

Beyond the Final Frontier? Integrating Another Level of Governance¹

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Introduction

This paper directly addresses the interaction between international regimes and European integration. It focuses on the European Union's (EU)² pivotal role as the interface of the interaction between national, European and multilateral rules. I stress that there is truly an *interaction*, with intra-EU developments affecting multilateral regimes and vice versa.

I argue that the EU's dual character as both an international institution and international actor affects both the form and substance of the positions articulated, collectively or not, by the member governments. The dual character also has particular implications for how multilateral regimes affect existing and *future* European and national rules. I also contend that this interaction can occur whether or not there is a pre-existing European regime.

I illustrate my argument with two 'hard cases': the failed negotiations on a Multilateral Agreement on Investment (MAI) and the General Agreement on Trade in Services (GATS)

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This paper draws extensively on conversations Peter Holmes over the past year. I would like to thank the participants of the States & Markets Research Development Group and Helen Wallace for their comments. I claim full ownership of all errors.

² Although the term European Union is legally inaccurate, as all of the issues we discuss fall within the first pillar of the EU and as it is the European *Community* that is a member of the World Trade Organisation, I adopt common usage. I do, however, use the term Community competence.

agreement on basic telecommunications. In the former, despite the absence of a common EU regime on third country foreign direct investment (FDI), the member governments' negotiating positions were influenced by European coordination and the implications of a multilateral regime for future European integration. In the latter (more preliminary) case, although the EU's internal regime for liberalising basic telecommunications services served as a model for the multilateral regime, it had to adapt in response to the negotiations and its future development may be constrained by the agreed multilateral regime.

This paper is also intended to be a contribution to the emerging literature that seeks to integrate internal EU policy-making and the conduct of EU foreign economic policy. I do so by joining the multilevel governance (intra-EU policy making) and multilevel game (EU foreign economic policy) literatures at the European level.

Adding another level of governance

As Peter Holmes and I argue in our companion paper, in the Uruguay Round, the multilateral system took two steps forward — greater emphasis on 'beyond-the-border' issues and binding dispute settlement — that together have altered, possibly profoundly, the impact of the multilateral system on regional and national regulatory regimes. The recent World Trade Organisation (WTO) dispute settlement findings against the EU's Banana Trade Regime and ban on beef hormones vividly illustrate this. In addition, the multilateral system and the EU are increasingly tackling similar issues (Woolcock 1993), which potentially implies greater scope for the EU to serve as a model for, in addition to a shaper of, multilateral rules. As a result of the increasing importance of this interaction, there is a need to reinforce the analytical links between the EU's internal and foreign economic policy-making.

I seek to do this by joining the literatures on multilevel governance and multilevel games, which although distinct share core common elements. In many respects, this is a logical extension to the EU of the approach Brian Hocking and Michael Smith (1997: 12) employ — coining the term 'multilayered governance' — in their analysis of the US response to

the single market programme.³ Many studies of EU policy-making (see, for example, Armstrong and Bulmer, 1998; Marks et al 1996; Wallace and Wallace (eds) 1996) perceive the EU as a system of multiple tiers of governance — typically sub-national, national and European — on which governmental and non-governmental actors interact. Although the principal locus of policy-making may vary between issues, actors are often engaged simultaneously on multiple levels. These interactions on and between levels are framed and shaped by domestic and European institutions. As a consequence, the different levels reward and bestow different power resources, and thereby affect the relative influence of various actors. It is also sometimes possible for actors to leverage other levels of governance in pursuit of their objectives on another level. A core implication of multilevel governance is that a plurality of actors are seeking to shape policy and will do so in which ever forum (level of governance) is most likely to produce the desired outcome.

A number of analyses of the EU's foreign economic policy (Collinson, 1999; Devyust, 1995; Meunier, 1998; Peterson, 1996; Rhodes, 1998; Woolcock and Hodges, 1996) and the relatively few studies of the impact of the multilateral system on EU policy making (Patterson 1997) deploy variations of Robert Putnam's (1988) metaphor of the two-level game. The multilevel-game approach (the EU has been characterised as a three-level game: national, European and international) is much more focused on governments than is multilevel governance. In the multilevel game metaphor domestic interests and institutions affect government negotiating positions by establishing a 'win-set' within which the resulting international agreement must fall. The governments then negotiate with each other to find a solution that is within all of their win-sets.

The nature of international economic negotiations, and the academic treatment of them (see, for example, Hocking and Smith 1997), are changing in a way that is blurring the traditional distinction between domestic and international politics. Foreign economic policy now engages directly a much wider array of non-governmental actors. This was vividly illustrated in the MAI negotiations. Both business organisations and trades unions were

³ Brigid Laffan, Rory O'Donnell and Michael Smith have picked up this issue in a broader context in their forthcoming book *Europe's Experimental Union*, Routledge.

engaged through formal consultative bodies (BIAC and TUAC, respectively) and an array of environmental and development organisations, with the aid of the world wide web, injected themselves into the debate. Although the multilateral system is still a long way from achieving the degree of 'normal' politics evident at the domestic or European level, the stark distinction between domestic and international politics, which arguably is what most separates multilevel governance and multilevel game approaches, has begun to erode. Although profoundly important, this is not the explicit focus of this paper, and I concentrate on the aggregated preferences articulated by governments.

Rather I focus on the role of institutions as both dependent and independent variables at different times on different levels of governance. This is the very heart of the interaction. Most studies treat institutions/regimes as either dependent (the subject of negotiation) or independent (a factor shaping negotiations) variables (Hall, 1986; Krasner, 1983; Keohane and Nye, 1989; Sandholtz, 1996); rather than acknowledge explicitly that they are both, albeit sequentially, rather than at the same time. The exceptions are historical institutionalist treatments of institutional change (see, for example, Hall and Taylor, 1996; Thelen and Steinmo, 1992), which focus on path dependence within essentially linear change, i.e., modifying existing institutions. Here, my concern is with how institutions on one level of governance affect those on another and are in turn affected by those new institutions.

In the case of EU foreign economic policy, the general framework of the treaties, crucially as interpreted by the ECJ and the member governments and Commission, influences the allocation of competence between the member states and the EU. The common commercial policy, for example, falls entirely within the latter and the member governments must act collectively and by qualified majority. Inward investment, by contrast, falls almost wholly within the member states' competence, which enables them to act largely unilaterally. Consequently, the allocation of competence affects whether and how the preferences of the member governments are aggregated into common positions on multilateral regimes (see further below). As I explain in greater detail below, where competence is shared between the member states and the EU ('mixed' competence in EU parlance) and the member governments

choose to cooperate, institutions must be established to structure cooperation among the member governments.

The EU's institutions, whether established or recently agreed, shape the position advanced by the collective of EU member governments in negotiations on multilateral regimes. Once agreed, those multilateral rules in turn can affect EU and member government rules and their preferences with regard to future actions.

Although multilateral regimes are admittedly less highly developed than the EU's *acquis communautaire*, both institutions and international regimes, to varying degrees, are composed of both formal rules and informal procedures that structure conduct. In addition, the norms and principles associated with institutions and regimes affect actors' preferences and their willingness to cooperate (Hall 1986; Krasner 1983; Keohane 1984; Sandholtz, 1996; Thelen and Steinmo, 1992). Thus institutions and international regimes are best treated as a continuum. This facilitates linking multilevel governance and multilevel game approaches.

Treating institutions and international regimes as a continuum is also useful for analysing the EU's role, as the impact of the *acquis* on policy-making varies with the allocation of competence across issues and over time (Armstrong and Bulmer 1998). Thus, while in many areas, such as the common commercial policy, the EU is 'more than a regime' (Wallace 1983), in others, such as with regard to third-country FDI, it resembles only a weak international regime.

Using the institution-international regime continuum as a bridge, I focus on the common element of multilevel governance and multilevel games that is particularly useful for my purposes; at least in theory, they stress that the interplay of forces goes both ways. This interaction, albeit without the extra-EU dimension, has been most thoroughly developed in the multilevel governance literature. Studies of EU foreign economic policy usually take a unidirectional approach — addressing either only inside-out or, more rarely, outside-in. In this paper I seek to reassert the *interaction* between the multilateral and European levels and (thus) the European level's significance as an interface between the multilateral and national levels.

The nature of the interplay

Inside-out

As noted above, the inside-out aspect of two-level game approaches, specifically the formation of EU negotiating positions under the common commercial policy (CCP) has received most academic attention (Hanson, 1998; Hayes, 1993; Hine, 1985; Johnson, 1998; Nedergaard, 1993). For reasons of space, I shall therefore take preference formation under the CCP as read, and focus instead on how the existence (or absence) of European regimes affects the process of preference formation in areas outside the CCP, upon which the multilateral system increasingly touches.

Although the ECJ interpretation has broadened the scope of the CCP over time (MacLeod et al, 1996; Pescatore, 1981; Weiler, 1991), the breadth of the international agenda, notably with the Uruguay Round, has expanded faster. As a consequence, a number of issues that are the subject to multilateral negotiations fall outside the CCP, which confers exclusive competence on the EU. On matters of exclusive EU competence, the member governments are prohibited from acting independently; common negotiating positions are agreed, at least in theory, by qualified majority vote; and the Commission conducts the negotiations. In addition, the European Parliament's role is very prescribed.

Where the member states retain at least some competence all of this is much more complicated. The institutional framework in which the member governments and the Commission operate is profoundly different. Unilateral action may be possible. If there is a common position, it must be accepted unanimously. The Parliament may also have to give its approval. Whether the Commission is the sole negotiator is at the discretion of the member governments. As a result of these institutional differences, the relative bargaining power of the member governments is affected — with the more extreme governments acquiring more leverage as they cannot be outvoted; the Commission's role is diminished; and the European Parliament's, as well as that of the national parliaments, is augmented. These differences can obviously have profound implications for both the conduct of multilateral negotiations and for the aggregation of the member governments' preferences.

Significantly for my purposes, exclusive Community competence does not end with the CCP. As the result of the doctrine of 'implied powers,' which the ECJ established in its 1971 *ERTA* judgement (Case 20/70) and extended in subsequent judgements, when the EU adopts common (internal) rules the member governments lose the right to enter into obligations with third countries that affect those rules or alter their scope. This 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 European market programme has had profound implications for the conduct of the EU's foreign economic policy, without any formal changes to the institutional framework itself.

Although the EU had participated in multilateral negotiations on issues of mixed competence before, the Uruguay Round addressed many more. Many of the new issues — including services, intellectual property and investment — brought into multilateral system by the Uruguay Round negotiations raised competence questions for the EU. As a result of the (parallel) single market programme, however, some of these issues fell at least partly within EU competence, particularly as the single market programme progressed. Thus more of the Uruguay Round agenda fell within Community competence at the end of the Round than had at the beginning. In addition, the member governments were aware of the increased negotiating leverage that a collective position brings. They, therefore, authorised the Commission to negotiate on their behalf on all issues (Johnson, 1998; Woolcock and Hodges, 1996), but noted that this decision did "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, in large part because of progress on the single market programme largely anticipated the Round, but it did become an issue when it came to the adoption of the agreement. As a result, the member governments and the Commission could not agree who should sign the agreement or on what grounds it should be ratified. The Commission subsequently referred the matter to the ECJ.

The ECJ's November 1994 Opinion 1/94 on the conclusion of the Round, although not entirely negative for the EU, 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 the CCP, 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 of Rome 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 EU alone. It also ruled that although the EU 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 stressed, however, that in areas of mixed competence the need for external unity means that it is essential that there be close cooperation between the member governments, 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 competence and necessity.

The issue of competence aside, the existence of an internal regime represents at least a starting common negotiating position. This is particularly true to the extent that the EU regime might be adopted as a model for the multilateral system, as it was to an extent in telecommunications (Holmes et al 1996), public procurement and subsidies (Vogel 1997; Woolcock 1993) (See also Holmes and Young).

Significantly, as the above discussion indicates, the allocation of competence is often unclear. Although the treaties and subsequent ECJ jurisprudence provide a guide, where any specific issues lies on the competence continuum is open to interpretation; political interpretation (by the member governments and Commission) in the first instance and subject only later to specific (official) interpretation by the ECJ. Thus competence is essentially a political, not legal, issue.

Outside-in

It is essential to distinguish between competence and 'voice.' As the Uruguay Round demonstrated, the EU (member governments and Commission) may decide to speak with a single voice even if competence for some matters lies with the member states. The forum in which a multilateral negotiation takes place can influence this decision. Thus, as the result of essentially accepted past practice, and logistics, the EU speaks with a single voice in the GATT/WTO (Johnson, 1998). There are no such disciplines in the OECD. The EU is not a member and EU participation, as opposed to that of the member states, is subject to a special protocol. Therefore, although the member governments may decide to negotiate in the OECD on the basis of a common position, as they did on shipbuilding, there is not an obligation to do so. Having to agree a common position — especially one, as is the case in issues of mixed competence, based on unanimity — clearly affects the aggregation of the member governments' preferences.

For the most part, the impact of international agreements on the EU and the member states is taken for granted in studies of EU policy-making. This, however, under-emphasises the effect that international agreements can have on EU regimes. The impact can come in three periods: as concessions agreed during negotiations; as rule changes necessitated by subsequent interpretations of agreed multilateral rules; and as constraints on future action.

Although not my focus here, it is important to recognise that multilateral agreements can be empowering as well as constraining. Thus the EU played a leading role in reaching an agreement at Kyoto on reducing greenhouse gas emissions, even though protracted internal efforts to agree a carbon tax had come to nought. The Kyoto agreement then reinforced one side of the argument in subsequent intra-EU rule making. The EU was also an active participant in the Uruguay Round negotiations on trade-related intellectual property rights (TRIPs), despite not having a coherent internal intellectual property regime.

The most commonly cited example of multilateral negotiations affecting an EU regime is the negotiations on agriculture during the Uruguay Round. Pressure from trading partners, particularly the US and the Cairns Group, during the Round, combined with internal budgetary

pressures contributed to the EU adopting the "MacSharry Reforms" of the common agricultural policy (CAP) in 1992 (Pan 1996; Patterson 1997). These reforms essentially opened the door for the conclusion of the Round in December 1993. The EU's Uruguay-Round commitments were subsequently an important part of the process that led to the agricultural reforms agreed at the Berlin European Council in April 1999. The timing, in the light of enlargement, however, was not such to make the issue critical, and the reforms were consequently modest. The decision to review the reforms in 2002/3, however, is linked to the 'Millennium Round' of trade negotiations.

As Peter Holmes and I note in our companion paper, the conclusion of the Uruguay Round, gave teeth to the assessment of compliance with multilateral rules. In essence the introduction of binding dispute settlement means that an external body interprets the meaning of the agreed rules, at least if the two (or more) parties to the dispute cannot settle the issue (politically) between themselves. As a result of recent unfavourable dispute settlement panel judgements the EU is having to reconsider its ban on beef hormones (see Holmes and Young) and its Banana Trade Regime (BTR).

Lastly, agreed multilateral disciplines can constrain future internal development. Again, agriculture is illustrative. Any reform of the CAP to adjust for enlargement will have to be compatible with the Uruguay Round agreement (and any multilateral agreements concluded in the meantime). The BTR ruling and the need to comply with WTO disciplines have shaped the Commission's proposals for negotiating its new trade and aid arrangements (Lomé V) with developing African, Caribbean and Pacific (ACP) countries (Stevens 1998).

These issues illustrate that there is a reverberation between the multilateral and EU levels. External pressure contributed to reform of the CAP, which made conclusion of the Uruguay Round possible, which imposed further disciplines on the CAP. The EU's experience with mutual recognition informed the multilateral rules on technical barriers to trade (including sanitary and phytosanitary (SPS) measures). The beef hormone ban was overturned for contravening these rules (see Holmes and Young). The Commission (1999) is now considering seeking a review of the SPS agreement.

The Cases

The multilateral agreement on investment (MAI)⁴

The negotiations on a multilateral agreement on investment represents a hard case for exploring a) the interaction between European and multilateral regimes and b) the EU's role as an interface between the national and multilateral levels because there is not really a EU regime on inward FDI and no agreement was reached. Nonetheless, there are clear indications of both interaction and interface.

Inside-out

Although the EC's framework for investment among the member states is comprehensive and robust, it does not have a framework coping with extra-EU investment. The one attempt to develop such a regime in the early 1970s coincided with and, due to divergent member government preferences, in the end succumbed to the OECD's (non-binding) Declaration on International Investment and Multinational Enterprise (Brewer and Young 1995; Van Den Bulcke 1992). As a result, extra-EU investment is governed, to the extent that it is, by a complex tangle of bilateral investment treaties (BITs) between the fifteen individual member states and third countries. The UK alone has BITs with about 90 countries. Thus, while investment within the EC is governed by Treaty principles, investment between an EC member state and a third country is governed by national rules and the provisions of the relevant BIT, if any.

There are three related reasons for this disjuncture between the EC's coherent internal regime and fragmented external arrangements. First, unlike with investment between the members, the EC's founding treaties did not address investment with third countries. Second, the member governments have traditionally had substantially different preferences with regard to foreign investment. Third, the degree of congruence of preferences necessary to adopt common (external) rules ('positive integration') is greater than that needed to abolish (internal) restrictions ('negative integration'), particularly with the weight of the treaties fully behind the latter (Pinder, 1968).

⁴ For a more detailed and theoretical discussion of EU cooperation in the MAI see Young 1999.

Consequently, the EU's institutions for dealing with third-country FDI are weak. In particular, the treatment of extra-EC FDI does not fall within the scope of the CCP (ECJ 1994, 1995), despite the (unsuccessful) efforts of the Commission and the some member governments sought to bring it into the CCP in the Treaty of Amsterdam (CRGMS, 1996; Interviews, 10/3/98, 24/11/98). In addition, as the EU's internal investment regime is based primarily on 'negative integration', rather than on the adoption of an extensive system of common rules, the doctrine of implied powers applies to very few of the issues that affect FDI.

As a result, it was an open question whether the member governments would choose to cooperate in the MAI. Although the divergent substantive interests of the member governments stacked the deck against cooperation, 'soft integration' — the informal institutions, conventions, norms and symbols embedded in the Treaties — contributed to them coordinating their positions and even adopting common positions on some issues (Young 1999).

In the absence of formal integration with respect to extra-EC FDI, there were no formal procedures for coordinating EC and member government positions in the MAI. As in other situations in which the member governments have agreed to cooperate, but have not been guided by the treaties (Young 1998), they developed 'soft institutions' to structure their cooperation.

The central issue was how closely the member states would coordinate their positions. Because of differences among the member governments regarding adopting a common position irrespective of competence, it took almost a year to find a framework for cooperation.

Adopted as a series of (non-binding) Council of Ministers' Decisions,⁵ it had four components:

- 1) in areas of Community competence the Commission would negotiate on the basis of negotiating directives from the Council and in consultation with any appropriate Council committees;
- 2) coordination meetings involving Commission, Council and member government officials would take place before each OECD meeting;

⁵ Council Decisions of 10 April 1995 (Doc. 6422/95); 22 May 1995 (Doc. 7244/95); and 22 April 1996 (Doc. 6370/96).

- 3) the Committee of Permanent Representatives established an ad hoc working group on the MAI to assist the Commission, to do preparatory work for the Council and to ensure close cooperation between the EC and the member states;
- 4) 'modalities' were agreed to structure participation and confirmed the obligation to cooperate in accordance with the treaties and ECJ case law.

Thus, the Commission and the member governments agreed that they would, 'in principle, reach common positions on the issues under negotiation.' Such common positions, without prejudice to competence, would be 'defended jointly and in a concerted manner'. Pending the agreement of a common position, the parties were not to take positions in the negotiations that would foreclose the possibility of reaching a EU common position later.

With the catastrophic exception of the French withdrawal from the talks in October 1998, the member governments seem to have adhered to these procedures fairly well. The obligation to and procedures for coordination affected the way member governments presented their views (Interview, 24/11/98) and encouraged them to avoid precluding prematurely the prospect of reaching a common position (Interview, 24/3/98). The impact of the EU interface on the member governments is most evident in four respects: seeking special treatment for regional economic integration organisations (REIOs); the treatment of cultural industries; the screening of exemptions requested; and the targeting of others' exemptions. These issues also demonstrate anticipation of an interaction between European and multilateral rules.

The point of a REIO clause, for example, was to avoid any automatic legal obligation to extend liberalisation within the EU (or between the EU and its associated countries) to other countries. It was thus essentially a carve out from most-favoured-nation (MFN) treatment (non-discrimination among foreigners). Although the more liberal governments — such as those of the Netherlands and the UK — were not enthusiastic about such a clause, they accepted it in the end and agreed to speak with one voice on the issue (Interviews, 17/7/97, 24/3/98, 24/11/98).

Whether and what common position to take on cultural matters was more vexing (Interviews, 15/7/97, 17/9/97, 24/11/98). The French, with the support of other southern

member governments, wanted to exclude industries related to culture — such as publishing, television, and radio — from the provisions of the agreement. The more liberal member states, led by the UK, and the Commission (1997) opposed such a sweeping approach, not least because they wanted to curb some of Canada's cultural restrictions. Eventually a fragile agreement — on the basis of the internal compromise reached on audio-visual services during the GATS negotiations — was reached. The member governments agreed that the MAI would apply to cultural industries, but the EU and the member governments would submit reservations exempting them from MFN and national treatment (NT) (non-discrimination between foreign and domestic firms). Thus they would compromise neither existing provisions nor constrain future developments (Interviews, 24/3/98, 24/11/98; Commission, 1997).

When, relatively late in the negotiations, the participants submitted their proposed lists of exceptions from MFN and NT principles, the Commission reviewed the member governments' proposals for compatibility with the EU's internal rules, the *acquis communautaire*, which, among other things prohibits discrimination on the basis of nationality (at least within the EU) (Interviews 6/5/99). The logic appears to have been that if a member government submitted an exception, it was probably on the basis of nationality and therefore it potentially infringed the *acquis*.⁶ In such circumstances the Commission would consult with the member government in question. The effect of this process appears to have been to discourage the member governments from submitting exceptions 'just in case' they wanted to impose restrictions later (Interviews, 6/5/99). In addition, with the exception of fisheries, where due to national registries it was necessary, the member governments were not permitted to maintain national exceptions where exceptions were taken at the European level (Interviews, 6/5/99).

The Commission also consulted each member government individually to explore whether there were any exceptions that might be traded away. This exercise, however, did not yield much — for example, the Irish government was willing to give up its NT exception on

⁶ In this context it is worth noting that many of the exceptions listed in the member states' exceptions from NT under the OECD's (non-binding) National Treatment Instrument specify home country nationals and do not distinguish between EU and non-EU nationals. See <http://www.oecd.org/daf/cmis/country/>.

wheat milling under the OECD's (non-binding) National Treatment Instrument. What might have been traded away was never put to the test, however, because the talks broke down before those negotiations could really get started.

Likewise, the coordinated targeting other countries' exceptions never came to fruition. In a very informal group chaired by the Commission, the member governments allocated responsibility amongst themselves for investigating the other partners' exceptions (Interviews 6/5/99). The Commission examined the US position, although all of the member governments were asked to comment on the US's extensive list of exceptions. Each member government and the Commission then had exploratory discussions with its allocated country and reported back to the group. The negotiations collapsed, however, before they could move beyond the information gathering phase.

All of this effort came to nought in October 1998, however, when the French government, without consulting its EU partners, decided to walk away from the talks (Interviews, 24/11/98 and 6/5/99). This represented a catastrophic breakdown in the coordination procedure, but, because cooperation was bound by only 'soft institutions' France faced only political costs — such as condemnation or non-cooperation in other areas — for its unilateral exit. As the negotiations were struggling anyway, however, the other member governments did not impose them. Had the negotiations been on the brink of success the calculation might have been different.

Outside-in

As no agreement was reached there can be no feedback effects from the agreement. There are, however, implications of non-agreement. For various reasons, most of these costs actually fell on the US, as its firms stood to gain most. Nonetheless, although there are as yet no obvious signs of it, the experience of the MAI negotiations may well affect how the EU and its member states approach the issue the next time round, as they have indicated they would like to do as part of a 'Millennium Round.'

In addition, the negotiations themselves reveal feedback effects. It is also clear from the coordination efforts within the EU that the member governments, albeit some more than others, were concerned about the potential feedback effects of an agreement.

This is perhaps most evident with respect to the REIO clause. Two dimensions of potential feedback seem to have been of particular concern: one purely internal, the other linked to enlargement. Some of the more cautious member governments indicated that they would be less willing to proceed with further internal liberalisation if it would be automatically extended to non-EU (particularly American) firms (Commission 1997). The EU also sought to include alignment by applicant countries to the EU's investment rules within the scope of the REIO (Commission 1997). This would have meant that non-EU firms would not automatically benefit from the liberalisation associated with those countries' closer integration with the EU.

The EU's other key defensive objective was explicitly preserving the EU's and member governments' freedom of manoeuvre with respect to cultural industries. Thus it sought to ensure that if the MAI applied, it would not bite.

Conversely, as a product of the deterrent effect of the screening process, the member governments were discouraged from lodging exceptions just in case they wanted to act at some point in the future. Thus the interface of the EC, albeit mildly, contributed to national stances that could have constrained the member governments' actions in the future.

A final EU concern with the feedback effect was evident in its wanting to seek guarantees that the agreement would be directly applicable. This was due to the Commission's (1997) interpretation of ECJ jurisprudence that if the provisions of the MAI were sufficiently precise they would be directly applicable and enforceable in the EU, and, it argued, probably also in the member states. It thus wanted to ensure that this would also be the case in the non-EU countries.

It is also worth noting that concern that the combination of non-discrimination and binding investor-state dispute settlement might curb all governments' capacity to regulate contributed to the collapse of the talks (see Holmes and Young).

GATS basic telecommunications agreement

Inside-out

When the Uruguay Round came to a close in December 1993 there were a number of issues in the GATS negotiations, basic telecommunications among them, on which some of the parties did not think there had been sufficient progress. It was thus agreed that negotiations in these areas should continue beyond the official end of the Round.

This posed some problems for the EU, because, as noted above, the issue of competence had reared its ugly head with the conclusion of the Round and the ECJ's judgement was still pending. The Commission and member governments were confronted with the need to find a *modus vivendi* for participation in the continuing GATS negotiations. Towards this end, the member governments, the Council and the Commission agreed a code of conduct at the General Affairs Council in May 1994.

The code, without settling the distribution of competences, enabled the Commission to continue to negotiate on behalf of the EU 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. The code, however, was not seriously tested in the negotiations on basic telecommunications services, in large part because the GATS regime trailed (just) behind and was modelled on the EU's internal liberalisation programme. The negotiations were conducted on the basis of guidelines agreed by the Council in June 1994, in consultation with the 113 Committee, and in the light of the ECJ's emphasis on the duty to cooperate in areas of mixed competence (Commission 1994).

The need for a political solution to the competence question was underlined by the ECJ's conclusion in Opinion 1/94 that cross-border services were an exclusive Community competence, but that establishment was a member state competence. In the words of one

senior British trade official, the Court had 'cut the [telecoms] baby in half' (UACES Workshop Oct. 1997).

The proportion of the telecoms issue which fell within the Community's competence, although never formally identified, increased substantially during the course of the GATS basic telecommunications negotiations as a consequence of the rapid development of the EU's internal regime. Although not the focus of this paper, it is necessary to sketch briefly this development.

The Commission's 1989 Green Paper, which was endorsed by the Council in June 1988, was the first step towards an EU telecoms policy. It proposed open competition for the provision of services except voice (basic telecommunications in GATS parlance). The Commission pressed ahead faster than many of the member governments wanted to go, using its competition powers under Article 90 of the Treaty of Rome to adopt liberalising directives on terminals (1988) and services (1989). Following unsuccessful challenges to these directives before the ECJ, the Commission and member governments found a more cooperative way forward (Sandholtz 1998).

These early moves internally coincided with the first consideration of an EU negotiating position for the GATS negotiations in autumn 1989 (Woodrow and Sauvé 1994). Although already emphasising that the EU had valuable experience in increasing competition while the member states maintained quite different regulatory frameworks, the Senior Officials Group on Telecommunications (SOG-T) emphasised that the Commission's directives on services and open network provision (ONP), at the time still pending, would provide the underlying base for any EU negotiating position.

This set the tone for the rest of the EU's participation in the GATS negotiations, with the exception, perhaps not surprisingly, of the end-game. A series of (non-binding) Council Resolutions linked the opening of the Community telecommunications market for third countries to comparable access to their markets and recognised that the establishment of a fair international trade environment was a key factor in the future development of the Community's

regulatory framework.⁷ The Commission's (1994) report on the GATS negotiations on basic telecoms, shortly after they really got underway specified that 'external negotiations cannot proceed faster than the internal process of liberalisation.' Thus, to an extent the competence circle was squared by basing the Community's external negotiating position closely on internal developments.

The Commission's 1994 report had also identified gaining multilateral acceptance of the European approach of open network provision as one of the objectives to be pursued. In this the EU was largely successful. The Commission's 1995 ONP directive envisaged a regime under which any telecommunications operator from inside or outside the EU would have the right to interconnect at cost-related charges and to offer services across the EU. The member governments' regulations would remain separate, but would be subject to scrutiny by the European Commission under competition rules.

The EU essentially succeeded in securing its objective of transposing this approach to the multilateral level. In many respects, the ONP directive's provisions were replicated in GATS 'Reference Paper', which established global rules and principles covering competition in the telecommunications sector (Holmes et al 1996).

Outside-in

The EU, however, did not get entirely its own way. Some of the more reluctant member governments had negotiated derogations from the ONP directive — some with respect to the speed of liberalisation, others with respect to retaining restrictions on foreign equity (See Table 1). Consequently — in conjunction with the principle of not proceeding faster externally than internally, reiterated in the Council Resolution of 3 October 1995 — the EU's initial offer in October 1995, while opening the EU market on an MFN basis, retained equity restrictions in some member states (Holmes et al 1996).

This was not sufficiently liberal for the US, which bowed out of the talks in spring 1996 because the critical mass of market-access commitments had not been reached (Bronckers and Larouche 1997). This precipitated the first real crisis of these negotiations within the EU, as

⁷ Council Resolutions of 22 July 1993, 22 December 1994 and 18 September 1995.

the Commission — supported by the British, Dutch, German, Finnish and Swedish governments — proposed making an offer more liberal than the agreed level of internal liberalisation (*Financial Times*, 13 March 1996). Specifically, it proposed that Belgium, France, Italy, Portugal and Spain abolish their ownership restrictions and that Spain would accelerate liberalisation. In the face of vigorous opposition from the Spanish government and complaints from the Belgian and French governments, the member governments agreed that the EU would only make an improved offer if others did so first (*Financial Times*, 26 March 1996).

In November 1997 the EU and US, in an agreed move, tabled revised (and improved) offers. The EU was able to do so, because the Commission had leveraged its internal competition powers to extract additional concessions from some of the member governments (Bronkers and Larouche 1997). In particular, it required that Spain accelerate the break-up of its voice telephone monopoly as a condition of exempting Telefonica's accession to the Dutch-Swedish-Swiss alliance Unisource from EU competition rules (Bronkers and Larouche 1997).

Thus, through a combination of direct external negotiating pressure and the translation of that pressure through the Commission, the EU's liberalisation process was accelerated and advanced by the GATS negotiations beyond what had been internally agreed (see Table 1). The fact that the negotiation of the GATS agreement had a feedback effect on the member states is particularly striking given that the EU's regime served as the model for the multilateral regime.

Table 1. Direct and indirect effects of the GATS negotiations on EU national regulations

<u>Country</u>	<u>ONP deadline for liberalisation</u>	<u>directive equity restrictions</u>	<u>GATS deadline for liberalisation</u>	<u>agreement equity restrictions</u>
Belgium		49%		none
Portugal	2003	25%	2000	partial removal (subject to parliamentary approval)
Spain	2003	25%	1998	none

There are other implications of the GATS regime for the EU. First, because it offered liberalisation on an MFN basis, the EU cannot now impose reciprocity conditions on operators from other countries which are able to extract essentially monopoly rents from calls to and from the EU. In addition, the EU's (adapted) regime is now also subject to the WTO's dispute settlement system, which at least one Commission official (Durantez 1996) thinks has some advantages for complainants over going through the EU's legal system.

Conclusion

In both cases there are clear effects running from both the member states through the EU to the multilateral level and from the multilateral level to and through the EU. The EU's presence at the interface between the national and the multilateral influenced the way those effects played out. This is even the case where one would not expect it. Despite its weak extra-EU FDI regime, operating within the EU affected the member governments' participation and positions in the MAI negotiations. Even though the GATS regime was modelled on the EU's, some of the member states still had to adapt to the multilateral system.

This indicates that the interaction between national, European and multilateral policy making needs to be taken into account. A focus on one level of governance might miss crucial causal factors. As the multilateral system extends further into behind-the-border issues the impact on the EU, as well as other countries, will potentially become more important and may affect more areas. Consequently, the interaction with the multilateral system should be built more effectively into analyses of EU policy making. Linking multilevel governance and multilevel game approaches by treating institutions and international regimes as points on a continuum may provide a first step in that direction.

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