

A League of Gentlemen

Who really runs EU Trade Decision-Making?

November 2003



"All governments need to assure that transparency also starts, like they used to say about charity, at home."

"We need (to) a closer involvement of Parliaments in WTO matters..."

Pascal Lamy
European Union Commissioner for Trade

This report was commissioned and produced by WWF-UK, drawing extensively on research conducted by Elizabeth Drury. Any errors are unintentional, and – if drawn to our intention – will be corrected in subsequent versions.



Foreword

The failure of the Fifth WTO Ministerial in Cancun in September has led the European Commission to undertake a "thorough review of our options and possible approaches" to trade policy. The Commissioner for Trade, Pascal Lamy, has posed four questions at the centre of the EU's engagement in the multilateral trading regime. These range from the philosophical, on the balance between market access and rules, to the political and practical, for instance the best forum for pursuing the EU's trade agenda.

WWF welcomes the fact that the Commission has launched a far-reaching review of EU trade policy. But there is one issue – we have called it the 'fifth question' – that the Commission has failed so far to raise in the debate: Who really runs EU trade decision-making?

There are a growing number of people in Europe who have been raising precisely this question and not just among the non-governmental organisations. For example, in a leaked internal UK Government report on Cancun, frustration was expressed that "[t]he relationship between the Commission and member states came under strain in Cancun. Debate was stifled, and information flows were poor."

This WWF report highlights the gaps in democratic accountability in EU trade policy making. It examines the way in which EU trade policy-making has come to be dominated by a small grouping of influential trade specialists. The consequences of these processes being dominated by experts are numerous. One of main concerns in this report is the exclusion of some of the broader societal debates underpinning sustainable development from the central formulation of trade policy.

Our knowledge of many of the serious environmental and social problems with which we are faced is constantly improving. The United Nations Environment Programme (UNEP) Global Environment Outlook 3 in 2002 looks ahead thirty years to 2032. One scenario examines a world shaped by the current 'markets first' economic orthodoxy based on the "values and expectations prevailing in today's industrialised countries." Under this projection, the report foresees a world where "social stresses threaten socio-economic sustainability as persistent poverty and growing inequality, exacerbated by environmental degradation, undermine social cohesion, spur migration and weaken international security".

This 'markets first' economic orthodoxy must change in a way that puts the pursuit of sustainable development at the centre of policy making. This is a debate about allowing other values besides narrow economic and political self-interest to enter the political discourse. In the trade policy context this means that policy-making must be opened up to a much broader range of arguments, discussions and choices to ensure fair and equitable relationships with Europe's trading partners. The report shows that European processes are currently poorly equipped to meet this challenge, and that these broader political debates will not be accommodated under the current arrangements for rule by experts.

Commissioner Lamy has launched this important debate about trade policy precisely at the time when Europe's leaders are contemplating a new European Constitution. The convergence of the collapse of Cancun and a new Constitution for Europe presents a brief opportunity to open up trade policy making to much greater accountability and transparency. Let us hope that Europe is ready and able to take up that challenge.

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Introduction

1.1 Trade policy-making and sustainable development

WWF has long argued that trade policy should be shaped with sustainable development at its heart. There is an increasingly hackneyed refrain amongst those civil society organisations that recognise the crucial importance of international trade policy in alleviating the long-term drivers of global poverty and environmental degradation: 'trade liberalisation is a tool, not a goal'.

Whilst trade policy-makers often concede this point, liberalisation is nonetheless still pursued as a proxy for sustainable development – sometimes with the parallel implementation of 'flanking measures' to mitigate its worst excesses. We need to begin to design decision-making processes that can pick-apart the detail of tradepolicy, and discriminate those instances where the pursuit of liberalisation and sustainable development coincide from those where they patently do not.

Trade negotiators alone are ill-equipped to do this. The pursuit of liberalisation is premised upon economic theory beguiling in its simplicity, yet striking in its failure to deal with the complexities of the international economy. Today's economic orthodoxy, and its practitioners, have pervasive influence. Indeed, in the words of John Maynard Keynes, "the ideas of economists and political scientists, both when they are right and when they are wrong, are more powerful than is generally understood. Indeed, the world is ruled by little else."

Hence if economic policy generally – and trade policy specifically – is to be pressed into service to deliver sustainable development, than it has to be pursued in the context of a broader debate: a debate which has the breadth and sophistication to begin to strike a crucial balance. It must engage with immediate economic needs, relieving poverty in the short-term, whilst ensuring that these needs are not addressed through the irreversible depletion of natural resources or degradation of the natural environment in a way that will threaten the welfare of future generations.

Indeed, whilst Romano Prodi has pointed out that we should ensure "all policies have sustainable development as their core concern", he has recognised too that "policymaking will often mean reconciling divergent interests and, in certain cases, achieving trade-offs between policy-sectors". This is the balance we must strike.

As international conferences – from Stockholm to Johannesburg – tirelessly repeat, we are far from achieving this. This is not the place to begin to catalogue the deluge of evidence pointing to a worsening of the global environment – accelerating soil erosion, water shortages and climate change – that will fundamentally threaten the welfare of future generations. These are not concerns that should narrowly concern a few "special interest" groups. They should animate us all. And because they concern – and touch on – us all, they have to be addressed through processes which are seen to be transparent, accountable, and democratic.

Here it is important to distinguish the *tactics* of trade negotiations from the *aims* of trade negotiations. On the one hand the tactics of engaging in international trade negotiations have, by their very nature, to be developed with a degree of secrecy. But on the other hand, the aims of these negotiations have to be determined through inclusive mechanisms. This report high-lights how this distinction – between tactics and aims – has been blurred, and how the imperative for secrecy over the course of

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¹ Romano Prodi, European Parliament, Strasbourg, 15th May, 2001.

conducting negotiations seems to have become appropriated to justify a lack of accountability over the aims of these negotiations.

1.2 Soul-searching after Cancun

These are concerns which have of course been thrown into sharp relief by the failure of the Fifth WTO Ministerial in Cancun. This has led to a period of intense soul-searching in the European Union about the direction in which its international trade policy is headed. It has prompted the EU Trade Commissioner, Pascal Lamy to frame this debate with four questions to which he has canvassed broad responses:

- Should the EU retain the same philosophical underpinning to its trade policy i.e. that this policy should represent a combination of market access and rules?
- What is the best forum for pursuing the EU's trade policy agenda? Is there a place for a plurilateral approach?
- What should be the future of trade preferences particularly given that in some cases preferences may offer greater benefits to developing countries than multilateral market opening?
- What scope for WTO reform exists?

But there is one issue that is notably absent from the Commission debate in the aftermath of Cancun. The issue of internal EU process.

Although the Commission appears to be silent on these issues, they have been raised by MEPs and member states alike.

1.3 What this report attempts to do

With a particular emphasis on trade and environment issues, this report focuses on the process of policy co-ordination for EU positions in international trade agreements. Based on extensive interviews with individuals involved in the EU trade policy process, it highlights some of the problems of lack of transparency, accountability, or democratic oversight. It moves on to make some tentative recommendations for ways in which continued oversight of the direction in which trade negotiations are going might be exercised. It does not purport to present definitive answers to addressing these problems. It does, however, indicate that things could – and should – dramatically improve.

2. EU trade policy-making: The internal workings of a secretive 'club'

Trade was assigned as a Community responsibility at the founding of the European Community in 1957. The founders of the EC recognised that Europe would achieve greater international influence if it were to negotiate trade deals with one voice. So the Commission was given the power to negotiate on behalf of the whole EC, and to present the agreements negotiated for Council approval. Because such agreements are considered to be primarily a part of external policy, and are therefore treated in a

similar way to foreign and security policy, they fall outside the EU's legislative procedures.

The decision-making processes for international trade agreements are essentially laid down in Articles 133 and 300 of the existing EU Treaty², which is currently under revision by an Intergovernmental Conference (IGC) of Foreign Ministers of the 15 member states. They are discussing a proposal for a revised Treaty text presented in June 2003. Trade agreements concerning goods (and certain commercial aspects of services and intellectual property) are concluded on the basis of Article 133. This provides for the Commission to prepare proposals for trade agreements, consult with Council representatives to establish a common EU position, and to negotiate directly on behalf of the EU at international forums. The Council of Ministers, acting by qualified majority at the General Affairs Council, gives permission for EU trade negotiations to start, and final approval to negotiated trade agreements. There is no formal consultation of the European Parliament at any stage.

EU and national trade officials have more than 45 years' experience of deciding EU trade policy. They are also well connected with other parties at international level, since multilateral trade deals have been around for as long and the international trade 'club' is well established. Key decisions on EU negotiating priorities are often taken by these officials behind closed doors, and without parliamentary or ministerial input, since proposals for EU mandates on trade agreements are often agreed as automatic 'A' points³ in any Council meeting. Yet these decisions can have huge ramifications for other EU policies: policies which have been agreed by votes in the European Parliament and the Council of Ministers.

The political pressures for majority consensus, which happen regularly in areas of qualified majority voting, take place for trade agreements between a group of national officials who are often led by Commission experts and who, unlike Council procedures for legislation, do not vote. The opportunities for pressure on individual officials whose national position may be opposed are greater in this informal 'gentleman's agreement' system, which, unlike Council meetings, does not normally published agendas⁴ or summaries of decisions taken.

2.1 The role of the European Commission

The influence of the Commission – essentially DG-Trade – in proposing and negotiating trade policy, as defined in the Treaty, is paramount. Firstly, the Commission has the right of initiative in preparing proposals for EU positions in trade agreements, which is not the case in other international agreements (multilateral environment agreements, for example). Secondly, the Commission also has the significant and effective power of being the sole EU negotiator in trade talks, because trade policy under Article 133 is a Community responsibility, or an EU 'exclusive competence'. In these areas of trade policy the Commission negotiates alone, without member state representatives present. In practice, this means – as one insider put it – "member states are less and less involved in the tactics of

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² Article 133 of the Treaty covers the Common Commercial Policy, which mainly applies to trade in goods (and certain commercial aspects of services and intellectual property). For other multilateral agreements, such as MEAs, and also concessions relating to services, intellectual property or investments, the general rules of the Treaty apply, mainly summarised in Article 300.

³ Non controversial issues, approved by Coreper, are reffered to the next available Council meeting as written 'A' points. These are not discussed further by the Council.

⁴ The Danish Presidence in Council in Counci

⁴ The Danish Presidency, in second half of 2002, began a process of publishing 133 Agendas which was discontinued under the Greek Presidency. Current policy is unclear.

negotiations". In other trade areas of so-called 'mixed competence', such as investment and certain services, the Commission retains the spokesman's role for the EU, but the Council Presidency can be present at negotiating talks.

2.2 The role of the Council and the 133 Committee

The Council is represented for all trade matters by a group of various national trade officials, known as the '133 Committee', since it is formally set up by Article 133 of the Treaty. This Committee scrutinises, amends and approves Commission proposals for EU negotiating mandates on trade agreements, and its members attend the international negotiations themselves. The Committee agrees EU position papers for agreements in principle, and these are then passed for formal approval firstly by COREPER (Committee of Permanent Representatives)⁵ and then by Council, usually as a written 'A' point. Due to the increasing technical complexity of trade decisions over the years, more and more issues are settled by trade officials in the 133 Committee, and Ministers themselves rarely debate EU negotiating mandates at the political level.

The Committee has no set numbers of participants and there can be around 50 people at its meetings. It operates at two main levels:

- Deputy level: 3-4 national trade officials from each member state: Commerce or Trade Counsellors from the Permanent Representations in Brussels, plus 2-3 trade experts from the national capitals who meet on a Friday
- Full member level or "top configuration": a monthly Friday meeting of national Trade Directors-General from member states, plus supporting officials.

In addition, other meetings of national experts examine specific issues on behalf of the 133 Committee where specialist discussion is needed.

DG Trade Commission officials attend all meetings to present their proposals, and the Director-General for Trade, Peter Carl, attends the monthly full members meeting, often also accompanied by the Commission's WTO representative, Carlo Trojan. Various Council of Ministers trade experts are also present.

Like other Council Advisory Committee meetings, this Committee operates *in camera* normally without public agendas. However, the role of other Committees is balanced by a wider consultation process, which includes the European Parliament from the start.

There are some significant differences in the discussions of the 133 Committee on international trade agreements which increase the impact of its secretive operations, compared with discussions of Council Committees in other policy areas:

- It is the sole body consulted on proposed EU positions for trade agreements⁶; Parliament is excluded from the consultation process.
- It debates an unpublished Commission proposal.

⁵ COREPER, established by Article 207 of the EC Treaty, is the auxiliary organ of the Council performing tasks of preparation and execution without exercising powers of decision which belong to the Council. It operates according to the Council voting system.

⁶ Execut for bileteral trade according to the Council voting system.

⁶ Except for bilateral trade agreements, where the relevant geographical area Advisory Committee is also involved.

- It is strongly influenced by expert and highly experienced Commission officials in the words of one national expert: "it's the one committee where a very vocal and active Commission has the lead role, not governments".
- It holds 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.

The 133 Committee thus has the main responsibility for ensuring necessary amendments to the Commission's proposals for EU positions in trade agreements. Like other Council Advisory Committees, the 133 Committee has no formal operational guidelines. The Committee works by consensus and 'gentleman's agreement'; there are almost no formal votes – as one 133 Committee member stated: "we hardly ever vote".

There are no set deadlines for consultation on the Commission proposals, and response time for comments from 133 Committee members "depends on the urgency of the case". However, for position papers relating to the current round of WTO negotiations, a set 10-day response period has recently been introduced. During this response period, the Brussels-based Trade Counsellors consult their national counterparts in the member states to obtain their national position on the issue. Not all member states follow every trade issue raised; the larger member states tend to respond to the widest range of issues.

At the 133 Committee discussion, the Commission DG Trade representatives present their proposals, and assess the strength of political will for change to their text in the 'tour de table' of member state views. Since Council decisions on trade policy are by qualified majority, objections at 133 Committee usually need to be supported by a significant number of 133 Committee members in order for the Commission to amend its proposal – a Commission insider talks of doing a "mental head count" of opinions. Some say it needs a qualified majority of member state representatives on 133 Committee for this to happen, and others point out that on occasions the serious objections of one major member state have been sufficient. Normally, however, the Commission reports that "if only one member state objects there is virtual consensus" and that member state is expected to back down. It seems that the political sensitivity of the issue, and the strength of political feeling of the member state representatives, are key factors in the process of reaching this consensus.

It is clear that Commission experts lead policy-making on trade issues, and that they are well placed to win debates within the 133 Committee in defending their proposals. Insiders report that "the 133 Committee is Commission-driven and dominated" and that "it's a waste of time for a member state to push an item on the agenda without prior agreement with the Commission".

2.3 The European Parliament

As discussed above, the European Parliament is specifically excluded from consultation on trade agreements concluded under Article 133.

Parliament *is* consulted on the other trade agreements on investment and services which fall under the provisions of Article 300, but this is a non-binding consultation and Council can act without Parliament's opinion. There is restricted provision in Article 300 for a binding European Parliament assent on specific types of agreement,

including on those which "establish a specific institutional framework by organising co-operation procedures". This provision was used as an exceptional case when the Commission and Council agreed to the European Parliament giving its assent on the creation of the WTO at the end of the Uruguay round in 1993.

These, of course, are not new concerns. Attempts were made to introduce European Parliament consultation at the Nice Intergovernmental Conference in 2000⁷. These failed, but calls for such changes were renewed prior to the launch of the Doha round of trade talks. In 2001 the European Parliament adopted a resolution on openness and democracy in international trade⁸. This noted that "there is still a democratic deficit within the European Union in the area of trade policy, in that Article 133 of the EC Treaty excludes the European Parliament from defining and genuinely scrutinising the common commercial policy". The Parliament called "once again therefore on the Member states to revise the provisions of the EC Treaty concerning the common commercial policy so as to guarantee full involvement of the European Parliament in this sphere, by providing for the European Parliament to be consulted on the negotiating mandates to be given to the Commission, opening up the 133 Committee to the European Parliament's representatives, and requiring the European Parliament's assent to all trade agreements".

Most recently, in its resolution on preparations for Cancun⁹, the European Parliament expresses its regret that "the draft Constitution... does not propose a formal parliamentary role in the opening of negotiations", and "calls on the IGC [intergovernmental conference] to confirm the power of assent and to include in the Constitution a requirement that Parliament be involved in defining negotiating mandates for international trade agreements".

2.4 The role of the Council Working Groups

Council Working Groups examine and agree EU negotiating positions in the course of negotiating some agreements. In the case of multilateral environment agreements, for example, the EU negotiating position is agreed by the Council Advisory Committee on International Environmental Affairs, or one of its specialist sub-groups.

In specialist areas such as details of climate change policy, the Council working groups on environment sometimes have greater expertise than Commission DG Environment officials. Instead of reacting to Commission proposals, as in the international trade field, the national environment officials often develop their own proposals for common EU positions with minimal or no input from the Commission if it does not have special expertise in that area.

But it seems that such Groups are excluded from trade policy debates. For example, one involved insider commented that "the Environment Council Working Group is not consulted or involved in trade and environment issues discussed at WTO". Rather, when environment-related trade issues arise, they are discussed in 133 Committee, and the environment briefings are relayed from individual national environment ministries. This system therefore precludes a discussion at EU level among

⁸ European Parliament resolution on openness and democracy in international trade (2001/2093(INI)), (434 for, 10 against, one abstention).

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⁷ Proposals to introduce European Parliamentary consultation on trade policy issues were on the table at Nice, but were dropped due to time pressure and lack of political will, in favour of higher political priorities regarding the inclusion of services, investments and intellectual property.

⁹ European Parliament resolution on preparations for the 5th World Trade Organisation Ministerial Conference (Cancun, Mexico, 10-14 September, 2003).

environment experts in order to reach a common EU position on environmental aspects of trade¹⁰.

2.5 What is the 133 Committee?

WWF commissioned a lawyer specialising in EU law to examine the role of the 133 Committee. She began by attempting to establish what the role of the 133 Committee is. Although Article 133 provides for a committee, it is not one for which the Treaty makes specific provisions concerning membership, appointment and consultation or one for which the Treaty requires Rules of Procedure to be adopted. It is also clear that the Committee is not technically a 'comitology committee', set up by Council legislation in order to assist the Commission in exercising powers conferred on it. Such committees are regulated by legislation concerning their decision-making process and must adopt the Commission Rules of Procedure.

Moreover, there is an apparent contradiction between the role of the Committee as set out in Article 133 of the EC Treaty, and that described by at least one member state. Article 133 states:

Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organisations, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it.

(Emphasis added)

And yet the website of the UK Department of Trade and Industry (DTI) states "Community trade policy is *decided* in the Article 133 Committee" (*emphasis added*)¹¹. Certainly, this would seem to more accurately reflect the true role of the 133 Committee in EU trade policy-making. However, the DTI website goes on to state that "[t]he Committee... is technically a Working Group of the Council."

The lawyer concluded "I have not been able to come to any definitive view on precisely what the role of the Committee is...". In the absence of a clear definition of the role of the 133 Committee, we can nonetheless speculate on how this might be delineated. It seems that there are three possible functions.

- The function may be to 'assist' COREPER and the Council in matters of trade policy. Although the Council and COREPER have the power to establish such committees to assist it in their own functions, the function of such a committee would differ from that envisaged by committees established under Article 133, which states that committees may be established to assist the Commission in its negotiations.
- 2. The function may be wider than assisting COREPER and the Council (as stated on the UK-DTI website). In this case, it would appear that the Committee is effectively acting on behalf of the Council itself. In this case, it is exercising powers which are vested only in the Council. It is unclear where such a mandate

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¹⁰ There was one notable exception to this when the International Environment Group and its sub-group on WTO considered the proposal for a Precautionary Principle at WTO, where it is reported that national and EU resources were stretched to the limit to obtain a common environmental position from the member states representatives which could be communicated to 133 Committee.

¹¹ www.dti.gov.uk/ewt/ukpolicy.htm

would come from – certainly this function would go well beyond that envisaged for special committees either by the Council Rules of Procedure for such committees or by Article 133 of the EC Treaty.

3. The function may be to assist the Commission in its trade negotiations, as envisaged by Article 133. However, according to the UK-DTI this would appear to be only a subsidiary function of this so-called "Article 133 Committee". Moreover, if that were indeed the sole function of the Committee there would appear to be little justification for it to be treated any differently to comitology committees established by the Council to assist the Commission and on that basis a persuasive argument can be advanced that it ought to be subject to similar provisions concerning decision making and rules of procedure.

The up-shot of this is that either the Article 133 Committee has powers which extend beyond those set out by Article 133 (i.e. its role extends beyond providing 'assistance' and it operates in breach of its mandate), or, if its role is limited to providing assistance to the Commission, a strong argument can be made that it should be subject to the same rules as comitology committees.

2.6 The 133 Committee is bound by obligations concerning disclosure of documents and the Council Rules of Procedure

Whatever the status of the 133 Committee, as a Council committee it is bound by both rules on public access to Community documents¹² and by the Council Rules of Procedure (in the view of the legal advice that WWF commissioned, there can be no question but that the Committee is part of the Council and it is therefore covered by the Regulation in the same way that a comitology committee is treated as part of the Commission for the purposes of the right of access to documents). Regulations apply (subject to certain limited exceptions) to the documents of the European Parliament, the Commission and the Council¹³. "Document" is defined very broadly as:

".....any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility" 14

It would clearly cover, in principle, any document held by or relating to the 133 Committee. Furthermore, the Council must by its own internal rules of procedure provide access to draft agendas and other documents such as information notes, reports, progress reports and reports on the state of discussions (which do not reflect individual positions). The burden of proving that an exception is applicable to the documents is borne by the institution. Any exception relied upon must be narrowly construed, and any refusal of disclosure must be fully reasoned. Such refusals can be challenged in the Court of First Instance.

¹⁴ Regulation (EC) No 1049/2001, Article 3(a)

¹² Regulation (EC) No. 1049/2001

¹³ Regulation (EC) No. 1049/94

3. Power relations in EU trade policy making

There are clearly instances where communication between DG-Trade and the 133 Committee falls apart. But even where this relationship is functioning properly, a recurrent impression is that this is a 'closed circuit' of discussions, which excludes other experts – whether from elsewhere in the Commission, or in member states.

3.1 The balance of power within the Commission

In theory the Commission needs inter-service agreement within the Commission before presenting its final proposals to 133 Committee. However, unlike legislative procedures, proposals for positions on trade agreements are not agreed by the College of Commissioners, and so the Environment Commissioner, for example, is not involved in approving a trade and environment paper. Commission DG Environment representatives may attend relevant 133 Committee meetings, but they do not take the floor.

Officials from other DGs are also offered tight deadlines for consultation on the final Commission proposals: for example, both DG Environment officials, and those national environment experts consulted by their trade colleagues have less than 10 days to consider and respond to proposed EU positions on trade and environment issues. The lack of capacity on trade policy in other DGs and national government departments makes this a very short time limit. One account was given of a paper prepared by DG Trade which was passed to DG Environment for their response just three days before it was due for circulation in Geneva. In another case, they were given just twenty-four hours.

Within the Commission, staffing capacity in DG Environment is relatively low in general compared with other Directorates, and this reflects political and policy priorities for the EU and national governments. For international trade issues, DG Environment has just 3 officials, who follow environmental impacts of all WTO policies, multilateral, bilateral and regional agreements, and who also attend 133 Committee meetings for specific agenda items.

3.2 The balance of power between the Commission and the Council

Inadequate capacity on international trade issues in many national ministries can make it difficult to assess Commission proposals in sufficient detail, or quickly enough to be able to input on specific issues. Due to the Commission's initiative in drawing up proposals, and its greater technical expertise compared with national trade officials, Council representatives on the 133 Committee need to act strongly, usually with a group of countries approaching a qualified majority, in order for Commission proposals to be significantly changed.

Within this group of EU and national trade officials reaching common positions on EU priorities for trade agreements, it should be noted that Commission trade officials have greater expertise than their national counterparts at every level of seniority.

The EU adopts specific positions on a wide range of priority issues for trade agreements, and this involves different specialised areas. Thus, at 133 Committee, Commission officials who have spent their entire career on international trade issues, and can be specialists in particular trade areas, are debating with national Commerce/Trade Counsellors from member states whose postings to Brussels only

last around 2-3 years. The lower technical expertise of the member states' representatives is then compounded by frequent changes in the composition of member states' representatives at the deputy member level of 133 Committee, although this is less marked at full member or Director level. The trade experts from national capitals vary according to the items under discussion, and they have little involvement in liaison with the Commission or other member states.

Although this can be achieved, it is reported that the Commission can use tactics to circumvent, or pre-empt, objections from 133 Committee members to its proposals. According to one 133 Committee member, it sometimes resorts to "tricks – like going to the press before presenting to the 133 Committee, which puts 133 Committee members under pressure not to change proposals when they have been made public".

In another case a paper on a key aspect of the trade and environment negotiations was circulated to members of the informal trade and environment committee, who were initially given just five minutes to respond. When members of the committee complained, the Commission relented and extended this period to twenty-four hours for comments before the paper was submitted to the relevant WTO Committee. There was one instance of the Commission apparently circulating a position at the WTO in Geneva, on the key trade and environment issue of observer status for MEA Secretariats, without having first consulted on this with member states at all.

But perhaps most invidiously, it has been reported that even when a paper goes to the 133 Committee, Commission officials may not always accept a rejection from its members, but may seek other alliances - for example with the US - to pursue their initiatives at international level.

At present, there are no timing obligations on DG Trade officials to produce proposals by any set deadline before their use in negotiations. This lack of deadline is open to manipulation by DG Trade officials, who follow most closely the timetables for trade negotiations. Consistent reports of 'very short notice' of Commission trade proposals appearing on the 133 Committee table just before EU talks are due to start could indicate a tactical strategy by DG Trade officials to reduce interference from other interests, including even the 133 Committee, in its proposals. When asked why the Commission did not produce proposals earlier, one DG Trade official's expressed the view that:

- DG Trade officials are under-staffed and faced with increasing numbers of proposals
- Proposals will lose political impact if they are produced "too early" and timing just beforehand is crucial
- "inter-service consultations can take up extra time if substantial amendments are made by one DG, which requires another consultation round for everyone."

This last comment invokes the concerns of some that DG-Trade deliberately withholds proposals as a 'bouncing tactic', presenting technical proposals late in order to frustrate full debate. Yet one Committee member conceded, "it is very rare that an issue comes out of the blue and needs a full decision immediately". The 133 Committee has attempted to respond to this by introducing a '10-day' rule for consultation on proposals relating to the current WTO round. However, this is inadequate to permit proper consultation within the Commission – let alone within member states.

3.3 Consultation between Council trade representatives and national governments

The Council trade representatives on 133 Committee are expected to consult at national level on non-trade issues, such as environment, once they have received the Commission proposals. Clearly, where there is insufficient liaison between national trade officials and their colleagues in other departments, such as the environment, this hinders full input from national environmental interests. This is indeed the case in some member states. But this consultation may also be frustrated where deadlines make it impossible.

National trade officials on 133 Committee have admitted that in the past they have felt under too much time pressure from the Commission to approve its proposals for trade rounds. It was in response to these concerns that the '10-day' rule was introduced during the Spanish Presidency. However this still represents a very tight time-frame for 133 Committee members to consult relevant experts at national level.

At least one Commission official has little sympathy for this problem, observing that "it is for member states to organise their own consultations in capitals [between different ministries] in time to enable a position to be taken".

Similar low capacity for national environment ministries to follow trade issues often hampers their ability to follow trade discussions in sufficient detail to be able to present the environmental case on specific issues to their national trade colleagues. It also hinders effective co-ordination with other environment ministries to reach a common EU position on trade and environment issues. One example quoted was the discussion of the Precautionary Principle within WTO prior to Seattle and Doha. This was a major environmental issue on the trade agenda, and it required huge efforts among Council environment contacts in Brussels, to inform and then get input from their national environment ministries; and then to co-ordinate these positions within the Council Environment Working Group in Brussels, before finally inputting effective arguments to the 133 Committee. Environmental resources on trade were "stretched to their limits" for this exercise, indicating that national environment contacts do not yet have the institutional capacity to follow trade policy and co-ordinate their positions at European level.

However detailed, environmental input is always filtered through the trade specialists, so that the 133 Committee, where final decisions are taken, does not hear directly from national environmental experts. DG Trade officials hear the views of some national environment experts within the informal 'trade and environment' working group, but since this only meets 3 or 4 times a year it is unlikely to give comments within the 10-day period for specific position papers. (Indeed, as noted above, there have been cases where its members have been asked to respond to a Commission position 'on the spot').

3.4 Parliamentary scrutiny in member states

In the absence of formal consultation of the European Parliament on EU policy for trade agreements, the only parliamentary input comes indirectly from national parliaments. However, this national influence is weak in the European and international context, partly due to the complex technical nature of international trade issues, and partly due to varying political priorities among member states. Thus, to date, there has been little formal involvement of national parliaments – although there are exceptions to this, such as in Denmark.

In Denmark, a system of wider consultation of civil society and national parliament on trade issues provides one model for consultation. Several committees on different aspects of trade policy have been set up and are open to civil society to debate the issues; they meet more regularly in advance of trade rounds.

The Danish Folketing, however, has a constitutional consultation right on all EU policies, including international trade agreements. It approves a specific negotiating mandate for the Danish representatives at international trade negotiations. This has also led to the recent development of wider public debate and consultations at national level on international trade issues, in so-called 'Beach Club' committees on different aspects of trade policies. Danish trade officials attend these open committees of interested stakeholders to provide information and exchange views. This system seems to provide much-needed transparency for debate of international trade issues. It is the only such national system encountered in the course of preparing this report.

Normally, national parliaments are not formally consulted on European policies for international trade agreements – they are merely informed.

3.5 The balance of power between the Commission and the European Parliament

Since neither European nor most national parliaments are officially and systematically consulted on Commission trade policy proposals, the usual transparency associated with consultation of elected representatives of citizens is missing in the course of trade negotiations. The current wording of the agreement with the Commission – that it will take into account Parliament's views "in so far as possible" – renders the informal discussions toothless.

Perhaps in part because of this situation, there is a lack of capacity on trade issues within the European Parliament. Even MEPs who have expert knowledge of trade issues feel they need more specific and detailed briefing from Parliament services than currently exists in order to follow the EU trade agenda effectively. Such briefing would be essential for members of other relevant Committees, such as the Environment Committee, who are not trade experts, but who should be politically involved in environment and trade issues.

4. Problems of confidentiality

One argument that is used to resist more open debate of negotiating positions relates to fears about resistance from those domestic constituencies who are affected disproportionately as a result of elements of a trade agreement for which their national negotiators are arguing.

Whilst liberalisation generates marginal benefits for the majority, the argument runs, this is likely to make it necessary for a government to advocate a position which will generate more acute losses for a minority. Because this minority may be able to organise themselves easily, and make their grievances heard, it is suggested that it is in the public good that the position a country takes in the course of negotiations is kept secret.

This is an argument against public debate on the *goals* of trade policy-making (as opposed to the *tactics*). It is also an argument that could be taken as a tacit

admission of the difficulty of demonstrating a marginal 'on aggregate' benefit for the majority in the course of some negotiations. On principle, therefore, it is highly questionable as a defence of secrecy. But this aside, it has also been argued that whilst this argument may apply to negotiations on 'classical' trade issues – tariffs and quotas – it is less true of the burgeoning array of other issues negotiated through international trade rounds – trade and environment issues, for example.

A more compelling argument for secrecy relates to negotiating *tactics*, rather than *goals*, and reflects the fact that tactics cannot, by their very nature, be open to public scrutiny. Negotiators will continually make tactical decisions about which elements of a mandate to pursue, and how best to pursue them. When, in the light of a specific and secret negotiating dynamic, difficult pragmatic choices have to be made, how can we know that these reflect the priorities as originally agreed in the mandate?

Because the negotiating process (in the WTO, for example) is itself secretive, it is difficult to establish mechanisms for proper scrutiny of the way in which the negotiations on a particular mandate are pursued. This is made more difficult because the scope of a round of negotiations may change significantly over their course, demanding revision of this initial mandate. The final agreement, the result of international compromise, will inevitably fail to incorporate most of the elements of the original negotiating mandate.

There is perhaps no easy way of providing for this level of scrutiny. International trade negotiations however are punctuated by a series of interim agreements – including the results of Ministerial meetings. Each could be followed by a period of transparent reflection on the progress of negotiations, on the success of negotiators in delivering on the mandate with which they entered these negotiations, and on any need to clarify the on-going mandate.

5. European Treaty Revision

Recommendations for formal consultation of the European Parliament on conclusion of international trade agreements were proposed to national governments in June 2003 by the Convention on the Future of Europe, within specific proposed Treaty Articles on the Common Commercial Policy and on International Agreements. They include an indirect power of assent for Parliament over future trade agreements. Although weak, they would be the first formal Treaty mention of European Parliament involvement in EU trade policy.

These proposals establish five opportunities for formal EP involvement:

• The EP has an indirect power of assent over trade agreements. Although Parliament is accorded specific and direct powers of assent over certain international agreements, but not specifically over trade agreements, an indirect power of assent exists by linking the provisions of Articles covering Common Commercial Policy and International Agreements. The proposed Article III-217 (Common Commercial Policy) paragraph 2 states that: "A European law or framework law shall establish the measures required to implement the common commercial policy"; this establishes measures for the CCP as a 'legislative field' and can then be linked with the provisions in proposed Article III-227 (International Agreements), paragraph 7: "The European Parliament's assent shall be required for.....agreements covering fields to which the legislative procedure applies" (emphasis added).

- For international agreements, including trade agreements, the EP, under proposed Article III-227, would have to be consulted before conclusion of an agreement, within a set time-limit, but the Council can act without Parliament's opinion if time limit expires¹⁵.
- It would formalise the prompt and full provision of information to the EP at all stages of international trade agreements.
- The EP, with other institutions, is specifically permitted to seek a Court of Justice opinion on whether any potential agreement contravenes the EU Constitution and the ECJ opinion could then stop an agreement.
- for the Common Commercial Policy, provision is introduced for joint decisionmaking between EP and Council on EU implementing laws.

National governments now need to take decisions on the final text of the Treaty revision, within the ongoing Intergovernmental Conference, which bases its discussions on the proposed text of June 2003¹⁶. Member states have now submitted their formal comments on the proposed text, and objections received include requests for deletion of the text relating to European Parliament assent on trade agreements. These will be discussed, among many other comments, at a meeting of Foreign Ministers in November 2003, and it is still unsure whether the IGC will reach a final decision on the new Treaty by December, or whether the debate will continue under the Irish Presidency in 2004.

6. Recommendations

Whilst there are limits to the level of scrutiny that can be brought to bear on the negotiating tactics, there are nonetheless many steps that could be taken to make trade policy-making more transparent and accountable. These relate to three elements:

The negotiating mandate: Parliamentarians from both member states and the European Parliament, and officials from both member states and the Commission, should be fully consulted through public debate in the course of developing the negotiating mandate to be given to the Commission.

The negotiating process: Parliamentarians from both member states and the European Parliament should be granted access to 133 Committee meetings. Negotiations have a series of 'junctures' - international agreement on some element of the agenda, or mid-term ministerial negotiations, for example. These should provide an opportunity for parliamentary review of the progress of negotiations, the success of negotiators in delivering on the mandate with which they entered these negotiations, and any need to clarify the on-going mandate

The agreement: The direct involvement of both member state's parliaments, and the European Parliament, should be required for all trade agreements.

¹⁵ Extract from proposed Convention Treaty Article III-217: "Council shall not conclude any agreement until the European Parliament has been consulted. The Parliament shall deliver its opinion within a time-limit which the Council may lay down according to the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act."

¹⁶ The current Treaty revision timetable provides for a final decision on the revised Treaty by Heads of State in December 2003 under the Italian Presidency.

The following proposals are not presented as an exhaustive set of recommendations, but are based on suggestions that were made over the course of compiling this study.

6.1 Commission proposals should be made public

Commission proposals for EU positions at international trade negotiations should be made public well before final decisions are taken on them by the 133 Committee. This is necessary in view of the increasing relevance of international trade agreements on existing EU legislation in other areas, such as development and environment.

6.2 There should be a formal consultation period for Commission proposals

The period between publication of Commission proposals and final agreement in the 133 Committee should be significantly extended – to at least a month – and applied to all trade proposals. This would allow for proper consultation with both experts and Parliamentarians in national capitals, and with the European Parliament.

There is a precedent in EU procedures for one-month time deadlines for consultation of the European Parliament – in plenary or in relevant Committee – in the field of technical implementing measures for EU legislation, dealt with by 'comitology' Committees. This time-limit can be shortened for urgent matters¹⁷.

Regardless of any potential European Parliament consultation role, a deadline for presenting Commission trade proposals could be set by formal request from the Council to the Commission on this point. There are various agreements which govern arrangements between the institutions and it is possible for Council to pursue this specific point without the need for Treaty revision.

6.3 Capacity for engagement on trade issues should be increased in other DGs

Other DGs need increased capacity on trade to be able to initiate Commission positions, and to respond to those developed by others. The European Parliament could propose this during their annual budget round, in the section on Commission staff.

6.4 The 133 Committee should, at minimum, implement those transparency procedures which apply to other Council meetings

Such procedures include:

Cuon proocuareo morau

- Advance publication of agendas. (The attempt under the Danish Presidency at end of 2002 to marginally improve transparency by publishing agendas of the 133 Committee meetings was discontinued by the Greek Presidency in 2003.)
- Immediate publication of records of decisions taken, and the list of participants
- Encouragement of full participation by representatives of non-trade policy areas

¹⁷ Agreement between the European Parliament and the Commission on procedures for implementing Council Decision 1999/468/EC of 28/6/99 laying down procedures for exercise of implementing powers conferred upon the Commission (OJ L184 17.7.1999). See also Annex XII, B.6 & 7 of EP Rules of Procedure.

6.5 Council Working Groups should be formally consulted by the 133 Committee

DG-Trade organises informal groups. However, these meet infrequently - the trade and environment group meets just three or four times a year. This cannot substitute for formal and frequent consultation of the Council Advisory Committee on International Environment.

- 6.6 Provisions should be made for *ex ante* consultation of the European Parliament on the EU negotiating mandate, formal consultation over the course of negotiations, improved representation at international negotiations, and provision of assent at the end of negotiations.
- Ex ante consultation on the negotiating mandate

Some MEPs are asking for such consultation, but for this to be meaningful, it would have to be agreed in conjunction with the two further provisions outlined below.

• Formal consultation over the course of negotiations

At least one national representative on the 133 Committee holds the view that formal European Parliament debates on trade agreements, leading to Parliament resolutions based on Treaty provisions, could be used as serious guidelines by Council and Commission during EU trade negotiations. Existing provisions for confidentiality in other policy fields, such as foreign and security issues, could be introduced where necessary to protect sensitive negotiating information.

• Improved representation of the European Parliament at international trade negotiations

The status of MEP delegations which attend multilateral trade talks as observers has caused political frustration among MEPs in recent years. There is room for the Commission to improve its information to and inclusion of MEPs in EU debate on positions during negotiations. The current 'exchange of letters' which sets out the conditions for the Commission to inform MEPs during negotiations could be revisited and the requirements for information strengthened. It would need clear political will by the EP to push for this, and there are indications that this exists. This does not require Treaty change and is not dealt with under the Convention.

• Assent at the end of negotiations

Recommendations for formal consultation of the European Parliament on conclusion of international trade agreements were proposed to national governments in June 2003 by the Convention on the Future of Europe, within specific proposed Treaty Articles on the Common Commercial Policy and on International Agreements. They include an indirect power of assent for Parliament over future trade agreements.

Assent would give Parliament the right to approve or reject a proposed trade agreement by an absolute majority of elected members. The current Convention proposal for general assent on international trade agreements reflects the existing European Parliament power of assent in the current Treaty, which was first exercised when the WTO was created. However, some experienced EU officials dismiss it as

providing no serious power, saying it would be known that Parliament would always give its assent and that it would be effectively a "nuclear option": It would be an extremely bold Parliament that refused to give assent to an agreement that had taken many years to negotiate, and that had been struck so as to balance the interests of all WTO Members.

6.7 Comparable provisions should be made for consultation with national parliaments

Clearly, such provisions must be made through decisions taken at the national level. However, such national-level initiatives would be supported through improvements to processes at an EU level – such as those outlined above – which would facilitate input from member parliaments.

6.8 Commission competence should not be further extended to include foreign direct investment

The latest Convention text would bring foreign direct investment (FDI) under the EU's Common Commercial Policy. As a result, the European Commission's mandate to enter into international negotiations on FDI would be based upon qualified majority voting. At present, Commission competence does not include foreign direct investment issues which are subject to unanimous vote in Council. Given the way in which the Commission is executing its current competence on trade issues, it seems nonsensical to contemplate the extension of this competence to include foreign direct investment as well. Any attempts to extend Commission competence in this way should be firmly shelved until the Commission can be seen to operate its current competence in a transparent and accountable manner.

6.9 The Commissioner for Trade should work to engender a more consultative and inclusive approach to the development of EU trade policy

Several people interviewed in the course of preparing this report highlighted the insufficient consultation on the part of DG-Trade to consult fully with other officials within the Commission. This is regrettable, particularly in view of the important – and growing – implications of trade policy for other areas.

For further information this work, or on WWF's Trade and Investment Programme, please contact:

Tom Crompton, Co-ordinator and Advisor on Trade Policy for WWF Network, WWF-UK,

Panda House,

Godalming,

Surrey.

GU7 1XR.

tcrompton@wwf.org.uk