

# EUROPEAN UNION AND ITS MEMBER STATES AS A COLLECTIVE ACTOR IN WTO DECISION- MAKING PROCESS

By

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## Introduction

One of the most prominent ambitions of the European integration process has always been to speak with one voice in relation to the rest of the world. In the area of international trade, and more specifically within the framework of the World Trade Organization (WTO), the European Union (EU or Union) is an important player. The EU is a collective actor of the WTO. While the EU and its Member States are all members of the WTO,<sup>1</sup> in practice they act as one actor represented by the European Commission (Commission). The Member States have pooled their external trade sovereignty and appointed the Commission as their common spokesman.

However, this transfer of competences and the practical importance of external trade policy seem inversely proportional to the institutional quality of the rules that are the basis of EU decision-making practice in the WTO. EU decision-making practices in the WTO have been criticized for lacking in openness and public scrutiny for many years. Furthermore, the European Parliament (EP), the only democratically elected institution of the EU, was excluded from the decision-making process for decades. The EU proclaims to be an international organization committed to constitutional principles of transparency, accountability, and legitimacy. This is not only expressed in the speeches and rhetoric of EU officials, but it is also spelled out in treaties,<sup>2</sup> official EU policy papers and declarations.<sup>3</sup> Therefore, it is of great importance that the EU's practices in the WTO are in line with these principles.

Until 1 December 2009, the European Union was governed by the Treaty on European Union (TEU), the Treaty establishing the European Community (TEC), and the Treaty

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<sup>1</sup> Article XI, Agreement Establishing the World Trade Organization.

<sup>2</sup> Articles 9-12 TEU.

<sup>3</sup> European Commission "Green Paper: European Transparency Initiative", COM(2006) 194 final, 3.5.2006, available at [http://ec.europa.eu/transparency/eti/docs/gp\\_en.pdf](http://ec.europa.eu/transparency/eti/docs/gp_en.pdf); see also Presidency Conclusions of the Laeken European Council (14 and 15 December 2001): Annex I: Laeken Declaration on the future of the European Union, in *Bulletin of the European Union*. 2001, No. 12, p.19-23; Declaration 17 of the Final Act on the Treaty of European Union, OJ C 191, 29.7.1992, p.101, which emphasized the importance of transparency of the decision-making process.

establishing the European Atomic Energy Community (TEAEC). The Treaty of Lisbon did not replace the first two treaties, but it amended them. The EU is now governed by two treaties: the Treaty on European Union (TEU) and the Treaty on Functioning of the European Union (TFEU). It is due to the Treaty of Lisbon that the institutional structure of the EU has changed, especially in the area of common commercial policy (CCP). The EU's legal basis for decisions in WTO matters is Article 207 TFEU. In this paper, the current regime on CCP will be discussed, as well as the past one when relevant.

This paper will outline and analyze the decision-making process in WTO matters. First, the players of the decision-making process -- the Council of the European Union (Council), the Trade Policy Committee, the Commission, and the European Parliament -- will be examined. Then the distinction will be made between decision-making in initiating WTO disputes and decision-making conducting trade agreement negotiations in the WTO. Then, decision-making practices in WTO matters will be assessed against constitutional principles of transparency, accountability, and legitimacy. After this assessment, conclusions will be drawn.

## **Actors of the EU decision-making process**

### **The Council**

The Council consists of representatives of the Member States at ministerial level.<sup>4</sup> It is assisted by a General Secretariat under the responsibility of a Secretary General, appointed by the Council.<sup>5</sup> The General Secretariat carries out all the necessary work for the activities of the Council, the Permanent Representatives Committee (COPREPER) and the committees and working parties set up in the Council.<sup>6</sup> The Council's task is to share lawmaking and

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<sup>4</sup> Article 16(2) TEU.

<sup>5</sup> Article 204(2) TFEU.

<sup>6</sup> Leal-Arcas, Rafael, "The EC in the WTO: The three-level game of decision-making. What multiculturalism can learn from regionalism", *European Integration online Papers* 8, 2004, p.10.

budgetary power with the EP, carry out policy-making,<sup>7</sup> and coordinate economic policies of the Member States.<sup>8</sup>

The Council is authorized to conclude, sign, and ratify international agreements concerning CCP, acting on the proposal from the Commission. Trade agreements are concluded on the basis of Article 207 TFEU. In addition, the relevant provisions of Article 218 TFEU apply. The Council, together with the EP, acting in accordance with the ordinary legislative procedure, adopts the measures defining the framework for implementing CCP.<sup>9</sup>

The Council acts by qualified majority in the case of trade agreements concerning goods, services, commercial aspects of intellectual property and foreign direct investment as provided in Articles 207(4) and 218(8) TFEU, except in the cases where the TFEU provides that the Council shall act unanimously.<sup>10</sup> Furthermore, the Council appoints the Trade Policy Committee.<sup>11</sup>

### **Trade Policy Committee**

Another actor in the EU decision-making process in WTO matters is the Trade Policy Committee. The Committee assists and consults the Commission in international trade negotiations. The relevant provision is Article 207(3) TFEU which states that the Commission shall conduct negotiations of international trade agreements in consultation with a special committee. However, the Committee's function and structures are not prescribed. Article 207 TFEU does not specify what the relationship should be between the Commission and the Member States' representatives in the Committee and leaves many issues open, such as what the procedure for the Commission's consultations with the Committee is.

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<sup>7</sup> Article 16(2) TEU.

<sup>8</sup> Article 207 TFEU.

<sup>9</sup> Article 207(2) TFEU.

<sup>10</sup> Articles 207(4)(2) and (3) and 218(8)(2) TFEU.

<sup>11</sup> Article 207(3)(3) TFEU.

The Committee has no set numbers of participants.<sup>12</sup> It operates at two main levels: (1) there is a full member level or ‘top figuration’ (Titularies). This level consists of senior trade policy officials at Director-General level who meet once a month,<sup>13</sup> and (2) there is a deputy level which is comprised of three to four trade officials from each Member State that meet each Friday.<sup>14</sup> The Committee almost never meets at the political level, i.e. the level of European Trade Commissioner and Ministers.

Furthermore, the Committee also sets up a number of specialized sub-committees which deal with issues such as textiles, steel, trade in services, the mutual recognition of standards and the WTO. Coordination between the Trade Policy Committee and the sub-committees is generally good, supported by the fact that there is some overlap of membership between the Committee and the sub-committees.<sup>15</sup>

The Committee scrutinizes and consults the Commission’s proposals for EU negotiating mandates on trade agreements. Its primary purpose is to serve as a means to facilitate decision-making in EU trade policy, but it never takes decisions.<sup>16</sup> The Committee provides that the Member States are not excluded from the process of decision-making in the area of trade.<sup>17</sup>

The role of the Trade Policy Committee in policy-making is two-fold: (1) the Committee consults with the Commission on trade matters, and (2) it assists the Commission in the

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<sup>12</sup> Johnson, Michael, *European Community Trade Policy and the Article 113 Committee*, 1998, p.29; see also World Wide Fund For Nature, “A League of Gentlemen: Who really runs EU Trade Decision-Making?”, 2003, p.8.

<sup>13</sup> Johnson, Michael, *European Community Trade Policy and the Article 113 Committee*, 1998, p.20; Murphy, Anna, “In the maelstrom of change: The Article 113 Committee in the governance of external economic policy” in *Committee Governance in the European Union*, Christiansen, Thomas and Kirchner, Emil (eds.), 2000, p.107.

<sup>14</sup> World Wide Fund For Nature, “A League of Gentlemen: Who really runs EU Trade Decision-Making?”, 2003, p.8; see also Murphy, Anna, “In the maelstrom of change: The Article 113 Committee in the governance of external economic policy” in *Committee Governance in the European Union*, Christiansen, Thomas and Kirchner, Emil (eds.), 2000, p.107.

<sup>15</sup> Murphy, Anna, “In the maelstrom of change: The Article 113 Committee in the governance of external economic policy” in *Committee Governance in the European Union*, Christiansen, Thomas and Kirchner, Emil (eds.), Manchester and New York: Manchester University Press, 2000, p.107.

<sup>16</sup> Interview held with Mr. Raimund Raith, Legal Advisor, Legal Service of the Commission on 20 October, 2008 in Brussels.

<sup>17</sup> Interview held with Mr. Raimund Raith, Legal Advisor, Legal Service of the Commission on 20 October, 2008 in Brussels.

conduct of CCP negotiations with external partners. Its function is also to assist the COREPER<sup>18</sup> and the Council in matters of trade policy.<sup>19</sup> Despite the important role of the Trade Policy Committee in the CCP, its formal role is purely advisory as confirmed by the Court of Justice.<sup>20</sup>

The discussions on trade policies take place in the Trade Policy Committee in Brussels, where all intra-EU negotiations and consultations are completed before any WTO meeting in Geneva. Once the EU negotiators are in Geneva, they meet at the premises of the Liaison Office of the Council to refine the EU position before the actual negotiations begin.<sup>21</sup>

The Committee does not have official rules on how it will proceed and how it will vote. However, informal rules are being followed at the meetings as a matter of practice. The Member States' representatives are seated in the circle with the Presidency and the Secretariat of the Council seated on one side and the Commission on the other side, facing each other. The Member States' representatives are placed around the table in the order of rotation of the Presidency. The Commission is represented by the officials from DG Trade. In addition, at every meeting, a lawyer from the Legal Service of the Commission is present in case there are any legal questions to be answered.

It is important to stress the role of the Presidency. The Presidency chairs the meetings. Furthermore, it is also responsible for consultation with the Council Secretariat, the Commission, and other Member States for determining the Trade Policy Committee's overall work program and its priorities.<sup>22</sup> Nevertheless, the content and order of agenda for each

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<sup>18</sup> See [http://europa.eu/scadplus/glossary/coreper\\_en.htm](http://europa.eu/scadplus/glossary/coreper_en.htm).

<sup>19</sup> World Wide Fund For Nature, "A League of Gentlemen: Who really runs EU Trade Decision-Making?", 2003, p.11.

<sup>20</sup> Case C-61/94, *Commission v Germany*, [1996] ECR I-3989, paragraph 14.

<sup>21</sup> Interview held with Mr. Raimund Raith, Legal Advisor, Legal Service of the Commission on 20 October, 2008 in Brussels.

<sup>22</sup> Johnson, Michael, *European Community Trade Policy and the Article 113 Committee*, 1998, p.30.

meeting is prepared and agreed on by the Presidency and by DG Trade.<sup>23</sup> During meetings, DG Trade proposes and explains initiatives to the Committee and answers any questions posed by the Member States.

The Committee does not formally vote, since it never takes decisions. It works by consensus and ‘gentleman’s agreements’.<sup>24</sup> However, it tries to ensure that there is no blocking minority before passing matters to the next level of decision-making<sup>25</sup> and matters tend to be discussed until a clear consensus has been reached.<sup>26</sup> The Committee’s deliberations are not published. It does not issue public statements in its own name, because that is a matter for the Council, or for the Commission exercising its Treaty rights.<sup>27</sup>

From the interview conducted with a former member of the EU Delegation in Geneva, one gets the impression that the Committee is truly a consultative committee, where the Commission keeps the Member States updated on the issues.

## **The Commission**

The main job of the Commission is promoting the general interest of the Union and taking appropriate initiatives for that purpose.<sup>28</sup> The Commission negotiates international trade agreements when the TFEU provides for the conclusion of such an agreement between the Union and third countries or international organizations.<sup>29</sup> The Commission now has to report

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<sup>23</sup> Interview held with Mr. Raimund Raith, Legal Advisor, Legal Service of the Commission on 20 October, 2008 in Brussels.

<sup>24</sup> World Wide Fund For Nature, “A League of Gentlemen: Who really runs EU Trade Decision-Making?”, 2003, p.9; see also Murphy, Anna, “In the maelstrom of change: The Article 113 Committee in the governance of external economic policy” in *Committee Governance in the European Union*, Christiansen, Thomas and Kirchner, Emil (eds.), 2000, p.99-100.

<sup>25</sup> Murphy, Anna, “In the maelstrom of change: The Article 113 Committee in the governance of external economic policy” in *Committee Governance in the European Union*, Christiansen, Thomas and Kirchner, Emil (eds.), 2000, p.100.

<sup>26</sup> Ahearn, Raymond J., “Trade Policymaking in the European Union: Institutional Framework”, *CRS Report for Congress*, 27 March, 2002, p.5.

<sup>27</sup> Johnson, Michael, *European Community Trade Policy and the Article 113 Committee*, 1998, p.35.

<sup>28</sup> Article 17(1) TEU.

<sup>29</sup> Articles 207 and 218 TFEU.

regularly not only to the Trade Policy Committee but also to the European Parliament on the progress of negotiations.<sup>30</sup> It is also responsible, together with the Council, for making sure that the agreements are consistent with the internal rules and policies of the Union.<sup>31</sup>

Whenever the EU deals with WTO matters, the Commission is the negotiator and speaks on behalf of the EU as a whole. The Member States are physically present but the Commission conducts the negotiations. Nevertheless, during the negotiations, there is coordination between the Commission and the Member States in Brussels and in Geneva before and during the negotiations in the WTO. It is interesting to note that, although the Commission is the negotiator, the Member States vote.<sup>32</sup>

Even in the case of shared competence in international trade, the Commission is the sole spokesman for the EU and the Member States in almost all cases. This is necessary to ensure the effective implementation of international agreements such as WTO agreements. The Court of Justice insisted on the duty of close cooperation between the Member States and the EU in negotiating mixed agreements.<sup>33</sup>

The influence of the Commission in proposing and negotiating trade policy is immense. The Commission has the right of initiating the preparation of proposals for EU positions in trade agreements and it also has the significant and effective power of being the only EU negotiator in trade talks, because trade policy under Article 207 TFEU is the exclusive competence of the Union.

The Commission experts lead policy-making on trade issues. The Commission holds informal talks with the Presidency and more interested Member States.<sup>34</sup> It is up to the Commission to decide whether to accept, ignore or revise Member States' suggestions.

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<sup>30</sup> Article 207(3) TFEU.

<sup>31</sup> Article 207(3) TFEU.

<sup>32</sup> Leal-Arcas, Rafael, "The EC in the WTO: The three-level game of decision-making. What multilateralism can learn from regionalism", *European Integration online Papers* 8, 2004, p.7.

<sup>33</sup> See Opinion 1/92, [1993] ECR I-1061, paragraph 36 and Opinion 1/94, [1994] ECR I-5267, paragraph 108.

<sup>34</sup> Interview held with Mr. Raimund Raith, Legal Advisor, Legal Service of the Commission on 20 October, 2008 in Brussels.



Nevertheless, if 27 Member States do not agree or strongly oppose a Commission initiative, the latter will reconsider it and try to sort it out.<sup>35</sup> All this suggests that the Commission is the most important player in decision-making in WTO matters where it enjoys a considerable amount of discretion.

In the case of decision-making of WTO dispute settlements, the Commission also plays a central role. Two important and influential actors within the Commission are DG Trade and the Legal Service. DG Trade is responsible for the political aspects of WTO dispute settlements, while the Legal Service deals with the legal aspects. DG Trade decides over the initiation of disputes and requesting consultations with third parties, while the Legal Service is responsible for arguing the EU's case before the Panel and the Appellate Body of the WTO. The two DGs are mutually dependent on each other, since the Legal Service relies on the investigations and reports of DG Trade for obtaining facts important for a case, and DG Trade depends on the Legal Service for a successful outcome.<sup>36</sup>

### **The European Parliament**

The EP represents the will of the people. It is the only democratically elected institution of the Union.<sup>37</sup> The EP's main functions are the following: ordinary legislative power,<sup>38</sup> budgetary power,<sup>39</sup> power of control over the Commission where the EP elects the President of the Commission,<sup>40</sup> the power to dismiss the Commission as a whole.<sup>41</sup>

Before the Treaty of Lisbon came into force, the EP was formally excluded from decision-making under Article 133 TEC (now Article 207 TFEU). It made it very difficult for the EP to

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<sup>35</sup> Interview held with Mr. Raimund Raith, Legal Advisor, Legal Service of the Commission on 20 October, 2008 in Brussels.

<sup>36</sup> Billiet, Stijn, "The EC and WTO Dispute Settlement: the Initiation of Trade Disputes by the EC", *European Foreign Affairs Review* 10, 2005, p.208.

<sup>37</sup> Article 14(3) TEU.

<sup>38</sup> Ordinary legislative power has replaced the co-decision procedure and it is defined in Article 294 TFEU.

<sup>39</sup> Articles 313-325 TFEU.

<sup>40</sup> Article 17(7) TEU.

<sup>41</sup> Article 17(8) TEU.

get legally involved in WTO matters, but informal information procedures tried to solve this problem to some extent.<sup>42</sup> Despite the restrictions, the EP has taken efforts throughout the years to scrutinize and influence the EU's external economic relations.<sup>43</sup> It adopted its own initiative reports<sup>44</sup> and resolutions<sup>45</sup> in which it expressed, without being formally asked, basic positions and demands on WTO issues. Furthermore, the Framework Agreement on EP-Commission relations of 2005 made the EP an observer of trade.<sup>46</sup> Its International Trade Committee (INTA) has been regularly informed by the Commission on any development in trade policy. The INTA committee has been responsible for matters relating to the establishment and implementation of the Union's CCP and its external economic relations. The EP has had a constant dialogue with the Commission and the Council in both plenary and committee meetings where members of the EP voice their concerns.<sup>47</sup> During negotiations in the WTO, the Commission has been giving briefings to the EP through committee meetings in order to have legitimacy in trade policy. However, these procedures are not legally binding upon the Commission.

Under the Treaty of Lisbon, the role of the EP has considerably increased. The EP is involved in ordinary legislative procedure which applies to EU legislation concerning international trade and defines the framework for implementing the CCP.<sup>48</sup> Furthermore, the EP has to be regularly informed on the progress of negotiations.<sup>49</sup> The INTA committee receives the same information as the Trade Policy Committee. Finally, the EP has to give its

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<sup>42</sup> Bender, Peter, "The European Parliament and the WTO: Positions and Initiatives", *European Foreign Affairs Review* 7, 2002, p.195.

<sup>43</sup> Bender, Peter, "The European Parliament and the WTO: Positions and Initiatives", *European Foreign Affairs Review* 7, 2002, p.196.

<sup>44</sup> The European Parliament took for the first time a detailed position on the WTO by adopting the Kittelmann report (A4-0320/96, 13 November 1996). In 2001, the EP also adopted Schwaiger report (A5-0062/2001, 13 March 2001) with many recommendations and reminded the Commission of its WTO trade policy.

<sup>45</sup> See EP's Resolution: B5-0819/2001, 13 December 2001.

<sup>46</sup> Framework Agreement on relations between the European Parliament and the Commission of 26 May, 2005, OJ C 117E, 18.5.2006., paragraph 19.

<sup>47</sup> Bender, Peter, "The European Parliament and the WTO: Positions and Initiatives", *European Foreign Affairs Review* 7, 2002, p.196.

<sup>48</sup> Article 207(2) TFEU.

<sup>49</sup> Article 207 TFEU.

consent to the conclusion of a trade agreement.<sup>50</sup> However, its involvement in the trade negotiations is limited. The Trade Policy Committee keeps more power because it assists the Commission in drafting legislation. The EP is not directly involved in trade negotiations.<sup>51</sup> Moreover, it has no power to authorize the EU to enter into trade negotiations, because the Council retains the power to authorize the opening of negotiations, on the proposal from the Commission.<sup>52</sup>

## **Decision-making in WTO Disputes**

### **The EU in WTO Disputes**

Since the WTO dispute settlement system has been created, the EU has become one of its most frequent users. There are two basic routes to a WTO dispute for the EU. There is a more informal route through the provisions of Article 207 TFEU and there is a formalized procedure under the Trade Barriers Regulation (TBR).<sup>53</sup>

### **Procedure under Article 207 TFEU in initiating a WTO dispute**

Article 207 TFEU provides for an informal venue to a WTO dispute. A complaint should be lodged with the Commission, which then examines the complaint and gives a proposal or a recommendation to the Council. Most WTO panels opened under this informal procedure have been the result of informal complaints by industry or a Member State or it came from the Commission itself.<sup>54</sup>

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<sup>50</sup> Article 218(6)(a)(v) TFEU.

<sup>51</sup> Article 207(3) TFEU.

<sup>52</sup> Article 207(3) and Article 218(2) TFEU.

<sup>53</sup> Council Regulation (EC) No. 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the existence of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, OJ L 349, 31.12.1994, p.71-78.

<sup>54</sup> Billiet, Stijn, "The EC and WTO Dispute Settlement: the Initiation of Trade Disputes by the EC", *European Foreign Affairs Review* 10, 2005, p.201; see also Kujiper, Peter Jan, "The New WTO dispute settlement system: The impact on the European Community", *Journal of World Trade* 29(6), 1995, p.49-72.

The usual procedure is that officials in DG Trade first examine and scrutinize the complaint in close cooperation with lawyers of the WTO and International Trade Team in the Commission's Legal Service. The issue is then discussed in the Trade Policy Committee before the Commission takes a final decision whether to launch a WTO dispute, as sometimes a final opinion of the Committee is requested.<sup>55</sup> Furthermore, the Member States are informed about the developments in the dispute settlement proceedings during the Trade Policy Committee's meetings and the INTA committee is also briefed on the progress.

It is important to note that the Commission only needs to consult the Trade Policy Committee and only brief the EP. All this strongly suggests that the Commission is the most important player under this procedure. Furthermore, in the actual panel proceedings in the WTO, the contingent of the Commission's lawyers plays the leading role.<sup>56</sup> The Commission thus takes the central role in the WTO dispute settlement procedures and Member States are sidelined. Despite the regular consultation with the Trade Policy Committee, the Member States do not play a significant role in preparing the proceedings.<sup>57</sup>

### **Procedure to a WTO Dispute under the Trade Barrier Regulation**

TBR is the second route to a WTO dispute. It lays down Union procedures in the field of the CCP in order to ensure exercise of the Union's rights under international trade rules, especially those established under the auspices of the WTO. It is a legal instrument that gives the right to EU enterprises, industries, and the Member States to file a complaint with the Commission that then investigates and determines whether there is evidence of a violation of

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<sup>55</sup> Kuijper, Pieter-Jan, "The New WTO Dispute Settlement System: The Impact on the European Community", *Journal of World Trade* 29, 1995, p.55; see also Billiet, Stijn, "The EC and WTO Dispute Settlement: the Initiation of Trade Disputes by the EC", *European Foreign Affairs Review* 10, 2005, p.202.

<sup>56</sup> Billiet, Stijn, "The EC and WTO Dispute Settlement: the Initiation of Trade Disputes by the EC", *European Foreign Affairs Review* 10, 2005, p.202.

<sup>57</sup> Cottier, Thomas, "Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union", *Common Market Law Review* 35, 1998, p.353.

international trade rules which resulted in injury.<sup>58</sup> It represents an attempt by the Council and the Member States to reassert its influence and some power back from the Commission.<sup>59</sup> The TBR has a broad scope of application that applies not only to goods but also to services and intellectual property rights, when the rules concerning these rights have been violated and these violations had an impact on the trade relations between the EU and third countries. The TBR increases the role of the Council and the Member States through: (1) a safety-net procedure and (2) the establishment of an advisory committee.

While under the TBR the Council is empowered to take retaliatory measures by a qualified majority,<sup>60</sup> the Commission takes almost all procedural decisions on the initiation of TBR proceedings, the TBR decision to initiate WTO dispute settlement proceedings, the request to the WTO for authorization to retaliate and the suspension or termination of the investigation. However, the safety-net procedure provides that while the Commission takes the decision whether or not to launch WTO dispute procedures, the Council may at the request of a Member State and acting by a qualified majority, revise the Commission's decision.<sup>61</sup> This could be interpreted as some kind of check on the Commission's discretionary power.

An advisory committee was set up for the consultations. It consists of representatives of the Member States and a representative of the Commission as Chair.<sup>62</sup> Consultations are held immediately at the request of a Member State or on the initiative of the Commission, and the Chair of the TBR Committee provides the Member States with all available relevant information.<sup>63</sup> At the same time the Commission must provide the same information to the Trade Policy Committee in order to consider any implications for the CCP.<sup>64</sup> The regulation

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<sup>58</sup> Trade Barriers Regulation [TBR], European Commission, Director-General for Trade, last consulted on 12 August, 2010 at [http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc\\_122567.pdf](http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122567.pdf).

<sup>59</sup> Rosas, Allan, "International Dispute settlement: EU practices and procedures", *German Yearbook of International Law* 46, 2003, p.317.

<sup>60</sup> Article 13(3), Council Regulation (EC) No. 3286/94.

<sup>61</sup> Article 14(4), Council Regulation (EC) No. 3286/94.

<sup>62</sup> Article 7(1), Council Regulation (EC) No. 3286/94.

<sup>63</sup> Article 7(2), Council Regulation (EC) No. 3286/94.

<sup>64</sup> Article 7(2), Council Regulation (EC) No. 3286/94.

provides in detail how the procedure is carried out.<sup>65</sup> In TBR proceedings, the Member States are kept closely informed thanks to the committee procedure provided by Article 14 TBR. Through this committee the Member States are more involved in TBR proceedings than in proceedings under Article 207 TFEU.

In 2000, the Commission introduced on its website information on the TBR where it explains cases in detail, including an overview of each case and provides investigation reports to the TBR advisory committee and information on discussions with third countries.<sup>66</sup> These overviews provide: the measure that is being investigated, who is the complainant, steps taken in the TBR procedure, investigation reports, findings of the investigation, actions taken and the outcome.

Although all this points to a bigger involvement of Member States under the TBR, the Commission has adjusted its strategies. The TBR advisory committee is kept informed by the Commission, so it is much harder for the Member States to accuse the Commission of acting secretly. The Commission has used its expertise knowledge to its advantage in order to strengthen its position within the EU. There have been situations when the Commission thought it had a good WTO case and wanted to take action, but instead of going through informal Article 207 TFEU proceedings, it convinced the industry to bring the case through the TBR.<sup>67</sup> The main reason for doing so was to avoid a clash with the Member States in the Council over whether or not the subject matter belonged to exclusive competence of the EU.<sup>68</sup>

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<sup>65</sup> Council Regulation (EC) No. 3286/94.

<sup>66</sup> See <http://ec.europa.eu/trade/tackling-unfair-trade/trade-barriers/>.

<sup>67</sup> Billiet, Stijn, "The EC and WTO Dispute Settlement: the Initiation of Trade Disputes by the EC", *European Foreign Affairs Review* 10, 2005, p.205.

<sup>68</sup> Billiet, Stijn, "The EC and WTO Dispute Settlement: the Initiation of Trade Disputes by the EC", *European Foreign Affairs Review* 10, 2005, p.205.

## **Decision-making in conducting trade agreement negotiations in the WTO**

Decision-making within the EU on conducting negotiations in the WTO has been highly debated for a long time. It has been criticized for its lack of transparency, accountability and legitimacy. The decision-making in negotiating and conducting trade agreements was governed by Article 133 TEC until 1 December, 2009 when the Treaty of Lisbon came into force. The main actors in decision-making within the EU on conducting negotiations in the WTO were the Commission, the Trade Policy Committee, and the Council.

Before trade negotiations are opened between the EU and third countries within the framework of the WTO, the Commission drafts a proposed negotiating mandate which covers the Union's objectives.<sup>69</sup> Then the Commission meets with the Member States in the Trade Policy Committee where the positions on different subject-matters are coordinated. The key policy issue discussions take place in the Trade Policy Committee where the Member States will examine and possibly request changes to the Commission's proposal on a consensual basis. In the end, it is up to the Commission to ignore, accept or revise the Member States' suggestions. However, if the Member States are strongly opposing a proposed initiative of the Commission, then the Commission will reconsider it and try to sort it out.<sup>70</sup> The Commission is cautious and prefers redrafting its proposal rather than facing a failure.<sup>71</sup> It takes the leading role in the decision-making process in negotiating international trade agreements, and therefore in the WTO. This power of the Commission is constrained by the Council which needs to approve the negotiating mandate.

Once the issues are sorted out, the Commission's officials go to Geneva, where the second stage of consultations between the Commission and its Member States takes place. There is a

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<sup>69</sup> Meunier, Sophie, "What Single Voice? European Institutions and EU-U.S. Trade Negotiations", *International Organization* 54, 2000, p.107.

<sup>70</sup> Interview held with Mr. Raimund Raith, Legal Advisor, Legal Service of the Commission on 20 October, 2008 in Brussels.

<sup>71</sup> Meunier, Sophie, "What Single Voice? European Institutions and EU-U.S. Trade Negotiations", *International Organization* 54, 2000, p.107.

mirror Trade Policy Committee which meets at the premises of the Liaison Office of the Council's Secretariat. At this stage, some trade issues are discussed again. At these coordination meetings, a common position is reached which allows the Union to negotiate as one single entity.<sup>72</sup>

If the decisions involve the Doha Development Agenda, which represents international trade negotiations, the Commission needs an approval of negotiating directives by the Council pursuant to Article 218 TFEU. The proposal is forwarded to the COREPER and examined by the General Affairs Council. This Council will finally give a negotiating mandate to the Commission. Then the Commission officials will conduct the negotiations pursuant to this mandate. The mandate usually includes numerous documents, which are vague in their nature. This vagueness works well for both the Commission and the Member States, because it gives the Commission more leverage in conducting negotiations and at the same time it allows the Member States to disagree with the way the Commission is conducting trade negotiations.<sup>73</sup> If the decisions involve the Dispute Settlement Body (DSB) or when decisions are to be taken in the TRIPS Council, then there is no negotiating mandate needed for the Commission pursuant to Article 218 TFEU.<sup>74</sup>

If negotiations are successful, the chief negotiator of the EU initials the text of the agreement. After the text is initialed, the Council has to adopt a decision with respect to the agreement negotiated. The Council approves or rejects the trade agreement. After a decision is taken, the President of the Commission or its Ambassador of the Permanent Delegation of the

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<sup>72</sup> Interview held with Mr. Raimund Raith, Legal Advisor, Legal Service of the Commission on 20 October, 2008 in Brussels.

<sup>73</sup> Interview held with Mr. Raimund Raith, Legal Advisor, Legal Service of the Commission on 20 October, 2008 in Brussels.

<sup>74</sup> Interview held with Mr. Raimund Raith, Legal Advisor, Legal Service of the Commission on 20 October, 2008 in Brussels.



European Commission to the International Organizations in Geneva signs it, depending on the importance of the agreement.<sup>75</sup>

The Treaty of Lisbon introduced new actors in the decision-making process - the European Parliament. Now, the EP has to give its consent to agreements concluded under the CCP and the Commission must report regularly to the EP on the progress of negotiations. At the same time, its role is limited, because the EP is not directly involved in trade negotiations<sup>76</sup> and the EP has no right to authorize the EU to enter into trade negotiations.<sup>77</sup> However, even though the EP has no power to authorize trade negotiations, its power of ultimate consent may mean that the Council and the Commission will try to get implicit approval from the EP. It is yet to be seen how this will work in practice.

### **Assessment of EU internal decision-making in WTO matters**

There has been a lot of critique about the internal EU decision-making process in WTO matters, especially under previous treaties. Under the Treaty of Nice, the EP had no formal input into policy-making under Article 133 TEC (now Article 207 TFEU), despite efforts to acquire a right of co-decision power during the negotiations leading to the Amsterdam Treaty.<sup>78</sup> The Trade Policy Committee debated unpublished Commission proposals. It was strongly influenced by experts and highly experienced Commission officials. The Commission held substantial decision-making powers in itself, particularly on the EU negotiating mandate, as national Trade Ministers do not often get involved in the technical details.<sup>79</sup>

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<sup>75</sup> Interview held with Mr. Raimund Raith, Legal Advisor, Legal Service of the Commission on 20 October, 2008 in Brussels.

<sup>76</sup> Article 207(3) TFEU.

<sup>77</sup> Article 207(3) and Article 218(2) TFEU.

<sup>78</sup> Murphy, Anna, "In the maelstrom of change: The Article 113 Committee in the governance of external economic policy" in *Committee Governance in the European Union*, Christiansen, Thomas and Kirchner, Emil (eds.), 2000, p.100.

<sup>79</sup> World Wide Fund For Nature, "A League of Gentlemen: Who really runs EU Trade Decision-Making?", 2003, p.8-9.

The assessment of EU decision-making in WTO matters will be divided in two parts: decision-making in WTO disputes and decision-making in conducting trade agreement negotiations in the WTO. Both processes will be assessed in light of the constitutional principles of transparency, accountability, and legitimacy.

### **Transparency and EU decision-making in initiating WTO dispute settlement proceedings**

Transparency is defined as the availability of all information required in order to fulfill a specific function in a given context.<sup>80</sup> In order to assess the EU decision-making in initiating WTO dispute settlement proceedings through Article 207 TFEU and through the TBR route against the principle of transparency, the following questions will be answered: How accessible are the documents of the decision-makers? Are the premises of the decision-makers accessible to public? How transparent are the agendas and how accessible are the minutes from the meetings? How clear are the procedures of the decision-makers?

In the EU, access to documents is closely linked to the publication and notification of the regulations, directives and decisions. The Commission's decision to initiate a WTO dispute is published in the Official Journal of the European Union. In addition, once a month a detailed report on dispute settlement proceedings involving the Union is published on the website of DG Trade.<sup>81</sup> However, the Trade Policy Committee's documents are not available for the public. In the case of accessibility of the premises, the Commission's premises are closed for the public in general. Meetings, where the members of DG Trade and Legal Service are present, are not open for the public. Furthermore, the Trade Policy Committee meetings are also closed for ordinary citizens.

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<sup>80</sup> Settembri, Pierpaolo, "Transparency and the EU Legislator: 'Let He Who is Without Sin Cast the First Stone'", *Journal of Common Market Studies* 43, 2005, p.637.

<sup>81</sup> See [http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc\\_134652.pdf](http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134652.pdf).

The agendas of meetings within the Commission between DG Trade and Legal Service are only distributed internally and minutes from the meetings are not part of the public record. Furthermore, in the case of the Trade Policy Committee, the agenda of the meetings and the minutes are only available on the internal website of DG Trade. This website is only accessible to the civil servants of the Commission.

The procedure under Article 207 TFEU is informal. This particular way of initiating a procedure before the WTO has been developed over time. The procedure is clear but it is not written down. With respect to the Trade Policy Committee, there is no written procedure either. It should be noted that even though this Committee does not make decisions, its role in shaping policies is important and therefore the procedure within the Committee should be known to the public as well as the agenda and the minutes of the meeting. A decision to initiate a WTO dispute is not subject to voting neither in the Commission nor in the Trade Policy Committee. The decision by DG Trade and Legal Service is taken on the basis of mutual agreement and consensus.

TBR is the second venue to a WTO dispute. The Commission decides whether or not to launch a WTO dispute; however, the regulation provides that the Council may at the request of the Member States revise the Commission's decision by a qualified majority. Furthermore, the TBR provides for confidentiality of information provided by the party to an examination procedure.

The procedure under the TBR route is formal and very clear. The regulation lays down procedural rules: who can lodge the complaint, how the consultations and the examination procedure are conducted, and how decisions are taken. The procedure is very transparent.

In 2000, the Commission introduced on its website information on the TBR where it explains cases in detail, including an overview of each case and investigation reports to the

TBR advisory committee and information on discussions with third countries.<sup>82</sup> Furthermore, notice of initiation of the examination procedure and the decision to initiate a WTO dispute settlement procedure are published in the Official Journal. Therefore, it can be concluded that documents are easily accessible to the public and to all the parties interested in the matter. Nevertheless it should be noted that all TBR investigations reports available on the Commission's website are working documents of the Commission and are only provided for informational purposes.

### **Accountability and EU decision-making in initiating WTO dispute settlement proceedings**

In order for a practice to be considered accountable, there should be an actor that provides information about his conduct to some forum. The actor has to justify all actions to this forum and there must be a possibility for debate and imposition of sanctions.<sup>83</sup> In order to answer whether the EU decision-making on initiating WTO dispute settlement proceedings is accountable, two questions must be answered: is there an effective mechanism available for stable and reliable exchange of information between the decision-makers and the public and is there an effective mechanism allowing the public to impose sanctions on the decision-makers?

In the case of the Article 207 TFEU route, one can argue that there is no effective mechanism which would allow exchange of information between the decision-makers and the public. The Trade Policy Committee's procedures, agendas and minutes are not available to the public, where most of the decisions relating to initiation of disputes take shape. With respect to an effective mechanism allowing the public to impose sanctions on the decision-makers, this route does not provide one.

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<sup>82</sup> See <http://ec.europa.eu/trade/tackling-unfair-trade/trade-barriers/>.

<sup>83</sup> Bovens, Mark, "Analysing and Assessing Accountability: A Conceptual Framework", *European Law Journal* 13, 2007, p.452.

In the case of the TBR venue, there is an effective mechanism available for exchange of information between the decision-maker (the Commission) and the public. The website of DG Trade provides all information on undertaken investigations and possible initiation of a WTO dispute. The website of an international organization represents a reliable source for the public, even though they are posted only for informative purposes. This mechanism is easily accessible and available for ordinary citizens. Furthermore, the notices of initiation of the examination procedure and a decision to initiate a WTO dispute are published in the Official Journal.

With regard to an effective mechanism allowing the public to impose sanctions, the situation is different. Article 14(4) of the TBR provides that the Council may, at the request of a Member State and acting by a qualified majority, revise the Commission's decision. This provision can be interpreted as some kind of check and sanction on the Commission's discretionary power. However, strict time frames work to the advantage of the Commission which has the initiative. Furthermore, the Council is not a directly elected body of the Union and this allows only a partial imposition of sanctions by the public.

With the new Treaty into place, the Article 207 TFEU venue involves the EP in its decision-making; however only to inform the EP and not to consult it. The involvement of the EP will probably provide a mechanism which would allow exchange of information between the decision-makers and the citizens. One example is the Legislative Observatory web page which serves as an administrative, forecasting, information and research tool not only for EU legislative but also for non-legislative procedures involving the EP. This page can serve as a useful instrument to exchange information. The involvement of the EP, which is the only directly elected institution of the EU, also means that there is an effective mechanism to sanction one of the decision-makers.

## **Legitimacy and EU decision-making in initiating WTO dispute settlement proceedings**

Legitimacy means a broad societal acceptance of the system<sup>84</sup> and compliance and support of the citizens,<sup>85</sup> where not only particular decision-making procedures are seen as necessary conditions of legitimacy, but also the content of the decisions.<sup>86</sup> In order to answer whether EU decision-making on initiating WTO dispute settlement proceedings is legitimate the following questions need to be answered: Are there particular decision-making procedures necessary for the EU practices to be seen as legitimate? Is there any mechanism to judge the merits of the decision?

In the case of Article 207 TFEU venue, there is a formal procedure on negotiating and concluding trade agreements written down in the article itself, but there is no formal procedure on how to initiate an international dispute in the WTO. The actors involved in this procedure are not directly elected, except for the EP. However, there is a mechanism to judge the merits of the decisions. The institution that is responsible for that is the Court of Justice. Article 263 TFEU states that the Court has jurisdiction to review the legality of all acts adopted jointly by the EP and the Council, of acts adopted by the Council alone, of the Commission and of the ECB except recommendations and opinions. However, any kind of decision taken by the Trade Policy Committee is not subject to the Court's review.

In the case of the TBR route, there is a formal procedure on how to initiate a WTO dispute. The TBR lays out a detailed procedure: who can initiate a complaint, who will handle the complaint and how, and finally how the decisions are reached. The actors involved are not directly elected which poses a problem to the procedures in which they are involved to be legitimate.

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<sup>84</sup> Verhoeven, Amaryllis, *The European Union in Search of a Democratic and Constitutional Theory*, The Hague: Kluwer Law International, 2002, p.11.

<sup>85</sup> Nanz, Patrizia, "Democratic Legitimacy and Constitutionalism of Transnational Trade Governance: A View from Political Theory" in *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Joerges, Christian and Petersmann, Ernst-Ulrich (eds.), Oxford: Hart Publishing, 2006, p.63.

<sup>86</sup> Cohen, Joshua, "Procedures and Substance in Deliberative Democracy" in *Democracy and Difference. Contesting the Boundaries of the Political*, Benhabib, Seyla (ed.), Princeton: Princeton University Press, 1996, p.95-119.

When it comes to judging the merits of the decision, one could argue that there are two mechanisms available through this route. The first one is the Court of Justice which is given by Article 263 TFEU the right to review the legality of acts adopted by the Commission and the Council. The second one is provided in Article 14(3) and (4) of the TBR, according to which the Commission's decision can be disputed by a Member State in which the latter can refer the matter to the Council. The Council can revise the Commission's decision.

### **Transparency and EU decision-making in initiating trade negotiations in the WTO**

In order to assess the transparency of this EU practice the following questions will be answered: How accessible are the documents concerning what has been decided by the decision-makers? How transparent are the decision-makers' debates and how accessible are the agendas and minutes from the meetings? Are the premises of the decision-makers accessible to the citizens? How is voting proceeded in the decision-making bodies? How clear are the procedures of the decision-makers?

Decision-making in conducting trade negotiations is now guided by Article 207 TFEU and by Article 218 TFEU. When international trade agreements with third countries or international organizations need to be negotiated, the Commission makes recommendations to the Council, which in return authorizes the Commission to open negotiations. The Commission conducts these negotiations in consultation with the Trade Policy Committee which is appointed by the Council to assist the Commission. The Commission is required to report regularly to the Trade Policy Committee and the EP on the progress of negotiations. The conclusion of the agreement is decided by the Council which acts by a qualified majority on a proposal from the Commission.<sup>87</sup> The Council acts by unanimity in concluding some agreements covering trade in services and the trade aspects of intellectual property where a

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<sup>87</sup> Article 218(8) TFEU.

unanimity vote is required. Finally, EP has to give its consent to the conclusion of a trade agreement. In practice, decision-making in the CCP has been predominantly technocratic in nature. It has been steered by a technocratic core comprising the officials in DGs and national trade officials.<sup>88</sup> However, the inclusion of the EP in the decision-making process will change that.

The Council's decisions on conclusion of international agreements are published in the Official Journal of the EU. They are accessible to the ordinary citizens. However, the documents leading to these decisions are not available to the public. Furthermore, the Commission meets with the representatives of the Member States in the Trade Policy Committee, where the key policy issues are discussed and where the request to make changes is submitted to the Commission's proposal. Agendas and minutes from these meetings are not available to the public and therefore the decision-makers' debates are not transparent. The agendas and minutes from the Committee's meetings are available only on DG Trade Intranet. Even though, the Committee has only a consultative role, the important trade policies take shape in this committee and it would be very important to know what kind of discussions take place there.

The premise of the Council where the Trade Policy Committee holds its meetings is not accessible for ordinary citizens. Since the Committee is a consultative committee, the voting is based on consensus. The general framework of the decision-making is provided in Article 207 TFEU, however the procedures within the Trade Policy Committee are informal and have been developed over time. The mirror Trade Policy Committee is also an over time invention which does not exist in the treaties. In addition, the negotiating mandate given by the Council to the Commission includes many documents which are vague in their nature, making it not transparent at all.

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<sup>88</sup> Woolcock, Stephen, "The European Union's Role in International Commercial Diplomacy" in *The state of the European Union*, Usher, John A. (ed.), 2000, p.206.



## **Accountability and EU decision-making in initiating trade negotiations in the WTO**

In order to answer whether the EU decision-making in initiating trade negotiations in the WTO is accountable two questions must be answered: Is there an effective mechanism available for stable and reliable exchange of information between the decision-makers and the public and is there an effective mechanism allowing the public to impose sanctions on the decision-makers?

The Commission's and the Council's decisions are published in the Official Journal of the EU. These can be found on the official site of the European Union. Therefore the Internet website of the Union represents an effective mechanism for stable and reliable information between the public and the decision-makers. In the case of the Trade Policy Committee, its procedures, agendas and minutes are not available to the public even though the key policies do take shape in this committee. Therefore, it could be inferred that with respect to the matters and debates taking part in this committee, there is no mechanism to exchange information between the public and decision-makers.

With respect to the second question, neither the officials from the Commission nor from the Council are directly elected. In addition, the representatives from the Member States in the Trade Policy Committee change depending on the importance of the meeting and on the particular issue tackled. They are not elected to sit in the Trade Policy Committee. As a consequence, it could be implied that there is no effective mechanism allowing the public to impose sanctions on the decision-makers. If one can argue that the EU has been relatively efficient in its commercial policy-making, despite the difficulties in reaching a common

position among different interests of the Member States, this has come at the expense of democratic accountability.<sup>89</sup>

The EP, which is a directly elected institution of the Union, had for a long time a limited role in the EU trade policy. However, the new treaty provides that the EP is involved in the decision-making process of trade negotiations. Article 207(3) TFEU provides that the Commission shall report regularly to the EP on the progress of negotiations. The EP is the only directly elected body of the Union and as such could provide for an effective mechanism allowing the public to impose sanctions on them. Furthermore, before the Council can adopt a decision concluding a trade agreement, it needs to obtain the EP's consent. Nevertheless, it is questionable whether the new treaty, even though, it includes the EP in its decision-making, provides for an effective mechanism allowing the public to impose sanctions, since the major players are still the Commission and the Council. One positive development is that, since the EP is now involved in the decision-making, information on trade negotiations will be available on EP's web site – Observatory and INTA will receive the same information as the Trade Policy Committee. However, only in a year or two after the Treaty of Lisbon one can say how strong the role of the European Parliament is going to be.

One way of achieving accountability is through contacts with different interest groups, like environmental and consumer non-governmental organizations (NGOs), trade unions, and other organizations. These kinds of fora could provide for an effective mechanism available for stable and reliable exchange of information between the decision-makers and the public. In 1998 DG Trade created the Civil Society Dialogue (CSD) as a stage for exchanging views on EU trade policy.<sup>90</sup> Under this platform DG Trade holds regular meetings on many trade issues.

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<sup>89</sup> Woolcock, Stephen, "The European Union's Role in International Commercial Diplomacy" in *The state of the European Union*, Usher, John A. (ed.), 2000, p.206.

<sup>90</sup> See [http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc\\_146254.pdf](http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc_146254.pdf).

The aim of the Commission is to promote an active participation of civil society<sup>91</sup> through this process.<sup>92</sup> There is an informal contact group composed of representatives from different organizations and non-governmental institutions, which helps in coordinating the process by selecting topics and structuring meetings.<sup>93</sup> Nevertheless, the question that arises is how influential this type of forum is in shaping EU trade policy. Studies done on the impact of CSD in the shaping of trade policy produced the following results:<sup>94</sup> the formalization of the consultations meant that there is more inclusion than there was before the creation of the CSD; however, the Commission controls the agenda in such way that it does not allow for opposing interests to be heard and this caused the withdrawal of those who had more critical views; transparency is limited because the Commission does not offer its global vision of trade policy and does not provide systematic reports of its activities; there is no formal mechanism which would connect the CSD to decision-making, and the responsiveness to the demands of the civil society organizations is limited, or according to some, there is no influence on trade policies.

### **Legitimacy and EU decision-making in initiating trade negotiations in the WTO**

In order to answer whether the EU decision-making on initiating trade negotiations in the WTO is legitimate the following questions need to be answered: Are there particular decision-making procedures necessary for the EU practices to be seen as legitimate? Is there any mechanism to judge the merits of the decision? Is a political institution justifiable to those who are affected by them?

The EU decision-making on initiating trade negotiations in the WTO is guided by Article 207 TFEU together with Article 218 TFEU, which together provide the formal procedure on

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<sup>91</sup> Civil society represented at these meetings includes non-governmental organizations working on topics as diverse as consumer and environmental protection, animal welfare, human rights and humanitarian aid, labor and employers' associations and the European Economic and Social Committee.

<sup>92</sup> See [http://trade.ec.europa.eu/civilsoc/csd\\_proc.cfm](http://trade.ec.europa.eu/civilsoc/csd_proc.cfm).

<sup>93</sup> See [http://trade.ec.europa.eu/civilsoc/csd\\_proc.cfm](http://trade.ec.europa.eu/civilsoc/csd_proc.cfm).

<sup>94</sup> Kröger, Sandra, "Nothing but consultation: The place of organised civil society in EU policy-making across policies", *European Governance Papers*, No. C-08-03, 2008, p.26-27.

negotiating and concluding trade agreements. Since the procedure is written down in the treaty, it could be inferred that there is a particular procedure necessary for the EU practices to be seen as legitimate.

As it has been pointed out before, the merits of the Commission's and the Council's decisions can be reviewed by the Court of Justice as provided in Article 263 TFEU. Furthermore, Article 218(11) TFEU also states that the EP, the Council, the Commission or a Member State may obtain the opinion of the Court as to whether an international agreement is compatible with the provisions of the Treaties. Nevertheless, Article 263 TFEU says that the action before the ECJ can only be brought by individuals against an act addressed to that person or which is of direct and individual concern to them, and a regulatory act which is of direct concern to the former and does not entail implementing measures. Furthermore, any decision taken by the Trade Policy Committee cannot be reviewed by the Court because the Committee only has a consultative role. However, the key policy issues are shaped at this Committee, where the Commission has a leading role.

Finally, the Commission, the Council and the Trade Policy Committee are not directly elected bodies. Therefore, the Commission, the Council and the Committee are not justifiable to the ordinary citizens who will be affected by these decisions. On the contrary, the EP is a directly elected body and justifiable to the ordinary citizens, but its role in trade negotiations is limited.

## **Conclusion**

The EU internal decision-making process in WTO matters has been subject to criticism for many decades. It was criticized for its lack of transparency, accountability, and legitimacy. The major complaints were that EU decision-making practices in the WTO lack in openness and public scrutiny and that the EP, as the only elected institution of the Union, was excluded

from the decision-making process in WTO matters. In the case of the latter, the Treaty of Lisbon has changed that.

With respect to the venues through which the dispute can be initiated in the WTO, the new Treaty will bring changes to the Article 207 TFEU procedure, because the EP is now involved. However, the latter is only briefed on the progress of a dispute. The TBR route, which is not affected by the new treaty, is seen as more transparent, accountable and legitimate than the Article 207 TFEU one.

Nevertheless, since the representation of the EU in the DSB is highly technical, more transparency, accountability, and legitimacy would be highly counter-productive and it would jeopardize the Union's position in the DSB. Especially, since the reaction to any problem in trade needs to be resolved or dealt with quickly, and adding more procedures to make the processes more transparent, accountable, and legitimate, it could jeopardize an important case involving the EU before the Panel or the Appellate Body. The European business community's voice is heard through the TBR procedure in which the former can ask the Commission to investigate any form of unfair barrier abroad to their export of goods and services. In addition, the civil society actors are more interested in different issues of trade policies than the technicalities of the WTO disputes.

The involvement of the EP in the EU decision-making process in WTO matters will provide for more transparency and accountability in conducting trade negotiations and the process will also be seen as more legitimate. It will make the decision-making more open to public debate on the objectives of trade negotiations. Nevertheless, the involvement of the EP means that the decision-making process in conducting trade negotiations will become longer and more complicated, which can affect the efficiency and flexibility of the whole process. The trade policy will require more time in preparation. The implementation of trade policy stays with the Commission, but the Council and the EP will have some say in these matters. It

is yet to be seen how the EP will use its legislative powers in trade policy to influence implementation.

Furthermore, engaging in dialogue with civil society represents an attempt of the Commission to make the decision-making process in WTO matters more transparent, accountable, and legitimate to the public. However it seems that this attempt has not been so successful. The decision-making process in trade matters has been heavily criticized for lacking in openness in the last ten years even though the Civil Society Dialogue has been in place since 1998. Furthermore, some studies that were conducted and civil society organizations see the CSD as, “pure window dressing, aimed at increasing the legitimacy of the Commission, with freedom, but no influence.”<sup>95</sup>

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<sup>95</sup> Kröger, Sandra, “Nothing but consultation: The place of organised civil society in EU policy-making across policies”, *European Governance Papers*, No. C-08-03, 2008, p.27.

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