

The preceding discussion suggests that the EC is a more effective international actor in areas of mixed competence than is the common perception (see, for example, Meunier and Nicolaïdis, 2000). This perception is based on two principal implications of mixed competence, which are essentially opposite sides of the same coin: that it encourages protectionism and that it impedes the EC's ability to play a leading role in negotiations.

A protectionist outcome is more likely where competence is mixed because all member governments must accept an agreement, and the least liberal government will usually set the tone for the whole EC (Woolcock, 2000). This is because when a common position is pursued in negotiations that address issues including elements of both exclusive EC and mixed competence, the requirement of unanimity pervades the entire negotiation (Meunier, 1998; Woolcock, 2000).

One advantage of the need for unanimity is that it strengthens the EC negotiator's (whether the Commission or Council Presidency) hand with respect to the other countries in the negotiation (Meunier, 1998). The need to keep all member governments on-side makes granting concessions difficult. Consequently, any concessions by the EC command a high price from the negotiating partners. While having to maintain unanimous support for a negotiating position might have benefits where the EC is on the defensive, the need for unanimity arguably undermines the EC's capacity to play a proactive role in multilateral negotiations (Meunier, 1998).

This largely negative view of mixed competence — that it encourages protectionism and hampers activism — may be overstated. While this view may apply to wide-ranging negotiations, such as the periodic multilateral trade rounds, it is not obvious that it applies to all aspects of foreign economic policy, or, for that matter, other aspects of external relations. For a start, as discussed above, the ability of protectionist member governments to dictate a common negotiating position may be undermined by their interdependence with other member states with more liberal policies. The preceding brief overview of EC foreign economic policy, for instance, did not reveal any instances in which mixed competence unduly impeded the effectiveness of the EC's participation in international negotiations.

The absence of exclusive Community competence may actually be beneficial. The absence of the requirement to cooperate permits flexibility in how the EC and its member governments participate in multilateral negotiations. Where there are wide differences among the member governments' preferences, such flexibility may be necessary for the EC to participate at all. The EC's ultimately unsuccessful cooperation in the Multilateral Agreement on Investment negotiations might not even have got off the ground if the member governments, with their very different approaches to foreign direct investment, had had to agree a common negotiating position (Young, 2002).

Further, mixed competence might not be such a comprehensive impediment to EC activism as some fear. Certainly where the member governments have agreed an internal regime that is more ambitious than that under negotiation at the multilateral level (usually the case, especially with respect to services), the obstacle of unanimity is neutralised. This was evident in the ERTA negotiations and during the Uruguay Round. In the 'basic' telecommunications services negotiations the existence of an agreed internal regime enabled the EC and its member governments to play a leading role (Young, 2002). Likewise, the EC and its member governments were able to demonstrate leadership in the 1997 negotiations of the Kyoto Agreement on climate change because there was a prior internal agreement on reducing greenhouse gas emissions (Sbragia with Damro, 1999). Thus there is a link between the adoption of internal EC rules and the member governments' collective ability to overcome the unanimity hurdle associated with mixed competence so as to play a leadership role in multilateral negotiations.

EUROPEAN FOREIGN ECONOMIC POLICY AFTER NICE

The February 2001 Treaty of Nice⁵ marks a sharp departure from the sporadic and gradual process of adaptation described so far in this chapter. By extending the scope of the common commercial policy to encompass all trade in services, with a few notable exceptions, as well as all trade-related aspects of intellectual property rights, the Treaty of Nice, when ratified, will improve the fit between the EC's procedures and the breadth of the international trade agenda (see Box 2).

[INSERT BOX 2 NEAR HERE]

This chapter, however, has argued that mixed competence has not impeded the EC and its member governments as much as is often assumed. Further, to the extent that mixed competence increases the leverage of the most reluctant member government on any issue, it is a problem that Nice did not fully solve. A number of particularly sensitive service sectors — audio-visual, education, health care and social services — were explicitly identified as being of mixed competence, and foreign direct investment in non-service sectors was not incorporated in the revised common commercial policy (Commission, 2000). The round of multilateral trade negotiations launched in Doha in November 2001 addresses a number of such issues, including audio-visual, education and transport services, and the 'trade and' issues -- environmental protection, competition policy and investment -- may be brought on to the agenda later.⁶ This means that the member governments will still have to ratify the agreement individually, which implies that aspects of the negotiations that fall within the common commercial policy can still be held hostage by protectionist member governments.

So long as issues of mixed competence are situated within the WTO framework, however, cooperation among the EC's member governments, while not necessarily easy, will not be fundamentally questioned. Where these issues are based in other international fora, such as the Organisation for Economic Cooperation and Development or one of the UN's subsidiary bodies, of which the EC as such is not a member, cooperation will be more problematic. Nonetheless, intra-EC cooperation may well be accepted, particularly if the member governments' preferences are reasonably congruent.

My analysis also suggests that while the Nice reform is likely to have only limited impact on the conduct of European foreign economic policy in the short- to medium-term, it may have as yet unforeseen implications for the allocation of competence between the EC and the member states, despite the efforts of the member governments to ring fence the changes they agreed at Nice.

IMPLICATIONS FOR THE TWO-LEVEL GAME METAPHOR

More broadly, my analysis of the dynamics of EC foreign economic policy also provokes an assessment of Robert Putnam's (1988) two-level-game metaphor. The main appeal of the metaphor is that it furnishes a way of linking domestic politics and international relations. 'Domestic' institutional structures, however, are often incorporated inadequately when the metaphor is deployed. This reduces its applicability and masks some of its

⁵ The Treaty of Nice, *Official Journal*, C 80, 10 March 2001.

insights. Most treatments of EC foreign economic policy are a case point, applying the metaphor only loosely without addressing fully how it must be adapted to accommodate the specific institutional context of the EC.

The EC context affects the two-level-game metaphor in two key ways. First and foremost, a common EC negotiating position is itself the product of a two-level game. Thus the EC's participation in international negotiations could be thought of as two two-level games that intersect at the European level. This is why having an already agreed internal regime to provide the foundation for an common external negotiating position is so important to the EC's effectiveness as an international actor.

Crucially, however, despite Nice, the member governments' participation cannot be taken for granted. The EC's institutional framework with respect to at least some 'new' trade issues, such as services and investment, is incomplete and open to interpretation. How the existing institutions are interpreted plays a pivotal role in shaping whether the member governments act unilaterally or collectively, and affects the dynamics of cooperation when they choose a collective response.

Second, the member governments, which as the Council are responsible for ratification of agreements involving EC competence, are much more closely engaged in negotiations than are traditional legislatures. One would expect this to restrict the scope for the negotiator (usually the Commission) to move the agreement towards its preferred outcome, at least without the member governments' knowledge. It should also make it more difficult for the Commission to leverage an international agreement to affect internal change, at least without the complicity of the member governments. Conversely, the close involvement of the member governments in negotiations suggests that the negotiator is more aware of the parameters of acceptable outcomes, which should reduce the risk of ratification failure (Sbragia with Damro, 1999). The implications of these features for the conduct of the EC's foreign economic policy are only beginning to be explored.

The EC is in many respects an extreme case, but the challenges it poses for the two-level-game metaphor should encourage us to think more carefully about how we apply it. In particular, much greater care needs to be paid to the impact of 'domestic' institutions – including parliamentary v. presidential democracy, ratification by referenda or multiple tiers of governance – on the functioning of the metaphor. In essence this is a call for building comparative politics more firmly into the metaphor.

CONCLUSIONS

This chapter has challenged the common perception that the EC's foreign economic policy is firmly supranational (see, for example, M. E. Smith, 2001). It has also illustrated how the institutional context in which the member governments choose whether to cooperate has changed over time and not always in ways that they favoured. Thus this chapter has demonstrated that the EC's status as an international actor is complicated even within economic policy. In doing so it has revealed that there are a variety of forms of cooperation among which the EC's member governments can choose if they decide to cooperate. This suggests that it may be worth thinking about the different forms of cooperation in EC foreign economic policy as forming a spectrum ranging

⁶ 'Doha WTO Ministerial 2001: Ministerial Declaration,' WT/MIN(01)/DEC/1, 20 November 2001, available at:

from no cooperation through 'soft' cooperation to 'hard' cooperation, where exclusive EC competence applies. Considered in this light, the differences between the practices in the EC's different external policies may not be so stark as it might at first appear.

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Figure 1 Depiction of a two-level game

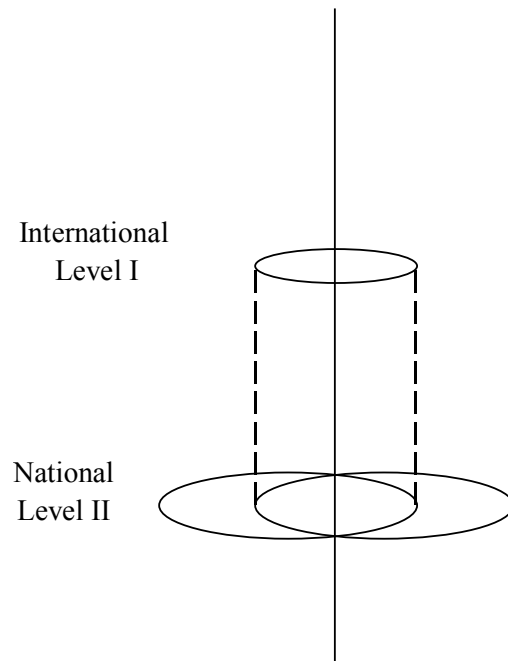
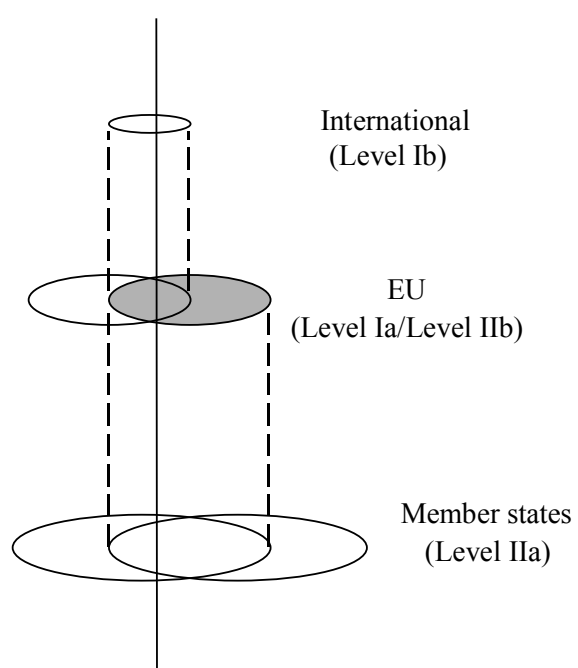


Figure 2 Depiction of a three-level game



Box 1 The scope of the common commercial policy prior to Nice (Article 133)

...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.

Table 1 Flexibility in EC external negotiations

<i>Negotiation</i>			<i>Negotiator</i>		<i>'Soft' institution</i>	<i>Ratification by</i>	<i>Implications for future negotiations</i>
European Road Transport Agreement			Council president		Council agreement	Member states	'doctrine of implied powers'
International Rubber Agreement			Joint Committee and nine national delegations		Council agreement	EC and member states	broader scope of the common commercial policy
Tokyo Round			Commission		Council approval of Commission's 'overall approach'	EC and member states	mixed agreement
Uruguay Round			Commission		Council approval of the Punta del Este declaration	EC and member states	limited extension of the common commercial policy
post-Uruguay Round			Commission		Code of conduct	EC and member states	

Box 2 The scope of the common commercial policy in the Treaty of Nice (Article 133)

5. Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, insofar as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6.

By way of derogation from paragraph 4, the Council shall act unanimously when negotiating and concluding an agreement in one of the fields referred to in the first subparagraph, where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules.

The Council shall act unanimously with respect to the negotiation and conclusion of a horizontal agreement insofar as it also concerns the preceding subparagraph or the second subparagraph of paragraph 6.

...

6. An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation.

In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States.

....