

**Who Cares about Modalities? The European Commission
and the EU Member States as Interdependent Actors in
the WTO Negotiating Process**

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1. Introduction

In the course of April-July 2002 a discussion took place in the WTO on the deadlines that would be applied in the negotiations on the modalities of both the agricultural negotiations, and those of the negotiations on the market access for non-agricultural products. The European Commission – as negotiator on behalf of the European Union – made a big issue of these deadlines, to the surprise of many. The question was twofold. First, whether a deadline for the modalities of the industrial market access negotiations would be set. Second, in case such a deadline would be set, what the deadline would exactly be.

On the first question, most developing countries were pitted against most industrialized ones as the latter saw the modalities deadline as a way to check whether and to what extent the developing countries would be prepared to make market access concessions. The modalities would indeed, include both the structure and the sectoral scope of the tariff negotiations.

On the second question, the developed countries wanted to have the same deadline for the modalities on industrial market access as for the agricultural negotiations, which was March 31, 2003. Most developing countries wanted, in case a deadline was unavoidable, a later deadline. Of all the developed countries, the European Union most adamantly stuck to the March 31 deadline. It was the only one to block a compromise proposal by the chairman of the industrial market access negotiating group in an informal meeting of the group in June 2002. Some explained this by claiming that this was needed to “entice the EU to make agricultural concessions”, although others claimed that even with such a deadline, the EU would not make any major concessions in that sector “even if it gets benefits from industrial market access.”¹ When the EU blocked the decision again at a new informal meeting on July 5 and the group’s chair decided to cancel the scheduled formal meeting of July 11-12 because of that, trade officials were at pains explaining the EU position. As *Inside U.S. Trade* observed:² “(..) trade officials are at pains to come up with a clear answer as to the reasoning behind the EU position, particularly since it is now proposing to proceed without any agreed deadline for modalities (..). ‘It is all very strange and mysterious and difficult to understand’, one trade official said.”³

Part of the answer to this conundrum may lay inside the EU itself, in the way in which the EU operates internally on multilateral trade negotiations conducted in the WTO. It may lay in the role of the European Commission as an internally contested institution in such negotiations. Indeed, since the end of the Uruguay Round, the role of the European Commission as negotiator on behalf of the European Union in multilateral trade negotiations has increasingly come under attack. Questions have been raised about the exact powers of the Commission and about the way in which it has been wielding these. Related to these have been concerns – especially among the EU’s external negotiating partners (cf. Barchefsky, 2001) – about the authoritative nature of the deals the Commission agrees to and about the related question of authority and accountability inside the EU (cf. Paemen & Bensch, 1995: 95). Despite some

¹ *Inside U.S. Trade*, Vol. 20, n° 24, June 14, 2002, p. 17.

² *Inside U.S. Trade*, Vol. 20, n° 28, July 12, 2002, p. 8.

³ The agreement reached on July 18, 2002 stated that the WTO members should “reach a common understanding on a possible outline on modalities by the end of March 2003 with a view to reaching agreement on modalities on 31 May.” It was largely similar to a proposal submitted by Norway in June 2002.

optimism,⁴ the question of authority, accountability, and relative powers remains a daunting one when it concerns the EU's conduct of external trade negotiations.

It is maybe not a coincidence, that this question shows up in the context of negotiations conducted in the framework of the WTO. This framework provides both opportunities for the European Commission to act autonomously from the EU member states, and incentives to do so. It is a framework that is too large in membership to allow the European Union to completely control it. It is also a framework that creates a negotiating agenda that also contains issues for which the EU prefers not to have any multilateral negotiations at all. Consequently, internal EU decision-making on WTO-negotiations takes place under the pressure engendered by the external (WTO) negotiating process. It pushes the EU to consider concessions, even if these are unattractive, and it puts pressure on the EU negotiators – thus, the Commission – to strike the right balance between the concerns of the EU member states, and the requests made by the EU's negotiating partners in the WTO. Striking this balance often is a difficult exercise. As the member states' reactions to the November 1992 Blair House Agreement have shown, it may even backfire on the Commission's role as the negotiator. It is important therefore to ask how the Commission strikes this balance, what the effect of the WTO negotiating context is (if any), and how it affects the relationship between the Commission as negotiator on behalf of the EU, and the EU member states. That is the subject of this paper. It will show that although the WTO framework may provide the Commission opportunities to act autonomously, it is not in the Commission's interest to use these opportunities extensively. On the contrary. The Commission must use the WTO system and the EU system itself, to involve the member states' representatives sufficiently in the WTO negotiations so that pressure from these can be transmitted to the domestic political systems of the member states. Only in this way can it secure the member states' approval of the agreements that it negotiates in the WTO.

The analysis itself is based on two parts of empirical research. The first – and most extensive – part consists of interviews taken from both Commission officials and officials of the member states responsible for the negotiations on the Uruguay Round.⁵ The aim of these interviews was not to conduct research on the substantive issues of these three cases, but rather to help the interviewees to focus their answers to concrete cases, rather than to the abstract notion of negotiations in general. This was necessary because the questions themselves dealt with the way in which the respondents perceived their role and the opportunities of their role in both the internal EU decision-making and the external negotiations, and the limits of that role and its opportunities, given the involvement of the other actors (external partners, member state representatives, Commission representatives), and the impact of certain factors (the institutional context of the external negotiations, stages in the negotiating process, politicization of negotiating issues, the constraints of the mandate, etc.).⁶

⁴ Cf. the speech by Pascal Lamy, current EU Commissioner of external trade, before the American Enterprise Institute on December 18, 2000, in which he said: "(...) the climate on external trade negotiations has changed radically. My predecessors 10 years ago would have spent probably two thirds of their time sorting out a policy line with the Member States, and one third negotiating with third countries. This proportion is out of whack, and I'm glad to say that it has now switched."

⁵ The interviews on the Uruguay Round focussed on the negotiations that took place between September 1986 (Punta Del Este) and December 1990 (Heysel Conference in Brussels).

⁶ The respondents were Commission officials that acted as negotiators in the external trade negotiations, and two groups of national officials: one group of officials directly involved in controlling the Commission, and a second group of officials to which the first group was directly accountable. All these officials were selected on the basis of the snowball method. The national officials were – for reasons of time and finances – restricted to Belgium,

The second part of the empirical research was conducted through interviews taken from European Commission negotiators, officials from the Belgian trade administration in the course of February and April 2001, and British trade officials in the course of May and July 2002. Due to time constraints, it only concerns seven Commission officials, three Belgian officials, and seven British officials directly involved in the operation of the Committee 133. The interviews focussed on the preparations of the (abortive) attempts to start the Millennium Round (1998-99) and on the subsequent Commission attempts to reanimate the idea of a round of multilateral trade negotiations in 2001 (Everything but Arms Initiative).

2. External Trade Negotiations and Principal Agent Analysis

When analyzing international trade negotiations, it seems evident to do so from the perspective of Putnam's two-level game. In this game, the chief of government (COG) negotiates agreements with other countries while taking into account that such agreements have to be ratified domestically. Part of the COG's role is to anticipate the reactions of the domestic ratifiers by trying to conclude an agreement that is within their win-set. But in doing so, he has opportunities to affect the outcome by influencing the domestic actors' win-set itself. In addition, due to his double-edged position – as an actor at both the international level and the domestic level – he can determine to a certain extent where an international agreement will be located inside the win-set of the domestic actors. This combination of dependence (on the subsequent ratification process) and autonomy (due to his double-edged position) makes that the COG's actions can be analyzed from a principal-agent perspective in which the agent has to face several domestic principals.

In external trade negotiations conducted by the European Union, it is the Commission that has the role of the agent, and the member states the one of the principals (cf. Meunier & Nicolaïdis, 1999: 480; 2000: 327-328). Central in the principal-agent analysis is the autonomy the agent acquires and the limits the principals experience in avoiding this (cf. Schmidt, 2001: 41). Preference-related explanations can be put forward to explain why principals delegate, and why agents are interested in being autonomous. The latter often is the consequence of a divergence in preferences between the agent and its principal. The agent uses its autonomy then, to pursue its own interests even if these run counter to those of the principal.

Looking for autonomy is one thing. Acquiring it is another. Different explanations may be put forward to explain why agents acquire this autonomy in relation to their principals. Part of the explanation is related to the actions of the agent, and part of it is related to the costs and benefits for the principals of countering the agent's endeavors to gain autonomy (cf. Pollack, 1997; Majone, 1996). Both the agent's search for autonomy and the principal's search for control involve the use of formal and informal devices. An agent may be a veto player, for instance because it is the only one that is formally entitled to initiate new policies (like the European Commission). In that case, despite their ability to block the agent, the principals remain dependent on the agent for the introduction (and therefore, enactment) of new policies. Depending on their position in relation to the status quo, this will affect their ability to realize their preferences.

the Netherlands, France, Germany, and the UK. For the two latter, interviews were limited to the permanent representations in Brussels. For the former, interviews were taken from officials in the permanent representations, and in the respective national administrations.

Even if most authors on the principal-agent theory stress the agent's desire to gain autonomy, it remains an empirical question whether this is always the case. It is of course, in the first place related to the respective preferences of the principals and the agents. When their preferences are identical, there is no reason why the agent would want to escape from the principals' control or why the principals would want to invest in control on the agent. But even in a situation where these preferences diverge, the agent may have an interest in restricting its own autonomy. This may be the case because the principals can provide it with legitimacy and its concomitant authority (cf. Nicolaïdis, 1999), or because the agent wants to avoid involuntary defection by the principals (Putnam, 1988).

There are equally situations where the principals are not at all interested in controlling the agent even if their respective preferences diverge. Majone (2001: 109-114) has stressed, for instance, that in order to secure the agent's credibility where such credibility is in the principals' interest, the latter may forego their ability to control the former. It may also be the case that the principals consider the cost of agent autonomy as being lower than the cost of being held responsible for the policy decisions that the agent can now enact autonomously. The trade negotiating delegation by the United States' Congress can largely be explained by this (Destler, 1995; Kerremans, 1999).

Besides the contingent nature of the agent's desire to escape control and the principal's desire to restrict autonomy, principal-agent theory can also be seen as pointing the researcher to the fact that the relationship between the agent and his principals can only be fully understood by analyzing the preferences of, and the interactions between the two. In addition, it suggests that in assessing such interactions, one has to look at both the formal and informal ones. Last but not least, it confronts the researcher with the need to look at the configuration of these interactions. After all, control can be exerted through direct and indirect interactions whereas autonomy can be achieved as a consequence of the agent's position in a configuration of interactions.

This means that in order to fully grasp the governance regime of the EU's external trade policy, one has to look at the informal and formal aspects of the relationship between the different actors involved, and at the configuration of their interactions.⁷ On the basis of that, one has to raise the question whether, and if so, how the principals try to impact on the agent, and the agent on the principals. The system can be fluid however, as the principals may be prepared to invest in the monitoring of the agent at some points in time, but not at others. Likewise, the system's fluidity can be exposed by the agent's concern to escape from the principals' control at one moment and to seek such control at others. In other words, the relationship between the principal and the agent is a dynamic one where concerns about autonomy, authority and control may lead to different outcomes at different points in time, and where such outcomes are being affected by the use of formal (such as treaty provisions, negotiating mandates) and informal devices (such as the opening and closing of communication channels on policy issues). As such, principal-agent theory forms an attractive perspective – complementary to Putnam's two-level game – to analyze the dynamic nature of the relationship between the EU institutions in the context of multilateral trade negotiations.

⁷ By focussing on the configuration of the interactions between them, and not just on the configuration of the networks between them, one avoids looking at the relationship between the principals and the agent as to a network of positions. Rather, it is the network of actors – with the emphasis on agency – that matters. Indeed, such a network is treated "(..) as an enabler as well as constrainer, in which actors reproduce their network ties through action or modify them, leading to a theoretical blurring of the distinction between macro-structure and micro-action" (Stevenson & Greenberg, 2000: 653).

The specifics of this relationship and the context in which it is being analyzed are that one agent has to deal with several principals (cf. Majone, 1996: 38-39; Stone Sweet & Sandholtz, 1997: 313; Hooghe & Marks, 2001: 76-77), and that this agent occupies a double-edged position: a position inside the EU itself, and a position in the external trade negotiations (in this case in the WTO).

3. Negotiating in Practice

The EC Treaty provides for several legal bases for the conduct of external trade negotiations, such as those in the WTO. As far as trade in goods is concerned, article 133 TEC applies. Under certain conditions, paragraph 3 of article 300 TEC counts too, as does article 310 TEC in the case of association agreements.

The third paragraph of article 133 TEC⁸ distinguishes three consecutive stages in trade negotiations (on goods and most services): the initiation stage, the negotiation stage, and the ratification stage. Following this article, and the text of article 300 TEC to which article 133 TEC refers, the initiation stage starts with recommendations made by the Commission to the Council – meaning that the Commission has the monopoly of initiative in this area – and ends with the Council authorizing the Commission to open the negotiations. The negotiation stage consists of negotiations conducted by the Commission and followed closely by a committee consisting of member states' representatives. This committee – which is in reality a structure of committees – is better known as the Committee 133.

At the end of the negotiation stage, the Commission concludes the agreement, if any, on an *ad referendum* basis, after which the Council decides on its approval (i.e. ratification) (article 300, par. 2 TEC). In some cases – that will not be dealt with here – the European Parliament has to approve the ratification as well (through the so-called *avis conforme*).

As provided by both article 133 and article 300 TEC, the Council may issue directives that determine “the framework” within which the Commission has to negotiate. In the literature, these directives are quite often referred to as the mandate from the Council to the Commission. From a principal-agent perspective, both the Committee of member states' representatives and the mandate provide the tools with which the principals (i.e. the member states) can exert control on the agent (i.e. the Commission). In addition, although both treaty provisions suggest that the principals can exert extensive control on the agent, they equally grant the agent – thus the Commission – veto power. This power is granted twice. First at the start of the initiation stage, and second at the start of the ratification stage. In the former case, the Commission can withdraw any proposals about directives whenever it feels that negotiations among the member states will result in directives that it cannot accept. In the latter case, the Commission just doesn't conclude an agreement with its external partners.

The system described above, suggests a more or less adversarial model of the EU's conduct of external trade negotiations, where the Commission negotiates and the Council disposes. The Commission may have a double right of veto, during the negotiations it has to consult with the Committee 133 whose influence is guaranteed by the fact that the member states can wield Damocles' sword of not approving the agreement on the one hand,⁹ and because already

⁸ Current version, which means the version as amended by the 1997 Amsterdam Treaty and the 2001 Nice Treaty. For the “raison d'être” of the 1997 changes, see Kerremans (1998), and Meunier and Nicolaidis (1999).

⁹ In Putnam's words: involuntary defection.

during the negotiations, there is a mandate that clearly sets the confines of what the member states will be prepared to accept at the end of the process on the other hand.

But the Commission needs to negotiate, and in order to be able to do so, it needs some autonomy. Given this combination of the need for autonomy and of the member states' capacity to control, article 133 and 300 seem to provide an "invitation to struggle", an invitation to adversarial relations. The picture provided by practitioners is partly different however. Partly, because indeed some adversity features the relationship, sometimes quite strongly. But besides adversity, cooperation, sometimes quite intensively, seems to be a word that catches the situation as much as adversity does. Two elements play an important role in this. First, the way in which the mandate is being approached and second the fact that the member states exert a large part of their control through authoritative representatives.

3.1. The Relative Role of a Negotiating Mandate

When talking with Commission trade officials and with their member state counterparts, one is struck by the discrepancy between the prominent place of the negotiating mandate in the literature and its much more equivocal role in reality. This seems to be the consequence of the fact that the mandate is a double-edged sword, and this in a double sense. On the one hand, mandates are inherently opposite to the adaptive capacity of the EU in external trade negotiations and this creates its own risks for the principals. On the other hand, mandates define the parameters, not just for the Commission, but also for the member states themselves. They allow the principals to tie the hands of the agent, but – due to the multiplicity of the principals – at the price of mutually tying their own hands as well.

As far as the former is concerned, it is important to point at the fact – as several interviewees have done – that the Treaty does not *require* the Council to define a mandate or to issue negotiating directives. It only *allows* the Council to do so. Besides that, the treaty does not refer to a mandate but to directives. Most of the interviewees emphasized this. It may seem a detail, but from their perspective it isn't. The term "mandate" sounds more compelling than the term "directives", which means that even if the Council has issued directives, it remains a political responsibility for the Commission to assess what the precise binding nature of these directives is.

Whereas the Treaty does not require a mandate, even not directives, it requires an authorization. Indeed, the Commission cannot formally start external trade negotiations without being authorized by the Council, even if the Council can only provide such authorization on recommendation of the Commission. Based on the interviews conducted, one can conclude however, that in many cases such authorization is granted without the immediate issuance of negotiating directives, let alone a formal mandate. Many directives are being created during the negotiating process and regularly adapted in a piecemeal fashion. And even then, the precise status of such directives is unclear. Take three examples, based on the interviews conducted. The first one is the Uruguay Round, the second the abortive attempt to start a Millennium Round in Seattle in November-December 1999, and the third the successful attempt to start the so-called Doha Development Round in November 2001.

Although some have claimed that the Commission took part in the Uruguay Round negotiations on the basis of a mandate, the Commission officials themselves and their counterparts in the member states depict a more confusion picture. First, the claim that "the

EU negotiated the conclusion of the Uruguay Round in 1993 under a mandate written in 1985!"(Nicolaidis, 1999: 102) cannot be confirmed because many doubt that there even was a mandate. There was a text, the 1986 "conception d'ensemble", but all the way through the seven years cycle of the Uruguay Round, the status of that text remained unclear. In addition, this text was formulated in such generalized terms that its usefulness declined the more detailed and focussed the negotiations became. Finally, the text was even never formally adopted by the Council.¹⁰

Second, during the cycle itself, the Council and the Committee 133 regularly discussed the negotiations and took decisions on the issues at stake. But once again, the precise nature of most of these decisions was unclear, and they have certainly not been interpreted as a formal mandate. A few exceptions did arise however, and the most prominent of them was agriculture. There, the Council indeed adopted texts – at the different stages of the Uruguay Round – that were meant to be clear and strict negotiating directives to the extent that indeed in these cases, one can define them as mandates.

Equally, in the preparatory stage of what was meant to become the Millennium Round, the Council authorized the Commission to negotiate without issuing a formal mandate. The Council adopted a position on the agenda of the Millennium Round but did so relatively late in the process – in October 1999 – and in a way that cannot be interpreted as negotiating directives, let alone a mandate. The model that the EU (both the Commission and the member states) had in mind, was quite similar to the model used in the Uruguay Round. During the Seattle Ministerial itself – where the Millennium Round was supposed to be launched – the Council would adopt a text that would formally authorize the Commission to take part in a new cycle of multilateral trade negotiations and that would include a list of objectives to be achieved in these. As a matter of fact, on their way to Seattle, the Commission officials already had a draft text for this authorization. The idea was to adapt the text taking into account the negotiations the EU would conduct with its external partners on the agenda of the Millennium Round in Seattle. The text of the authorization was meant to closely reflect the WTO Seattle Ministerial Declaration itself. In the course to the Doha Ministerial in November 2001, the EU used the same approach, which means that two texts guide the EU's conduct of the Doha Development Round: the October 1999 guidelines on the negotiating agenda, and the WTO ministerial declarations adopted in Doha.¹¹ As such, there hardly is a mandate in the strict sense of the word. There is, however, a clear authorization.

This authorization without a formal mandate is – according to the interviewees – more the rule than the exception, even if member state representatives stressed that this doesn't mean that the member states don't provide any guidance on how the Commission should conduct the external negotiations. But there is a reluctance to do this *via* a strictly defined mandate. In explaining this, two arguments have been put forward. First, that if a mandate is being determined at the start of the process, the EU's adaptive capacity is being affected negatively. Indeed, as Commission officials have stressed, if the Council engages in the process of determining a mandate, the most conservative member states (those fearing concessions in the external negotiations) are able to pin the EU down on a minimalist EU-position for which

¹⁰ As Paemen and Bensch (1995: 96) observe, when referring to this text, its "most significant feature (...) was that it was never formally adopted by the Council. In fact, this text was more a statement of the European Community's views on the situation in the area of multilateral trade than a set of negotiating directives."

¹¹ It concerns *inter alia* the Ministerial Declaration (doc. WT/MIN(01)/DEC/W/1), the Declaration on the TRIPs Agreement and Public Health (doc. WT/MIN(01)/DEC/W/2), and the decision on implementation related issues and concerns (doc. WT/MIN(01)/DEC/W/10).

later in the process – when external negotiations are taking place – the question will arise to what extent this position is tenable. This minimalist position is the price the member states that favor the negotiations have to pay to those that favor the status quo, taking into account, however, that the external negotiating context (the WTO) pushes the EU as a whole in the direction of negotiations. Refusing to negotiate is then, barely an option (or an extremely expensive one).

Interviewees in the member states stressed that from the point of view of the member states, a strictly defined (and thus, minimalist) defined mandate at the start of the process can backfire. Given such a mandate and a strong external pressure on the EU to give in, the lack of any adaptations to the mandate later in the process will inevitably lead to a situation where the Commission is going to weigh the pro's and the con's of exceeding the mandate. The result is then, a high probability that it is going to do so.¹² The point is however that, if the Commission decides to do so, it can do so in an uncontrolled way. What direction is the Commission going to take when exceeding the mandate? What will be the consequence for the member states? Will the Commission create a "fait accompli" that will put the pressure directly on the member states' shoulders to decide whether to reject an agreement reached between the Commission and its external partners that exceeds the mandate. What will be the distributional consequences of such an agreement? In short, the negative effect of an early defined mandate on the EU's adaptive capacity translates itself in two problems: the erosion of the EU's capacity to strategically adapt itself to the external negotiations (given the minimalist outcome of the mandate-defining process), and the risk of a *de facto* member states' loss of control over the Commission, due to the latter's voluntary defection.

Besides this effect on the EU's adaptive capacity however, another argument plays a role as well. Different from what one would conclude from the Treaty, negotiating directives or even a mandate, not only commit the Commission but also the member states both towards the Commission and towards each other. Taking away flexibility from the Commission – which is a serious risk if some member states fear concessions in the external negotiations – means taking away flexibility from themselves. Conceding on issues as part of compromising on the text of a mandate entails accepting all that is in the mandate that one doesn't like. For example, if a mandate allows the Commission to make concessions on the tariff rate quotas for textiles, the member states that conceded on this point are committed by this as well. The Commission – and the other member states – can refer to that commitment in case later in the process, the member state concerned would be unhappy with the concessions made on this topic. This possibility makes the member states reluctant to pin themselves down on clear positions, especially early in the process, and to limit the internal negotiating process to the setting of a number of parameters that should guide the Commission when it fulfills its external negotiating role. Later in the process, when the external bargaining context is much more clear and the consequences of different options much more predictable, this reluctance may decline, depending on where one stands compared with the other member states.

Because of the absence of clear a negotiating mandate at the start of, and even during the external negotiating process, the emphasis is much more on an *interactive* determination of negotiating guidelines in the EU. In this process, the relationship between the Commission and the member states, or rather, between the Commission and the members of the special committee (like the Committee 133), is not by definition adversarial. It is a relationship that consists of a mixture of cooperation and opposition. In this sense, the approach towards the

¹² One could say that the Commission engages then, in voluntary defection. It voluntarily and willfully defects from the mandate.

mandate and the negotiating directives directly affects the negotiation process between the Commission and the member states on the one hand, and the Commission and its WTO partners on the other.

3.2. Interaction Rather than Confrontation during the Negotiating Stage

The mixture between opposition and cooperation consists of both opposition and cooperation. Opposition exists because one of the important tasks of the Committee 133 is to control the Commission. The Committee 133 is organized in such a way so as to enable it to control the Commission at all stages of the external negotiating process. It convenes regularly at its senior level and weekly (on Fridays) on its deputy level. Whenever technical issues are on the agenda, the Committee meetings can be attended by national experts as well. Ad hoc committees 133 can also be created, as happened during the Uruguay Round.¹³ The resulting system of committees allows the member states to keep maximum control on the Commission's activities in the external negotiations. Thus, there is a kind of opposition.¹⁴

But besides opposition, there is cooperation. It emerges because ultimately, the member states have to approve the agreement by way of their representation in the Council. Commission officials stressed therefore, that they have an interest to keep the member states' representatives involved in the external negotiations. First, because that provides the Commission with an additional instrument to know the member states' sensitivities. Second, because if necessary, the latter have to feel "the heat" of the external negotiations as much as the Commission does. It is only in such cases that they will understand why the Commission acted as it did, even if that meant that it had to interpret the negotiating guidelines flexibly or to go beyond the mandate if any. But also in the process of defining the guidelines, Commission officials stressed that they have an interest of involving the members of the Committee 133 as much as possible. If these members know the external negotiating environment sufficiently, there will be less risk that they will tie the hands of the Commission – through strictly defined directives – in a way that would jeopardize the external negotiations from the outset.¹⁵

¹³ Until the entry into force of the Amsterdam Treaty, the committee's name was the "Committee 113". With the modification of the numbers of the treaty provisions on May 1, 1999, the committee's name was changed into the Committee 133.

¹⁴ Note that because of the way in which article 133 (3) TEC has been amended by the Nice Treaty – which entered into force on February 1, 2003 – this is stressed even more than before. Indeed, the second part of this paragraph – referring to negotiations on international trade agreements on goods – was amended as follows (amended text in italic): "The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. *The Commission shall report regularly to the special committee on the progress of negotiations.*"

¹⁵ Even on the issue of agriculture, with some member states' propensity to favor the status quo, it is difficult to conclude from the Uruguay Round negotiations that the negotiating directives on this issue had only been defined by the member states without a Commission that pushed them into a direction that recognized the external consequences of their positions as well. The two following quotes indicate the bitterness related to this Commission role that can emerge in highly politicized issues such as agriculture. It concerns reactions by the French agricultural minister and his British colleague after the November 1990 Council decision on the EU's position on agriculture for what was intended to become the final stage of the Round (which didn't materialize because of the failure of the Heysel Conference). The French minister said (*Agence Europe*, November 8, 1990, pp. 1 & 29): "Les gouvernements ne comptent plus. La Commission a tous les pouvoirs. Malgré la résistance de la France et de l'Allemagne, il a fallu s'incliner." And his British colleague said: "Rarement une proposition aussi importante de la Commission avait été aussi peu modifiée. Tout ce que certains disaient impossible à

The fact that the Commission has an interest in cooperation on the one hand, and opposition on the other, affects the way in which it approaches its relationship with the Committee 133. On the one hand, most Commission negotiators prefer not to negotiate in the presence of the member states' representatives unless such negotiations give the Commission the opportunity to show to these representatives that it is working hard to defend their interests.¹⁶ Otherwise, when major concessions have to be made, the Commission negotiators tend to prefer more private negotiating sessions and the strategy of the accomplished fact. The external negotiating environment – especially in a setting like the WTO – allows for variation on the extent to which the member states will be able to attend – without the possibility to speak themselves – the negotiating sessions. The formal sessions – like the Trade Negotiating Committee (TNC) and the different Negotiating Groups during the Uruguay Round – provided the member states this opportunity to attend. But most negotiations took place in more informal settings. The green room meetings provide a first example, although there, the tendency has emerged to allow at least the EU Council presidency alongside the Commission negotiators, and although since a few years, most member states are able to attend some of these meetings as well.

But besides the green room meetings – where the 1994 code of conduct applies to¹⁷ – major breakthroughs tend to be achieved in private meetings between Commission negotiators and their major counterparts.¹⁸ Sometimes, other forums such as the Quad meetings are being used or private meetings in the shadow of OECD Ministerials or G7 meetings. That does not mean that in such meetings the definite decisions are being taken. It means however, that the contours of the final agreements are being negotiated to such an extent that a major political threshold emerges for the member states to completely reject them and, by doing this, to jeopardize the possibility to achieve a final agreement.

In this whole system of *de facto* autonomy there are two “lubricants”, that make the process less adversarial than it seems. First, the assumption of trust, and second the carefully weighed involvement of the member states. The two are largely intertwined.

Trust is of course an important facet of the delegation of negotiating authority¹⁹ to the Commission, although some respondents – both from the Commission and the member states – stressed that there is no such thing as trust.²⁰ As one observed: “Everybody knows, even

accepter est finalement là, les modifications ne sont que des feuilles de vigne avec la France pourra s'habiller.” (*Agence Europe*, November 8, 1990, p. 6).

¹⁶ The interviews with the Commission negotiators learned that the personality of the negotiators involved, determines to a large extent their attitude towards negotiation sessions where member state representatives can look “over their shoulders”. Whereas most of them disliked such situations, some of them stressed that once and a while, it can be gratifying that member state representatives do this, because it helps them to recognize the constraints under which the Commission has to defend the EU's (and eventually their) interests.

¹⁷ The (informal) Code of Conduct of 1994 provides that all member states are entitled to attend the informal external negotiations, unless the Committee 133 decides otherwise (interviews with Commission officials, March 2001).

¹⁸ The Blair House meeting of November 18-19, 1992, where the Blair House agreement was reached, provides an example of such a private meeting (cf. Meunier, 1998: 203).

¹⁹ Although trust and delegation are not synonymous (cf. Hoffman, 2002: 383).

²⁰ Levi (1998: 78) has defined trust as an “encapsulated interest”, thus: “A trusts B because he presumes it is in B's interest to act in a way consistent with A's interest.” Braithwaite (1998: 47) defines it as follows: “Trust defines a relationship between actors or groups in which one party adopts the position, expressed either verbally or behaviorally, that the other will pursue a course of action that is considered preferable to alternative courses of action. The alternatives are plausible options that may benefit the holder of trust or harm the giver of trust, yet

expects, that the Commission will cheat or will have to cheat one way or the other. It is more a question, therefore, of limiting distrust, than of granting trust.” It is only because the member states assume the Commission “to cheat” only when it is necessary to fight as much as possible for a European interest that is sufficiently close to their own, and will not give in unless really necessary, that they grant or leave it a certain leeway. In the absence of this assumption, the member states would not grant this leeway.²¹ The acrimonious conflict that surrounded the Blair House Agreement of November 1992 led to a situation where some member states – in the first place France – believed that this assumption didn’t hold anymore (cf. Meunier & Nicolaidis, 1999: 483-484). It partly explains why the provisions of article 133 TEC became an issue in the 1996-97 IGC, and once again in the 2000 IGC.

Second, it helps that the member states feel the heat of the external negotiations as well. This is certainly the case for crisis situations. Commission officials stressed that in such a situation, the Commission has an interest in fully exposing the members of the Committee 133 to that crisis as well. It is only through such an experience that they will feel the consequences of the lack of negotiating flexibility, and the possible need to make concessions on certain issues.

The involvement of the member state representatives in the WTO negotiations, which is partly a consequence of the code of conduct, and partly the result of the Commission’s willingness to really expose them to the dynamics of the external negotiations, leads to a situation where the Committee 133 transmits the pressures from the external negotiations *via* the EU system to the member states. Commission officials stressed that they perceive the Committee 133 partly in this way. The transmitters are therefore, both the Commission – who explains its actions in the Committee 133 – and the member states’ *representatives* in this committee (see double arrows in figure 1).

trust is expected to be honored and often is.” But one has to be careful with these definitions. As Hoffman (2002: 376) has observed, “no single definition serves as a focal point for research.” What is important however (see Hoffman, 2002: 376-377), is the fact that trust refers to an attitude “involving a willingness to place the fate of one’s interests under the control of others.” That is particularly important in the context of this paper.

²¹ Hoffman (2002: 377) relates this to the intensity of trust and the intensity of the trusting relationship. As he observes with respect to the latter: “intensity refers to the amount of discretion trustors grant trustees over their interests.” But he adds (Hoffman, 2002: 378): “(..) there are always limits on trust, but these limits are not necessarily obvious.”

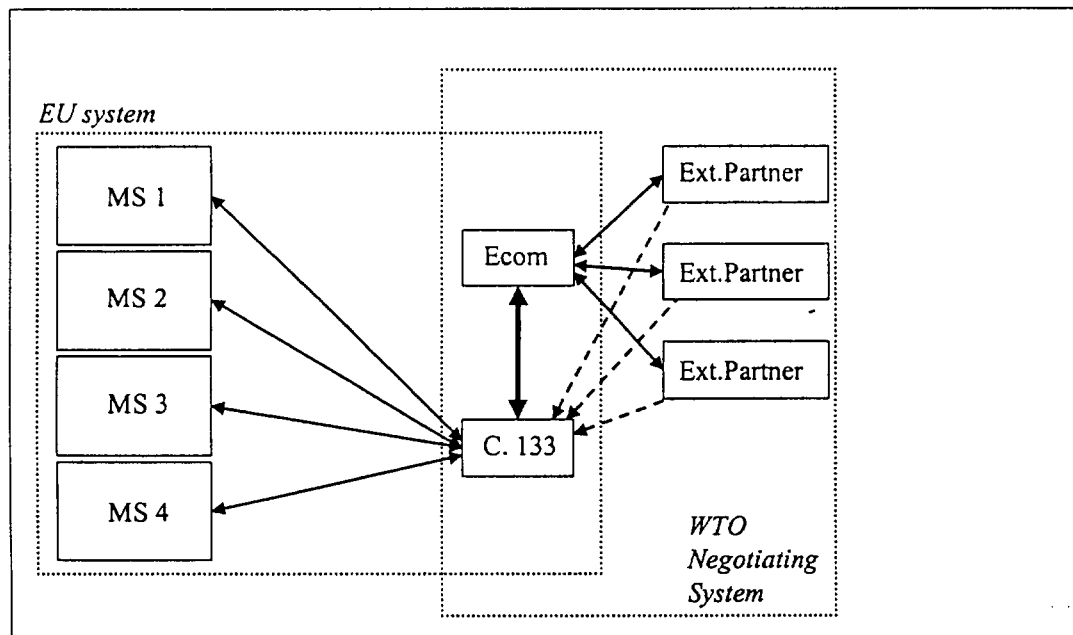


Figure 1: Interactions between the Commission, the Committee 133, and the EU’s WTO Partners

As the Committee 133 is also meant to be the forum where the member states expose the Commission to their concerns and their sensitivities on these – a function that is equally considered to be important by Commission officials – the Committee 133 basically functions as a forum where the pressure of the external negotiations and the pressure of internal concerns on these negotiations meet. Ultimately, the Commission officials – the people that negotiate externally – will have to decide what to do with these pressures, but more often than not, they don’t like to take that decision in a vacuum. They want to know the political parameters of each of the member states and they want the member states to reassess these in the light of the political parameters of the external negotiating environment. In this sense, the Commission may take risks, but calculated risks.²² The member states – as their representatives have witnessed – expect the Commission to take such risks, knowing (or expecting) however, that first, these will be calculated, and second that the arithmetic to calculate these, will be based on the member states’ interests and concerns.²³ All respondents emphasized that sometimes something may go wrong, but that – despite all media attention for this – this is more the exception than the rule. One member state respondent indicated: “When you delegate, you take risks. But you don’t take them out of the blue. Neither does the Commission.”

²² The mirror of this calculated risk, is the calculated risk taken by the member state that the Commission would abuse their trust (cf. Hoffman, 2002: 378).

²³ Clearly, this means that it is unclear whether the member states entertain predictive trust – based on the prediction that the Commission will defend their interests because the cost of not doing so would be too high – or fiduciary trust – where they expect the Commission to act loyally, scrupulously, uprightly, and truthfully. Trusting relationships of a fiduciary nature are, therefore, special forms of cooperation “involving discretion-granting policies and leaders that view one another as trustworthy” (Hoffman, 2002: 381; 384; see also Majone, 2001: 113).

3.3. A Cooperative System?

The picture depicted above, may provide the impression that the EU's system of external trade negotiations is based on cooperation only, that the Commission has an interest in exposing the Committee 133 to all information it has about the external negotiations. The reality is more complex however. First of all, the member states know pretty well that the Commission's privilege as the external negotiator provides it with the opportunity to impact on the internal decision-making process in ways that wouldn't be there in the absence of that privilege. As one Commission official observed:

“Although the member states accept that the Commission is the sole negotiator, sometimes the concomitant privileges or the things it proposes are difficult to swallow. Indeed, it means surrendering part of your control on the talks.”

To a certain extent of course – due to the rules and the code of conduct – the Commission has to involve the member states through their representatives in the Committee 133. In addition, in the light of the above, the Commission has an interest of doing so. But this still leaves the Commission some leeway to carefully dose the member states' involvement in the external negotiations. The fact that an important part of the WTO negotiations takes place in informal settings – like the green rooms – and through private contacts, provides the Commission opportunities to strategically increase or to restrict the Committee 133 members' access to the external negotiating process. It will be tempted to do so in case it prefers an agreement itself, while knowing that reaching such an agreement will require concessions that one or some member states won't like at all. But doing so may be necessary, but not sufficient. What the Commission needs to do is basically close the door to the member states until it has negotiated an agreement that is shaped in such a way that every member state has sufficient reasons not to reject it. It can reduce the probability of rejection further by presenting the agreement as a final one to take or to leave by the member states. A rejection would then, make those member states that reject responsible for the involuntary defection by the EU as a whole, and for the collapse and failure of the external negotiations.

A package deal is helpful here because it provides the Commission more opportunities to balance the costs and benefits for each of the member states. But when the Commission works towards a package deal, it has an interest in restricting the transfer of information about that deal to the member states as long as it has not finalized the deal with its external partners. There are two reasons for that. First, because building a package deal means that the Commission tries to give each of the member states sufficient reasons not to reject the agreement, and that therefore, the extent to which the Commission has succeeded in this can only be assessed when the agreement has been finalized and accepted by its external partners. Second, because exposing all its “trumps” to the member states early in the process would mean that it would expose all its “trumps” to its external partners too. As has been recognized by both Commission officials and members states' representatives, the EU system is a “leaking sieve” in which it is difficult, if not impossible, to keep a secret. The only remedy for this is that the Commission works with “faits accomplis” during the decisive stages of the external negotiations.

Once again and up to a certain extent, the respondents from the member states indicated that “faits accomplis” are an inevitable part of the process, and that they accept that the Commission needs to do this – albeit within clear parameters – in order to be able to do what they expect it to do: to take its responsibilities by working towards an agreement. After all,

the member states possess the ultimate sanction in case they are dissatisfied with the outcome: ultimately, they – jointly – have the capacity to veto it.²⁴

4. Conclusion

Based on the above, how can one assess the Commission's autonomy as a negotiator in the WTO on behalf of the EU? It is clear that the external negotiations – the ones in the WTO – create opportunities for the Commission to act autonomously. This is certainly the case, because informal talks play such an important role in the WTO.

The WTO also provides incentives for the Commission to act autonomously. The construction of package deals on the one hand, and the pressure to negotiate on issues that are extremely controversial for some EU member states on the other hand, requires that the Commission shields its activities from permanent member state scrutiny. But the Commission has no interest at all to close the WTO-process completely for direct member state involvement. In order to assure that the member states will understand the rationale for concessions made, the Commission needs to expose the member states' representatives directly to the WTO negotiating process. To a certain extent, due to its central position between the external WTO process and the internal EU process (see figure 1), and due to the opportunities the WTO process provides to engage in informal negotiations without member state attendance, the Commission can calibrate the member state representatives' involvement (see dotted arrows in figure 1) so as to strike the right balance between its negotiating autonomy on the one hand, and the need to get member states' backing for its activities on the other hand. Three factors affect the European Commission's ability to strike this balance: trust, politicization of the issues, and the scope of the issues included in the WTO negotiations.

The more the member states and their representatives trust the Commission, the more the Commission will enjoy authority while possessing autonomy. In that case, voluntary defection by the Commission can go hand in hand with a lack of involuntary defection by the member states as the latter consider voluntary defection to be an accepted part of the Commission's external negotiating role.

Politicization affects the Commission's authority in the opposite way. The more politicized issues are the less permissive the member states will be towards the Commission. Politicization refers here to politicization for one or more EU member states. It is affected by two factors: the saliency of an issue for a member state, and the extent to which the member state's position is closer to the status quo than the one of the Commission,²⁵ given external (WTO) pressure to change the status quo (comparable with Meunier's conservative model, see Meunier, 2000: 113-114). The Commission's reaction to such a situation may go in two directions (and often does simultaneously). As a higher level of politicization, increases the probability of more tightly defined negotiating directives, voluntary defection by the Commission becomes more probable. At the same time however, the Commission – anticipating this voluntary defection – will mentally prepare the Committee 133 members to such a defection by carefully calibrating their involvement in the WTO negotiations. In doing this, it stems the rising possibility of involuntary defection by the member states in response

²⁴ As one Commission official phrased it: "Losers can run away. Institutions cannot. If you abuse them, they will turn themselves against you." And in the same vein, Hoffman (2002: 381) observes: "Trustors create trusting relationships; trustees determine the success of these relationships."

²⁵ The Commission may be the consequence of substantive interests of the Commission itself, or to the Commission's preparedness to accept WTO pressure to change the status quo.

to its own voluntary defection. In other words, politicization increases the probability of involuntary defection, while at the same time pushing the Commission to act in a way that preempts this. What can be particularly helpful here, is the scope of issues on which concessions can be made and on which concessions from other WTO members can be gained. The larger this scope, the less difficult it will be for the Commission to balance the costs and benefits for the member states in such a way that involuntary defection by them becomes less probable, even if the Commission has exceeded its negotiating directives (see figure 2). From that perspective it is easy therefore, to see why an issue like the deadline on modalities' negotiations was so crucial for the Commission. It was nothing less than a case of preparing the EU system for the painful concessions that the Commission as EU negotiator will have to make in the ongoing Doha Development Round. It was therefore, an effort, to create the conditions under which voluntary defection by the Commission will not result in involuntary defection by the member states, or even worse (at least from the Commission's perspective): the jeopardy of the internal and external credibility of the Commission's negotiating role. At the end of the day, it is this that will determine whether the Commission can remain a credible representative of the EU in the WTO.

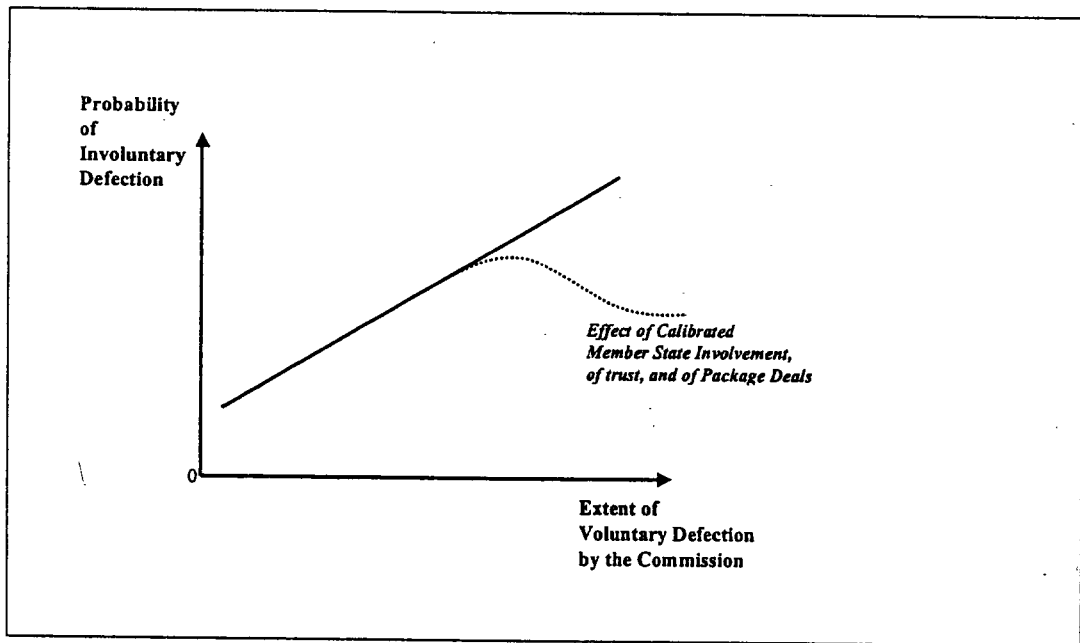


Figure 2: The Relationship between the Commission's Voluntary Defection and the Possible Involuntary Defection by the EU Member States

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