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Trade Policymaking in the European Union: Institutional Framework

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Summary

Trade policy in the EU is made in the context of legal provisions provided by the 1957 Treaty of Rome. As part of this treaty, an institutional framework for the making of trade policy — common commercial policy — was established. Despite relatively few changes in the treaty base of the EU's common commercial policy, its institutional framework has evolved over time as the scope of what constitutes trade policy has changed. The roles and functions of key institutions — the European Commission, the Council of Ministers, subordinate bodies of the Council, the European Parliament, and the European Court of Justice — are described in this report. The actual process of how the EU makes trade policy is of growing interest to the United States as the EU continues to play a larger and more assertive role in the world economy. This report will be updated as events warrant.

Background

The EU is a treaty-based institutional framework that defines and manages economic and political cooperation among its fifteen members. Impetus for the formation of the EU came in the aftermath of the devastation of World War II with the signing of several treaties by six countries — Belgium, France, Germany, Italy, Luxembourg, and the Netherlands.¹ By agreeing to integrate their economies in matters of coal and steel production, trade, and nuclear energy, Europe's leaders hoped to achieve a closer union among the people's of Europe and avoid another war on the continent.

As a result of the 1957 "Rome Treaties," the European Economic Community (EEC) came into force in January 1958. The EEC was designed to merge separate national markets into a single common market that provides free movement of goods, people, capital, and services across borders. To provide for the free movement of goods,

¹ Denmark, Ireland, and the United Kingdom joined the original six members in 1973; Greece joined in 1981; Spain and Portugal followed in 1986; and Austria, Finland, and Sweden became members in 1995.

the EEC recognized that it required a common external trade policy to prevent one member state from importing foreign goods at cheaper prices due to lower tariffs and then re-exporting the items to another member state with higher tariffs.

Article 113 of the Treaty of Rome provides the legal framework for trade policymaking. Embedded in this provision are two grants of authority for the making of trade policy: (1) from the member states and their parliaments to the assembly of European states, acting collectively through the Council of Ministers; and (2) from the Council of Ministers to the European Commission.² Article 113 states as follows:

- the common commercial policy shall be based upon uniform principles, particularly in regard to tariff rates, the conclusion of tariff and other agreements, the achievement of uniformity in measures of liberalization, export policy, and measures to protect such as those to be taken in the event of dumping or subsidies.
- the Commission shall submit proposals to the Council for implementing the common commercial policy.
- where agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open negotiations.
- the Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue for it.

Despite substantial changes in the international economic environment and in the global trade agenda over the past four decades, Article 113 has been modified only slightly on three occasions. The 1991 Maastricht Treaty on European Union (TEU) deleted and added some text that did not modify the substance of the article. The 1997 Treaty of Amsterdam amended article 113 (and renumbered it 133) by extending the scope of the common commercial policy from goods to negotiations on services and intellectual property in cases where the Council of Ministers agrees unanimously.³ And the 2000 Treaty of Nice, when ratified, will make further changes in the framework for the adoption of agreements in the areas of services and intellectual property.⁴ On the other hand, the

² Meunier, Sophie and Kalypso Nicolaidis, "Who Speaks for Europe? The Delegation of Trade Authority in the EU," *Journal of Common Market Studies*, September 1999, Vol. 37, No. 3, p. 480.

³ Young, Alasdair R., The Adaptation of European Foreign Economic Policy: From Rome to Seattle, *Journal of Common Market Studies*, Vol. 38, No.1, March 2000, pp. 100-101. In a 1994 decision, the European Court of Justice had ruled that services and intellectual property are policy areas subject to mixed national and community competence. In such areas, the principle of unanimity can be required to adopt any agreement concluded.

⁴ Under Nice, agreements in the area of trade in services and commercial aspects of intellectual property can be concluded by qualified majority vote, except when the external negotiation would
(continued...)

institutional framework for the making of commercial policy has evolved over time as the scope of what constitutes trade policy has increased to incorporate domestic regulations and non-tariff issues.

European Commission

The European Commission is the EU's version of a central executive body, vested with power to propose legislation and common policies. The Commission also acts as the guardian of EU treaties to ensure that EU legislation is implemented by all members.

For the trade issue, the Commission has broad authorities and responsibilities. Most importantly, the Commission develops proposals for the initiation and content of international trade negotiations and negotiates on behalf of the EU. In drawing up trade proposals, the Commission seeks to balance different national and sectoral interests. Depending on the negotiation and the mandate provided by the Council, the Commission has considerable flexibility in deciding on negotiating tactics. The Commission also has much autonomy for administering the EU's trade remedy procedures (anti-dumping, countervailing duty and safeguard procedures) against foreign non-members.

The Commission is headed by twenty commissioners who are nominated by the Member States and then selected by consensus for a five-year term. Each commissioner is charged with acting in support of EU needs and goals, independent of instructions from national governments. Most commissioners have held high office in their home countries previous to coming to Brussels. Each commissioner has an assigned portfolio and can draw on the Commission's administrative staff of 21,000 civil servants (often referred to as *Eurocrats*) for support. In addition, they are assisted by a small cabinet or team of aides. As a body they meet once a week to adopt proposals and finalize Commission policy. When necessary, decisions of the Commission are made by majority vote.

The group of Commission officials directly responsible for trade policy matters is located in the Trade Directorate. Directorates for the Internal Market and Industrial Affairs, Competition, and Agriculture also have considerable input into trade policy. Each directorate is headed by a director-general, who is equivalent in rank to the top civil servant in a government ministry. The directors-general report to one of the twenty Commissioners.⁵

Council of Ministers

While the Commission has the power and responsibility to initiate trade proposals, the Council of Ministers (formally named the Council of the European Union since the Maastricht Treaty went into effect in 1993) has the power to establish objectives for trade negotiations (a negotiating mandate) and the ultimate authority to implement results. As

⁴ (...continued)

require the adoption of internal rules such as taxation that still requires unanimity. France successfully negotiated a provision requiring cultural issues to be subject to the unanimity principle.

⁵ Hayes, J.P., *Making Trade Policy in the European Community*, St. Martin's Press, 1993, pp. 33-35.

provided in Article 113, the Commission conducts trade negotiations “within the framework of such directives as the Council may issue to it.” As interpreted over the years, the Council has very broad powers in the conduct of all bilateral, regional, and multilateral trade negotiations through its role as the main legislative body of the EU.

The Council is composed of ministers from each member government. The ministers represent the interests of their member states. Different ministers participate in the Council depending on the subject matter under discussion. From the mid-1980s, discussions on trade policy have often been on the agenda of the Council of Foreign Ministers although trade ministers have occupied the national chairs for discussion of numerous trade matters.⁶

The Treaty of Rome provides that the Council shall make its trade policy decisions by qualified majority vote (QMV) where formal decisions are required, or by unanimity in some cases affecting trade in services and intellectual property protection. Each member state has a given number of votes determined by a weighting system that takes population and other factors into account. Currently, five member states and twenty-six votes are necessary to form a blocking minority. In practice, however, the Council tends not to vote on major trade issues, but reaches decisions by consensus.

Subordinate Bodies of the Council

The third institution referred to in the Rome Treaty is a *special committee*. Based on the language of Article 113 (see above), it seems clear that the Council viewed the special committee as its representative or watchdog over the Commission in its work on trade issues. Initially called the 113 Committee but renamed the 133 Committee, it plays a key role in helping member states influence EU trade policy.⁷ While the role of the 133 Committee is formally consultative, the assistance it provides the Commission is at the heart of EU decision-making on trade.⁸

The 133 Committee meets at both the full committee or senior level and at the level of deputies. Charged with overall responsibility for trade policy, the full members (often referred to as *Titulaires*) meet on a monthly basis (August excepted). Full members tend to be senior civil servants drawn from national ministries of trade, foreign affairs, or finance. Usually close personally to the ministers they serve, they tend to have a good sense of what actions are politically acceptable within their member states. As many full

⁶ Holt, J.P. pp. 36-37. The Council of Foreign Ministers was regarded as the top level decision-making group until the European Council was added to the Council structure in 1974. Composed of the Presidents or Prime Ministers of each member state and the president of the Commission, this grouping, often referred to as the EU Summit, meets at least twice a year. Trade issues, however, generally are discussed and settled at levels below the European Council.

⁷ The 133 Committee is still referred to as the 113 Committee in a number of journals and articles. With the entry into force of the Amsterdam Treaty in 1997, the 113 Committee was renamed the 133 Committee as a result of the renumbering of Article 113 of the Treaty of Rome.

⁸ Murphy, Anna. “In the Maelstrom of Change – Article 113 Committee in the Governance of External Economic Policy,” In Christiansen, Thomas, and E. Kirchner, *Administering the New Europe: Committee Governance in the European Union* (Manchester: MUP) 2000.

members serve for extended periods of time, they have a reputation for dealing with sensitive issues on an informal basis.

The 133 Committee also usually meets weekly at the level of deputies. The deputies are drawn from member states' permanent representations based in Brussels. This group focuses more on technical than political issues.

Since the 133 Committee is an advisory body, no formal votes are recorded and its deliberations are not published. Matters tend to be discussed until a clear consensus or effective majority has been reached, and the commission tends to follow its advice. According to one interpretation, "the Commission rarely insists on going against the wishes of the Committee (which it is legally entitled to do) for the simple reason that its members reflect the wishes of ministers who ultimately have the power to refuse to conclude the agreement negotiated by the Commission."⁹

Matters which the 133 Committee wants to refer to the Council tend to be prepared by the Committee of Permanent Representatives (COREPER). Comprising member state officials who are national ambassadors to the EU, their deputies, and a secretariat with a staff of about 2,000, COREPER is a key group that assists the Council.

European Parliament

The 626 member European Parliament (EP) plays a limited and mostly indirect role in trade policy. While the EP cannot enact laws like most parliaments, it can veto legislation in areas such as social policy, agriculture, and the EU's internal market. But the EP does not have a veto power over trade legislation. However, by holding hearings and issuing reports, the EP can influence the atmosphere for consideration of trade issues.

The EP has tried to exert greater influence over trade issues, particularly those that have a heavy regulatory component. Reflecting perhaps an effort to enhance its powers vis-a-vis the Commission and member states, the EP has in recent years been the driving force behind a number of controversial trade issues that have divided Washington and Brussels. These include the EU ban on aircraft engine hush kits to meet noise standards, data protection issues that affect U.S. firms, and broadcast and motion picture quotas. In addition, the EP tried to amend and ultimately blocked the Commission's proposed directive that would have made unsolicited takeovers of EU firms easier.¹⁰

European Court of Justice

The European Court of Justice (ECJ) is the EU's version of a Supreme Court with the responsibility to decide what is legal and what is not under the founding Treaties. Cases may be brought to the ECJ by the Commission, the European Parliament, member governments, nationals of member governments, or foreign entities. Given its powers to

⁹ Hayes-Renshaw, Fiona and Helen Wallace, *The Council of Ministers*, St. Martin's Press, 1997, p. 88.

¹⁰ Van Oudernaren, John. "E Pluribus Confusio:: Living with the EU's Structural Incoherence," *The National Interest*, Fall 2001, p. 28.

interpret the provisions of the European treaties, the ECJ has played an important role in implementing the EU's common commercial policy.

The ECJ has played a major role in deciding how policy powers are to be assigned between the Commission and member states in a number of issue areas. Known as the issue of "competence," the ECJ has clarified that trade in goods falls within the exclusive competence of the EU, but that investment remains mainly within the competence of member states. And in 1994 the ECJ rejected the Commission's request to extend its competence for goods to services and intellectual property as well. By ruling that these were areas of mixed competence, thereby subject to the principle of unanimity, the ECJ arguably reduced the leverage of the Commission vis-a-vis member states during internal bargaining on the EU position.¹¹

U.S. Interests

As the EU plays a larger and more assertive role in the world economy, its trade and investment policies increasingly have the potential to help or hinder U.S. economic interests. For this reason, it is important for policymakers and private sector interests to understand how and why EU trade policies are crafted in order to represent and defend U.S. interests to the greatest extent possible.

From the perspective of institutional arrangements, the making of EU trade policy can appear relatively straightforward. The Commission has the power to propose new initiatives and the Council has the power to approve. In making its decision, the Council relies heavily on the advice of the 133 Committee.

While the roles and functions of the relevant decision-making institutions are spelled out, the relative influence of the key actors – the Commission, the Council, and the 133 Committee – on any specific issue is not easy to discern. Nor is it clear how each of these institutions reach agreement and why they may differ.

Unlike in the making of U.S. trade policy, the EU lacks formal and public mechanisms for taking advice and recommendations from the private sector. Most of EU trade policymaking is done informally and behind closed doors. A number of U.S. trade officials, including former U.S. Trade Representative Charlene Barshefsky, have criticized this process. In her view, some of the stress in the U.S.-EU trade relationship derives from an EU decision-making system that is slow, opaque, and lacks clear lines of authority between the Commission and member states.¹² Given that the EU process is unlikely to change as result of external criticism, U.S. policymakers face the challenge of trying to better understand how the process works and can be influenced.

¹¹ Woolcock, Stephen, "European Trade Policy," In Wallace, Helen and William Wallace, *Policy-Making in the European Union*, Oxford University Press, 2000, pp.274-375.

¹² Barshefsky, Charlene, "USTR Barshefsky on Transatlantic Economic Relationship," January 17, 2001. Found on the worldwide web at [<http://www.useu.be/ISSUES/bars0017.html>].