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Report on Trade, Environment, and European Trade Policy Development

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Preface

The Concerted Action on Trade and Environment (CAT&E) is designed to provide an opportunity for the large and growing community of European researchers working on trade and environment issues to meet regularly, to discuss research hypotheses and methods, to review results, and to develop new lines of co-operative research. CAT&E will launch a dialogue with policy makers at all levels. It aims to create a process that can document the progress of research and generate new research impulses in this area. It seeks to advance the resolution of current conflicts between trade and environment.

The information obtained in the course of the Concerted Action is annually summarised in state of the art reports and bibliographies in a fashion that is useful to both researchers and policy makers. These reports serve as an input to CAT&E's annual members' meetings and open conferences. To structure the reporting and discussions, the following themes have been identified initially (in random order; the theme of the present paper is underlined):

- ✓ Subsidies
- ✓ Government Procurement
- ✓ Investment
- ✓ TBT, SPS, and Labelling
- ✓ Trade and Development
- ✓ Trade, Environment, and Human Rights
- ✓ Trade in Commodities
- ✓ Implementation Procedures
- ✓ Trade in Services
- ✓ Intellectual Property Rights
- ✓ Trade and Multilateral Environmental Agreements
- ✓ Dispute Settlement
- ✓ Transparency and Participation
- ✓ Sustainability Assessment of Trade Agreements
- ✓ European Trade Policy Development
- ✓ Trade and Agriculture
- ✓ Trade, Environment, and Labour
- ✓ Trade, Environment, and Public Health
- ✓ Science and Precaution
- ✓ Trade and Environment in the Architecture of International Governance.

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1. Introduction

The European Union (EU) was a key actor in bringing the environment directly into the Doha Development Agenda. This development not only represents a success of European negotiation skills, but also presents challenges to the EU because issues of competence in future negotiations on trade and environment become more pressing. Actually, one of the most fundamental questions concerning European Trade is whether only the European Commission (EC) represents the Community or whether the EC shares the competence to negotiate trade issues with the Member States. This question is of vital significance given that the international trade negotiations such as those under the World Trade Organization have strong impacts on other policy areas which fall under the shared competence. In other words, the competence question gains increased importance because more and more issues originating from other policy areas have become part of the trade agenda and are now negotiated under the WTO regime.

In addition to the competence problem, it is noticeable that there has been some criticism of existing internal procedures in EU trade policy making, especially in terms of transparency and accountability. It is partly claimed that the appropriate design of those procedures would also contribute to fostering the consideration of environmental issues in trade policy development.

Overall, this paper seeks to analyse the EU trade policy making, focusing on the issues of competence and internal decision-making procedure, and also to assess its impact on the consideration of environmental issues. Along with an overview of the most important findings, the paper also points out the areas for further research in this field.

2. Identification of Relevant Research Hypotheses

This section first illuminates the differences between two different forms of competencies, focusing on their definitions and the historical circumstances of their developments. Then, it seeks to analyse the impacts of different negotiating procedures on the consideration of environmental problems in the EU's negotiation position. It also aims for an analysis of the effects of different internal procedures on the consideration of environmental issues in shaping EU trade policy.

2.1 Exclusive and Shared Competencies

The 1957 Treaty of Rome formally transferred the authority to negotiate and conclude international agreements on trade in goods from the individual Member States to the collective entity. This is often referred to as exclusive competence.

According to Article 133 TEC, the negotiation process on international trade issues formally works as follows: The Commission issues a proposal on the negotiation **mandate**, which is taken by qualified majority to the 133 Committee where key policy discussions take place. The Committee then submits the proposal to the Committee of Permanent Representatives (COREPER) and the General Affairs Council (GAC), which hand out the negotiation mandate to the Commission. In the **negotiations**, Commission officials represent the Member States

and conduct negotiations within the limits set by the Council's mandate. Depending on the specific Council mandate, the Commission has much autonomy and the Member States no longer have their own say. In the phase of **ratification**, individual Member States no longer have the power to formally ratify international agreements, but instead delegate this power to the Council, which approves or rejects the trade agreement in a vote by qualified majority.¹ In practice the Council tends not to vote on major trade issues, but rather reaches decisions by consensus.²

On the other hand, the **Uruguay** Round included for the first time the so-called "new issues". According to the subsequent advisory opinion of the **European Court of Justice (ECJ)**³, agreements on the "new issues" were concluded as so-called mixed agreements. These are made under shared Community competence, under which the negotiation procedure works as follows: The negotiation **mandate** is elaborated both by the Council (voting unanimously) and the Member States. During the **negotiations**, the Commission represents the Council. While the Member States are more actively involved into the negotiation process than in the case of exclusive competence, the Member States and the Community are still required to co-ordinate closely.⁴ Once negotiations are concluded, the resulting agreement is **ratified** by the EC voting unanimously in the Council, and separately by the Member States.

The Intergovernmental Conference, which was completed in **Amsterdam** in 1997, offered an opportunity to amend the respective provisions in primary law but resulted in a compromise which many authors considered disappointing. It allows for the future expansion of exclusive competence to the excluded sectors through a unanimous vote of the Council. Meunier and Nicolaidis, in their assessment of the Amsterdam compromise, see the possibility for this to develop into a EU version of the American fast-track, whereby Member States decide at the beginning of a negotiation that the end result will be ratified on a Qualified Majority Voting (QMV) basis.⁵ However, before this could be tested in practice, the Amsterdam Treaty was revised by the Nice Treaty in 2000. Again, the **Nice Treaty** did not lead to the results some hoped for. Although the scope of exclusive competence was broadened to trade in services, unanimity will still be required for provisions which are unanimously adopted internally. Additionally, positive exceptions to exclusive competence still exist. The Treaty changes from Nice are only cursorily covered in the literature. Young, for example, suggests that "the Nice reform is likely to have only a 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".⁶ However, new attempts to reform Article 133 TEC are undertaken in the framework of the **Convention on the Future of Europe**. The final Constitutional draft mainly simplifies the Articles on Common Commercial Policy. Competences mainly stay as they were before, with a slight shift towards centralisation. Trade in services and commercial aspects of intellectual property rights as well as foreign direct investment now regularly fall under the exclusive competence

¹ Meunier 2003, p 9.

² Ahearn 2002, p. 4.

³ See also: ECJ Opinion 1/94; Hilf (1995) and Bello/Schmertz (1995).

⁴ Leal-Arcas 2001, p. 11.

⁵ Meunier and Nicolaidis 2000, p. 340.

⁶ Young 2002, p. 12.

of the EU. The movement of persons and the commercial aspects of intellectual property rights are exempt, meaning that the Council shall act unanimously where unanimity is required for the adoption of internal rules.

2.2 Impacts of different negotiating positions on EU trade policy making

Decisions on which competence is used for the EU representation in international trade negotiations, the development of which has been described above, have major impacts on how negotiations are conducted by the EU in the WTO. This question has led to an extensive debate in the existing literature.

Some authors state that under exclusive competence the EU speaks with a single voice and thus has a stronger position within negotiations.⁷ This statement, however, must be balanced against the view of other authors that powerful Member States exercise an informal veto both at the mandate and at the ratification stages. In addition, during the negotiations Member States can try to influence the Commission's position through formal or informal channels, although this applies also in the case of shared competence where Member States have spoken with one voice.⁸ Moreover, despite the official voting rule of qualified majority, decisions tend to be taken unanimously, which further strengthens Member States' role.

The idea of using mixed-agreements for the new issues led to a somewhat unclear situation concerning the question of which kind of competence would apply for which issues. Moreover, Leal Arcas points out that mixed agreements complicate both the conclusion and the administration of some of the international agreements conducted by the Member Countries as well as by the EC.⁹ There is a kind of common assumption that shared competence implies the fragmentation of unity and translates into less power for the EC.¹⁰ Consequently, it was mainly the Commission, with the help of some Member States, that repeatedly tried to revise the ruling of the ECJ and to widen the scope of Article 133 TEC so that exclusivity was extended.¹¹ On the other hand, there are some who observe that mixed competence has not translated into the fragmentation of unity and loss in power of the European Commission.¹² For example, Young argues that "mixed competence has not impeded the EC and its member governments as much as is often assumed".¹³ Meunier and Nicolaidis propose that the original statement that the EU speaks with a single voice thus must be revised to that effect: the principle of unity of representation by the Commission might be valid under both configurations, even though in both cases individual Member States usually seek to reduce Commission autonomy to the extent tolerated by their partners.¹⁴

⁷ Leal-Arcas 2002, p. 3.

⁸ Meunier and Nicolaidis 1999, p. 329.

⁹ Leal Arcas 2001, p. 3.

¹⁰ Leal-Arcas 2001, p. 2.

¹¹ Meunier and Nicolaidis 2000, p. 338.

¹² Young 2002, p 12; Meunier and Nicolaidis 1999, p 329.

¹³ Young 2002, p. 12.

¹⁴ Meunier and Nicolaidis 1999, p. 329.

Concerning the consideration of environmental issues, a few voices in the literature claim that the need for one EU voice is all the more acute¹⁵, since these “trade and ...” issues engage policy and advocacy communities well beyond the trade arena. In addition, a single voice of the EU is only to be assessed positively when environmental matters are explicitly part of the negotiation mandate. Thus, one of the hypotheses can be that a stronger voice under exclusive competence in the trade negotiations is beneficial as long as environmental concerns are considered within the EU negotiation position.

Still, there is a question as to what the chances that environmental matters become explicitly part of the negotiation mandate are. This point can be further elaborated in the question of the extent to which the internal procedures under exclusive or shared competence are apt to adequately integrate environmental concerns, and will be further discussed in the next section.

2.3 Impacts of different internal procedures on EU trade policy making

The strongest feature of the procedure to agree on the EU’s negotiation mandate is the role of the Article 133 Committee, which is used for agreements falling under exclusive as well as shared Community competence. The Council views the Article 133 Committee as its representative or watchdog over the Commission in its work on trade issues, and it plays a key role in helping Member States influence EU trade policy. While the role of the Committee is formally consultative, the assistance it provides to the Commission is at the heart of EU decision-making on trade. The full members meet on a monthly basis. They often are senior civil servants drawn from national ministries of trade, foreign affairs, or finance. Therefore, some authors state that they tend to have a good sense of what actions are politically acceptable within their Member State.¹⁶ Since the Article 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.¹⁷ As a result, the Article 133 Committee is frequently regarded as a closed shop that insufficiently considers voices speaking for non-trade-related issues, such as the environment. This view is underpinned by the perception that the 133 Committee is strongly influenced by Commission officials. Due to the Commission’s initiative in drawing up proposals and its greater technical expertise compared with national trade officials, Council representatives on the 133 Committee need to act strongly, usually with a group of countries approaching a qualified majority, in order to significantly change Commission proposals.¹⁸ Moreover, it is said that, depending on the negotiation and the mandate provided by the Council, the Commission has considerable flexibility in deciding on negotiating tactics.¹⁹

Another criticism is that the European Parliament (EP)- the only body that is directly elected- has limited powers in trade policies, as the EP is not involved in the negotiation procedure,

¹⁵ Meunier and Nicolaidis 2000, p. 342.

¹⁶ Ahearn 2002, p. 4.

¹⁷ WWF 2003, Ahearn 2002, p. 5.

¹⁸ WWF 2003, p 13.

¹⁹ Ahearn 2002, p 3.

either under exclusive or shared competence.²⁰ Suggestions for stronger democratic control by the EP, for example through consultations in the drafting process of the mandate, participation in the 133 Committee, or consultations before approval of all trade agreements, were not considered to their full extent. This also is a shortcoming from the environmental point of view, since the EP has often spoken in favour of the environment in the past.

In order to better reflect environmental considerations in the 133 Committee, it could be opened to a broader circle. This could include not only the Commission itself but also civil society groups. An ongoing dialogue between civil society groups and Directorate General (DG) Trade already exists. Launched in 1998, the “Trade Dialogue with Civil Society”, where representatives of civil society present proposals of their own to the Commission, has conducted a larger number of general and thematic meetings. However, the actual effect, if any, this dialogue has on policy is most likely very limited. In the end, there has been criticism of both the DG Trade and the members of the contact group.²¹ Yet another channel of participation is the Sustainable Impact Assessment (SIA) Programme, which was launched in 1999 as an effort to better integrate sustainability concerns into trade policy making. While it was acknowledged that participation processes in SIAs can contribute to building structures and frameworks for an institutional public participation in the trade and sustainability area²², it is still too early to gauge the impacts of participation in SIAs on EU trade policy making.²³

Furthermore, some features which might contribute to strengthening the voice of the environment within the Article 133 Committee are de-emphasised by the nature of the Committee itself. This mainly includes the Cardiff process, which calls for *inter alia* the General Affairs Council and the Common Market Council to consider environmental aspects in their work.²⁴ Since the Committee mainly consists of Member States’ representatives, genuinely European strategic issues are not likely to be considered. The General Affairs Council, which is directly committed to the Cardiff requirements, thus remains the only advocate for the Cardiff process. Its weight within the mandating procedure, however, has not yet been covered in the literature.

Finally, the above-mentioned rather disappointing findings are partially compensated for by the fact that internal European peculiarities incite the EU to consider environmental aspects during negotiations in order to avoid internal problems. This might also explain why the EU pressed so much for the consideration of environmental aspects during the Doha Round. If the EU would not have succeeded in including the environment, it would have risked institutional conflict within the EU. However, this should not distract from the fact that the Article 133 Committee is in need of reform.

²⁰ Meunier 2003, p 3.

²¹ Smith 2001.

²² WWF 2002.

²³ Knigge and Kranz 2005.

²⁴ See Council of the European Union: “Report of the Internal Market Council to the Helsinki European Council on the integration of environmental protection and sustainable development into internal market policy” Doc. No. 13622/99 and Council of the European Union 2002: Draft strategy on environmental integration in the external policies of the General Affairs Council. Doc. No. 6927/02.

On the whole, the underlying hypothesis here is that larger involvement of outside groups, such as the Commission, the EP, and the civil society groups, in the negotiation process at 133 Committee contributes to a more thorough consideration of environmental issues in EU trade policy making. In addition, between the two different types of competencies, it is speculated that shared competence is better at incorporating environmental issues into the process of shaping EU trade policy.

3. Survey of Methodological Approach

Research on the process of EU trade policy making is in a large measure legal, involving attempts to determine the area of competence. However, linked to the debate surrounding the European Constitution, political science has gained momentum in this area of research. As a result, the discussion on the competence question in literature is dominated by lawyers and, recently, political scientists as well. They mainly follow institutionalists' historic and process-oriented approaches.

4. Conclusions and Areas for Further Research

There is virtually no literature dealing with the European trade policy development, especially those which can verify the above-mentioned hypotheses. Clearly, more research on this topic needs to be conducted. In addition to this, a broader agenda or topics should be suggested for the areas which require further research.

First and foremost, research needs to be done on the effects of the institutional structures of EU external trade policy making on the integration of environmental concerns into actual trade policy. Research is scarce on the interfaces between environmental policymaking and trade policy making, especially against the background of the Article 133 Committee.

- Although literature exists on the effects of EU enlargement on EU external trade policy, research will need to be continued, comparing the expected effects with the actual outcomes. Research should also deal with the effects of EU enlargement on the multilateral trading system, as well as on the EU's role within this system.
- Furthermore, it would be interesting to compare agreements which fall under exclusive Community competence with those which fall under shared competence more substantively, from the viewpoint of the environment, in order to find out how the respective procedures impact the consideration of environmental aspects.
- In order to better assess the current institutional situation and future reform proposals, it is necessary to analyse the interests and attitudes towards environmental protection and trade of the various actors taking part in the negotiations.
- The European Constitution will imply changes for the Common Commercial Policy. These might generate additional research questions which should be explored further.

Moreover, it would be worthwhile to attribute further research to the following reform proposals, which might help increase the voice of environmental interests during negotiations:

- base environment-related trade issues on the environment Articles of the EC Treaty;
- strengthen environmental integration in all phases of negotiation;
- strengthen the consideration of sustainable development by using Sustainable Impact Assessments for trade issues;
- strengthen consultation of environmental officials and environmental organisations in the Article 133 Committee;
- strengthen the role of the European Parliament in the negotiation procedure.

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