Contesting Cosmopolitan Europe:
A Study of Non-Governmental Organizations in the European Union’s
External Trade Policymaking Process

by

Erin Norma Hannah

A thesis submitted in conformity with the requirements
for the degree of Doctor of Philosophy
Graduate Department of Political Science
University of Toronto

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Abstract

This thesis investigates whether more open trade policymaking processes that include non-governmental entities, by virtue of the divergence of interests represented, lead to a stronger, more legitimate and qualitatively enhanced international trade system. The European Union stands out among major trading powers for its significant and dramatic response to new demands for access and participation. The thesis examines whether improvements in the political opportunity structure for ‘progressive’ Non-Governmental Organizations (NGOs) result in more legitimate external trade policymaking in the European Union (EU). Legitimacy is assessed along two lines: the way policy is made (procedural legitimacy) and the projected outcomes of policy (substantive legitimacy). The role of NGOs is evaluated in two important cases in the context of World Trade Organization negotiations since 2000. The first concerns the formulation of the formal European Communities’ (EC) position on trade related intellectual property rights (TRIPS) and access to medicines. The second concerns the EC’s requests for water
services liberalization in the context of General Agreement on Trade in Services (GATS) 2000 negotiations.

Through a critical evaluation of the role of NGOs in these cases, the thesis argues that there is clear potential for NGOs to represent citizens’ demands, constitute a basic form of popular representation and hold decision-makers accountable to a broader public. However, they cannot determine policy outcomes in this arena.

This thesis challenges a theoretical perspective on public policymaking called Cosmopolitanism. Grounded in democratic and normative theory, it conceives of Global Civil Society, and NGOs in particular, as major conduits for democracy and social justice in global and/or regional governance. The thesis builds upon the insights of Constructivism to advance an alternative account of the significance of NGOs in the EU’s external trade policymaking process. In particular, it argues that epistemes, the deepest level of the ideational world, dominate the external trade policymaking process. NGOs succeed only when their attempts to achieve more democratic, just, equitable and fair external trade policies in the EU conform broadly to the dominant legal/liberal episteme. When they seek to overrule that episteme, they fail, regardless of their formal involvement in the external trade policymaking process.
Acknowledgements

I gratefully acknowledge financial support from the Ontario Graduate Scholarship Program. I wish to thank the Joint Initiative for German and European Studies and the Center for International Studies at the University of Toronto for their commitment to help finance graduate research abroad. The support provided to me helped finance my field research and was thus instrumental in the completion of this project. I would like to extend thanks to the School of Graduate Studies and the Department of Political Science at the University of Toronto for their ongoing financial support toward my graduate studies. The generosity and numerous ‘top-ups’ provided to me during the course of my graduate studies were enormously helpful.

A very warm thanks goes to the members of my thesis committee: Louis W. Pauly, Steven Bernstein, and Jeffery Kopstein. Working with the very highest caliber of scholars at the University of Toronto was a great honour. I sincerely thank them for their tremendous support, encouragement, and valuable feedback. I have learned a great deal from each of them and their reflections on my work proved extremely valuable.

With a deep sense of gratitude, I thank my thesis supervisor, Louis Pauly, for his endless wisdom and counsel. Professor Pauly provided me with the necessary guidance, patience, kind words and criticism when it was needed to bring this thesis to fruition. I also want to thank him for having so strongly believed in me and for providing me with insights which helped me solve many of the obstacles I encountered in my research. In particular, his advice was key to solving the case selection dilemmas I encountered in the early phases of the research. No matter the circumstance or his location in the world, Professor Pauly was always willing to take the time to provide me with candid and
grounded advice. For instance, his guidance was critical to my preparation for the job market. Our lengthy discussions about every possible aspect of the interview process gave me the necessary confidence to put my best self forward and, ultimately, to get the job. He was also instrumental in helping me bring all the final threads of this project together under a critical time line. Professor Pauly cares deeply about his students and has gone to great lengths to help me realize my academic and intellectual aspirations.

Steven Bernstein’s mentorship and friendship are among the most rewarding outcomes of this PhD journey. His enthusiastic and constant support for my work over many years has been tremendous. Indeed, he saw promise in my ideas even before I did. At a time when I was struggling to define my own research, Professor Bernstein offered me the greatest gift of my academic career to date, the opportunity to publish with him. That experience instilled in me the necessary confidence to conclude my own work and pursue new projects. Over the course of my studies, I benefited enormously from his extensive expertise on global governance and legitimacy. Professor Bernstein takes a sincere and genuine interest in the intellectual and academic well-being of his students. He also understands that personal well-being is key to academic success. His willingness to provide a sympathetic ear and, sometimes, some very tough advice made a critical difference in my life. Professor Bernstein is an exceptional model of the scholar I would like to become.

I am also particularly indebted to Jeffery Kopstein for asking the most difficult questions at the earliest stages of this research. In every encounter, he challenged me to be as intellectually and empirically rigorous as possible. His sage advice and engagement with my early arguments helped me to express my ideas much more clearly.
I would like to extend special thanks to Grace Skogstad who showed me a rare and much appreciated kindness in this process. She astounded me with the extent of her detailed and substantive comments on my thesis. The care and attention she gave to this project helped me produce a better quality thesis. I aim to treat the students with whom I will now work with the same level of consideration. I would also like to extend thanks to my external thesis examiner, Amy Verdun, for her very thorough review and constructive criticism.

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I wish to extend thanks to my new friends and colleagues at King’s University College at UWO who have been very supportive and helpful in these early days. I am especially thankful to Des Dutrizac, Academic Dean, and the members of the Department of Political Science for hiring me and having confidence in my ability to finish my thesis.

My loving community of friends and family, who offered me so much encouragement and laughter, made writing this thesis possible. Thank you to my ‘Inter-
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My sincere thanks go to my immediate family. My parents and my sister, Brooke Hannah, provided full confidence, unconditional love and support during my studies. I am grateful for my sister’s loyalty and friendship through all the seasons of this process. While I wrote this thesis, my father, Bruce Hannah, and I found a new and beautiful language for our relationship. I will cherish that connection always. My mother, Stephanie Hannah, instilled in me a deep-rooted belief in the power of hard work, big dreams, and a little help from your friends. No matter where I am in the world, she is with me in my heart, smiling with me, encouraging me, and talking tough when I need it. Together, we have broken the odds and stayed out of the woods.

My family happily grew during the course of my graduate studies and I would like to thank Ann Collins for showering me with love. I truly do appreciate and treasure our relationship. I am also tremendously grateful for the love and support of John Volekaert and the opportunity to make our familial “Belgium Connections” while conducting field research in Brussels. Writing a PhD thesis can be a very isolating experience. I would like to extend a very special thanks to Stuart and Barron Collins for lending a sympathetic ear and keeping me company on the loneliest days.
My deepest love and appreciation go to my husband, Bill Collins. During the course of my studies, he has bestowed upon me an abundance of patience, encouragement, perspective, sound advice, good humour and culinary delights. He is the source of my strength and my joy. Our life is richer for having walked through this experience together. Thank you for bringing out the best in me always.

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## Acronyms

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>11.11.11</td>
<td>Coalition of the Flemish North South Movement 11.11.11</td>
</tr>
<tr>
<td>ABIA</td>
<td>Assessor de comunicação Associação Brasileira Interdisciplinar de AIDS</td>
</tr>
<tr>
<td>ACP</td>
<td>African, Caribbean, Pacific Group of States</td>
</tr>
<tr>
<td>ALTER-EU</td>
<td>Alliance for Lobbying Transparency and Ethics Regulation</td>
</tr>
<tr>
<td>ARV</td>
<td>Antiretroviral</td>
</tr>
<tr>
<td>BizClim</td>
<td>ACP Business Climate Facility</td>
</tr>
<tr>
<td>CCBE</td>
<td>Council of Bars and Law Societies of Europe</td>
</tr>
<tr>
<td>CCP</td>
<td>Common Commercial Policy</td>
</tr>
<tr>
<td>CEEP</td>
<td>European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest</td>
</tr>
<tr>
<td>CEO</td>
<td>Corporate Europe Observatory</td>
</tr>
<tr>
<td>CIDSE</td>
<td>Development, Coopération Internationale pour le Développement et la Solidarité</td>
</tr>
<tr>
<td>CoR</td>
<td>Committee of the Regions</td>
</tr>
<tr>
<td>COREPER</td>
<td>Committee of Permanent Representatives</td>
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<tr>
<td>CPTECH</td>
<td>Consumer Project on Technology</td>
</tr>
<tr>
<td>CSD</td>
<td>Civil Society Dialogue</td>
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<tr>
<td>CSO</td>
<td>Civil Society Organization</td>
</tr>
<tr>
<td>CTE</td>
<td>Committee on Trade and Environment</td>
</tr>
<tr>
<td>DG</td>
<td>Directorate-General</td>
</tr>
<tr>
<td>DSU</td>
<td>Dispute Settlement Understanding</td>
</tr>
<tr>
<td>EBLIDA</td>
<td>European Bureau of Library, Information and Documentation Associations</td>
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<tr>
<td>EC</td>
<td>European Communities</td>
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<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
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<tr>
<td>ECOSOC</td>
<td>United Nations Economic and Social Council</td>
</tr>
<tr>
<td>ECSG</td>
<td>European Community Services Group</td>
</tr>
<tr>
<td>EEA</td>
<td>European Economic Area</td>
</tr>
<tr>
<td>EESC</td>
<td>European Economic and Social Committee</td>
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<tr>
<td>EFPIA</td>
<td>European Federation of Pharmaceutical Industries and Associations</td>
</tr>
<tr>
<td>EGA</td>
<td>European Generics Association</td>
</tr>
<tr>
<td>EP</td>
<td>European Parliament</td>
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<tr>
<td>EPA</td>
<td>Economic Partnership Agreement</td>
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<td>EPHA</td>
<td>European Public Health Alliance</td>
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<tr>
<td>ESC</td>
<td>European and Social Committee</td>
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<tr>
<td>ESF</td>
<td>European Services Forum</td>
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<td>ETUC</td>
<td>European Trade Union Confederation</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>EUWI</td>
<td>EU Water Initiative</td>
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<tr>
<td>FAO</td>
<td>Food and Agriculture Organization</td>
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<tr>
<td>FOE</td>
<td>Friends of the Earth</td>
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<tr>
<td>GAC</td>
<td>General Affairs Council</td>
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<tr>
<td>GATS</td>
<td>General Agreement on Trade in Services</td>
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<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<tr>
<td>Acronym</td>
<td>Full Name</td>
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<tr>
<td>---------</td>
<td>-----------</td>
</tr>
<tr>
<td>TRIPS</td>
<td>Agreement on Trade Related Intellectual Property Rights</td>
</tr>
<tr>
<td>UEAPME</td>
<td>European Association of Craft, Small and Medium-sized Enterprises</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
</tr>
<tr>
<td>UNICE</td>
<td>Union of Industrial and Employers’ Confederations of Europe</td>
</tr>
<tr>
<td>UNICEF</td>
<td>United Nations Children’s Fund</td>
</tr>
<tr>
<td>UNI-Europa</td>
<td>European Trade Union Federation for Services and Communication</td>
</tr>
<tr>
<td>USTR</td>
<td>United States Trade Representative</td>
</tr>
<tr>
<td>WDM</td>
<td>World Development Movement</td>
</tr>
<tr>
<td>WEED</td>
<td>World Economy, Ecology and Development</td>
</tr>
<tr>
<td>WHO</td>
<td>World Health Organization</td>
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<tr>
<td>WIPO</td>
<td>World Intellectual Property Organization</td>
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<tr>
<td>WTO</td>
<td>World Trade Organization</td>
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<tr>
<td>WWF</td>
<td>World Wide Fund for Nature</td>
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Chapter One: Introduction

International trade has changed dramatically in character, scope, and intensity since the conclusion of the Uruguay Round of Multilateral Trade Negotiations in 1995. A trade regime that was initially designed to manage barriers to trade at borders has evolved into a quasi-domestic regulatory regime; its rules increasingly shape national social, environmental, food and health policies.\(^1\) The Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) Agreements, together with the addition of the Trade Related Intellectual Property Rights Agreement (TRIPS) and the General Agreement on Trade in Services (GATS), extend international trade rules to areas that were traditionally the domain of domestic policy makers. Indeed, the original architects of the General Agreement on Tariffs and Trade (GATT) purposefully carved out these domains to allow for domestic intervention to mitigate the exogenous shocks associated with more open markets.\(^2\) Today, many fear governments are held hostage by World Trade Organization (WTO) rules, unable to manage negative externalities associated with their membership in the international trade regime.\(^3\)

These fears are compounded by the judicialization of the dispute settlement system which transformed the era of GATT diplomatic mediation into a more concrete system based on the rule of law. Dispute resolutions under the GATT were ad hoc and non-binding. They required the consent of the disputants both to begin the process and to

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1 Ostry (2006) and Howse (2001) both argue that the WTO’s new focus on domestic legal and regulatory systems is a primary source of its legitimacy problems. See also Kaiser and Gstöhl 2004; Bernstein and Hannah 2006. For an extensive, empirical analysis of relative benefits of harmonization and regulatory competition see Esty and Damien 2001.


3 For a developing country view, see Gallagher 2005.
accept its results.\textsuperscript{4} In contrast, the WTO’s Dispute Settlement Understanding (DSU) is characterized by compulsory adjudication with binding outcomes. According to Thomas Cottier, the power of the DSU is strengthened by the provision that members’ “failure to comply with DSU rulings opens the right to retaliate, to impose sanctions, primarily in the disputed field, but subsequently not excluding counter-measures (cross-sanctions) in more sensitive sectors of the targeted WTO member”.\textsuperscript{5} As such, governments no longer enjoy the same degree of practical flexibility in enforcing international trade rules. Essentially, in the interest of “promoting security and predictability”\textsuperscript{6} for traders in the multilateral trading system, policymakers have reduced the number and type of instruments available for circumventing international trade rules. These developments are accompanied by the emergence of new actors who are mobilizing, not to ensure particular sectors are protected or insulated from the costs of trade liberalization, but to demand that trade-related decisions-making processes directly engage broader civil society.\textsuperscript{7}

The study of the democratic quality, the transparency, and the accountability of the WTO has thus become a veritable cottage industry.\textsuperscript{8} It is now commonplace to refer

\begin{flushleft}
\textsuperscript{4} According to Hudec 1993, these two features compromised foundational principles of the rule of law and nullified the utility of dispute resolution.
\end{flushleft}

\begin{flushleft}
\textsuperscript{5} Cottier 1998, 329.
\end{flushleft}

\begin{flushleft}
\textsuperscript{6} Art. 3(2) Understanding on Rules and Procedures Governing the Settlements of Disputes (hereinafter DSU), Legal Texts at 405.
\end{flushleft}

\begin{flushleft}
\textsuperscript{7} See Esty 1998; O’Brien et al. 2000.
\end{flushleft}

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\end{flushleft}
to the legitimacy crisis or the social deficit in the international trade regime.\textsuperscript{9} There is a growing concern over the dis-embedding of markets from broader societal values or purposes and many characterize the technocratic and secret nature of decision-making in the WTO as signaling the triumph of free markets over public accountability. These arguments tap into widely held beliefs that more open trade policymaking processes that include non-governmental entities will, by virtue of the divergence of interests represented, lead to a stronger, more legitimate, and qualitatively enhanced international trade system.\textsuperscript{10} In this dissertation, I unpack and challenge this assumption through an examination of the role of NGOs in the European Union’s (EU) external trade policymaking process.\textsuperscript{11}

The EU stands out among major trading powers for its significant and dramatic response to new demands for access and participation. As I discuss at length in Chapter 3, since the conclusion of the Uruguay Round of Multilateral Trade Negotiations, the EU has introduced a spectacular range of mechanisms designed to increase the involvement of a wide range of Civil Society Organizations (CSOs) in its external trade policymaking process. For the purposes of this study, civil society refers to “a political space, or arena, where voluntary associations of people seek, from outside political parties, to shape the rules (formal and informal) that govern one or the other aspect of social life.”\textsuperscript{12} CSOs are

\textsuperscript{9} See, for instance, Woods and Narlikar 2001; Esty 2004.

\textsuperscript{10} For a sense of this debate see Marceau and Pederson 1999; Charnovitz 2000; Ostry 2001b.

\textsuperscript{11} The 1992 Maastricht Treaty formally replaced the European Community with the creation of the European Union. The European Union is the primary political body of concern in this study. At the WTO, the European Commission negotiations on behalf of the European Union and the 27 individual Member States. In this dissertation, European Communities (EC) refers to the external personality of the EU and the individual EU Member States. For voting purposes, the EC is comprised of 28 WTO members.

\textsuperscript{12} Scholte 2003, 15.
voluntary, politically oriented associations comprised of people who share concerns about a particular policy area or problem. Although they may promote the commercial interests of their members or be closely allied with particular political parties, CSOs aim to shape the way power is distributed and exercised without the promise of financial profit (like firms) or official power (like political parties).\textsuperscript{13} Given this definition, CSOs include a hugely diverse range of associations including special interest lobbies such as business forums, trade unions and farmers, consumer advocates, faith-based organizations, philanthropic foundations, development co-operative initiatives, local community groups, think tanks and Non-governmental Organizations (NGOs).\textsuperscript{14}

In this study, I am particularly concerned with whether improvements in participatory and access conditions for “progressive” NGOs result in more legitimate external trade policymaking in the European Union. Progressive NGOs work to ensure trade rules reflect broader social values and purposes, whether domestically or globally. They aim to elevate social, cultural and environmental concerns of entire communities over market-related concerns in the international trade regime and to give a voice to otherwise marginalized groups in the political process.

I assess legitimacy along two lines: the way policy is made (procedural legitimacy) and the projected outcomes of policy (substantive legitimacy).\textsuperscript{15} I evaluate

\begin{itemize}
  \item \textsuperscript{13} Scholte 2003, 16.
  \item \textsuperscript{14} Scholte 2003, 15.
  \item \textsuperscript{15} Max Weber (1968) draws this distinction between substantive and procedural legitimacy. Scharpf (1997) also makes a similar point arguing that legitimacy can either be won or lost on the input or output side of governance, “Equality before the law, public consultation and democratically elected officials are means to secure input legitimacy. Maximizing the efficiency and effectiveness of policy making via functional organizations and majoritarian decision making are qualities leading to output legitimacy”. Though the distinction is analytically useful, it is unfortunate that Scharpf’s (and many other scholars’) usage of the
\end{itemize}
the role of NGOs in two important cases in the context of World Trade Organization negotiations since 2000. The first concerns the formulation of the formal European Communities’ (EC) position on trade related intellectual property rights and access to medicines. The second concerns the EC’s requests for water services liberalization in the context of GATS 2000 negotiations.

Through a critical examination of the role of NGOs in these case studies, I challenge a theoretical perspective on public policymaking called Cosmopolitanism. Grounded in democratic and normative theory, it conceives of Global Civil Society, and NGOs in particular, as major conduits for democracy and social justice in global and/or regional governance. I build upon the insights of Constructivism to advance an alternative account of the significance of NGOs in the EU’s external trade policymaking process. In particular, I argue that although NGOs have been instrumental in providing education, raising awareness, and giving a voice to broader societal concerns about the social, health-related and environmental aspects of proposed trade deals, they cannot determine policy outcomes in this arena. Epistemes, the deepest level of the ideational world, dominate here. NGOs succeed only when their attempts to achieve more democratic, just, equitable and fair external trade policies in the EU conform broadly to the dominant legal/liberal episteme. When they seek to overrule that episteme, they fail.

The question of whether improving access and participatory conditions for NGOs produces more legitimate, qualitatively enhanced and strengthened external trade

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17 Adler and Bernstein 2004.
policymaking in the EU is an important topic to study for a number of reasons. First, democracy, Member State autonomy, and effectiveness of supranational decision-making are three values constantly in tension in the European Union. Until the early 1990s, indirect and/or output legitimacy were seen as adequate bases for authoritative decision-making in the EU.\(^\text{18}\) In the case of the former, it was commonly agreed that the legitimacy of the EU was domestically authorized by, and originated from, the authority of Member States; legitimation was derived from an agreement of Member States as well as the permission of citizens of these states to participate in the Union through referendum. In the case of the latter, decision-making processes are evaluated solely in terms of their problem-solving capacity and the ability of policy outputs to achieve collective goals that would have been unattainable had states acted on their own. This basis of authority created a favourable environment for the indirect accountability of the supranational institutions of the EU.

Generally speaking, the Single European Act (1986) and the Maastricht Treaty (1992) moved the European Union towards a political system in its own right. It became clear that a system based on indirect legitimation through the concurrent consent of all Member States for each decision taken was not always conducive to deeper integration. The ratification crises that followed highlighted public concern over the legitimation of EU power. Qualified majority voting and an increase in the delegation of power from national to supranational institutions in sensitive issue areas made it more difficult to claim legitimacy on the basis of efficiency or performance alone.

\(^{18}\) See Dahl and Tufte 1973; Schärf 1999.
In the absence of social legitimacy or, rather, a well-developed and identifiable “European People”, the focus has shifted towards input or procedural legitimacy as a necessary basis for authoritative rule making in the EU.\(^{19}\) Input or procedural legitimation strategies take democratic norms of public participation and control as indispensable features of legitimate governance. Essentially, these strategies attempt to democratize the processes by which EU-level policy is formed. This may be achieved by enhancing the powers of the European Parliament and by creating a constitution for Europe that could guarantee citizen rights and representation at the EU level.\(^{20}\) Alternatively, some propose to inject more direct participatory mechanisms and/or deliberative democracy into EU decision-making.\(^{21}\) Considering the most recent turns in the constitution debate, the latter seems more likely at least in the near term.

In addition, striking an appropriate balance between inclusive channels for participation and access on one hand and efficient policymaking on the other is a challenge encountered by all major WTO powers. According to Lisa Martin and Judith Goldstein, there are distinct dangers associated with the shift from GATT to WTO. In particular, greater legal precision of trade rules and increased availability of information about the distributional consequences of proposed agreements tends to increase the incentives for those negatively affected by the rules to mobilize and demand their

\(^{19}\) There are some notable exceptions. For instance, Fritz Scharpf (1999) denies that input legitimacy is possible at the EU level in the absence of an established demos.

\(^{20}\) For a sense of the debate over the appropriateness and desirability of a constitution for Europe see Lyons 1996; Weiner and Della Salla 1997; Shaw 1999; Weiler 2000.

\(^{21}\) For a general discussion of deliberative democracy see Estlund 1997; Bohman 1998; Dryzek 2000. For a sample of how the concept of deliberative democracy has been applied to the EU see Ericksen and Fossum 2000; Neyer 2003, 2004.
interests are translated into policy. The tension between demands for participation and efficient policymaking is amplified by the fact that the effective inclusion of actors who view trade liberalization critically could serve to undermine the free trade imperative, one of the original rationales underpinning the creation of the EU. Conversely, the systematic exclusion or marginalization of these groups seriously calls into question the legitimacy of the EU’s external trade policymaking process.

Given this debate in Europe, the primary motivation for this study concerns how the shift from GATT to the WTO potentially contributes to or alleviates the legitimacy deficit in the EU in the key area of external trade policymaking. My sense is that this shift is not only important for its distributional consequences regarding which sectors or firms benefit, but now also has broader implications for whether trade policy reflects wider societal interests, goals, demands and concerns. Evidence of the wider inclusion of NGOs in the EU’s external trade policymaking process following the shift from GATT to the WTO would also constitute a significant test of the importance of legalization in the international trade regime. My study thus aims to produce information regarding the relationship between international law and governance in the EU. On the basis of this information, I will propose possible strategies for mitigating the tensions between demands for public access to the external trade policymaking process and efficient policymaking.

Second, a burgeoning body of literature focusing on the emergence and role of Global Civil Society (GCS) in international relations has emerged over the past 10 years. 

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22 Goldstein and Martin 2000.
years. Scholars are concerned with the wide ranging impact of GCS on global governance and on the establishment, dissemination and enforcement of global norms, in the areas of human rights, environment, landmines and women’s rights amongst many others. They are also concerned with the consequences of the emergence of GCS for the sovereignty of states. The view that GCS has become much too powerful to ignore is a common thread in this body of scholarship. Other common denominators include the belief that GCS can and does represent global citizens’ demands, constitutes a basic form of popular representation, and can hold decision-makers to account, especially through “naming and shaming tactics”.

Despite these developments, research on GCS suffers from several key limitations, some of which I aim to overcome in this dissertation. First, there is a tendency for scholars to focus either on the role of GCS in international organizations or to adopt “second image reversed” perspectives. By conceiving of international politics

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26 See for instance, Keck and Sikkink 1998; Risse, Ropp and Sikkink 1999;


29 Clark et. al 1998; Berkovitch 1999.


31 Archibugi 2000, 146.

32 Coined by Gourevitch (1978) this concept refers to the study of how developments at the international level impact domestic politics. Where GCS is concerned, scholars tend to study how norm dissemination at
as either one or two level games, scholars ignore a host of new opportunities for GCS influence both below the state at the local level and at the regional level.\textsuperscript{33} As I noted above, the extension of the WTO Agreements to highly salient policy areas has led scholars to question the quality of governance at the WTO and to make related proposals to open up spaces inside the WTO to include participation by civil society actors. Unfortunately, these proposals ignore the fact that domestic constituents largely determine the interests and negotiating strategies of, at least, the most powerful members of the WTO. Moreover, they deny the multi-level environment within which GCS now operates, especially in Europe. With one notable exception, there has been virtually no empirical research on the interaction of members’ trade policymaking processes and their relationship with the policymaking process in the World Trade Organization.\textsuperscript{34} Consequently, scholars have not adequately considered the degree to which GCS representation is currently being channeled upward through local, regional and national levels of governance in WTO members. This research will help fill this lacuna.

Moreover, the GCS literature has been widely criticized for conflating correlations between prevalent GCS activity and policy change with causation.\textsuperscript{35} Scholars have also been charged with failing to move beyond generating descriptive

\textsuperscript{33} Overcoming this tendency is the key motivation behind Joachim and Locher’s (2006) recent work on the role of non-state actors in the UN and EU.

\textsuperscript{34} Sylvia Ostry et al. (2003) is the notable exception. In 2002, Ostry initiated a pilot project in cooperation with the Washington-based Inter-American Dialogue and the Inter-American Development Bank to study how best to accommodate the participation of non-state actors in the formulation of national trade policies and negotiating agendas. Of the countries studied (Argentina, Brazil, Canada, Chile, Colombia, Mexico, United States and Uruguay), they found that only Canada and the United States have established institutional arrangements involving legislative bodies and a wide range of interested parties.

\textsuperscript{35} Drezner 2005; Florini and Simmons 2000.
inferences to conceptualize GCS activities in clear analytical terms. Since comparative research on GCS activity is scarce and the focus tends to be on specific episodes of peak GCS activity where they are most likely to thrive, scholars have had difficulty specifying scope conditions for when GCS will succeed in altering outcomes in global or regional governance. Finally, by focusing research on “easy tests” and/or by neglecting to test competing explanations scholars have been charged with exaggerating the prevalence and magnitude of policy outcomes attributed to GCS activity. I aim to overcome these limitations by using rigorous process tracing, comparative case studies and by testing compelling alternative explanations against the evidence.

I. Research Design

To reiterate, this study evaluates whether improvements in participatory and access conditions for NGOs result in more legitimate external trade policymaking in the EU. The research in the following chapters has been designed with several objectives in mind. First, I aim to contribute to middle-range theorizing by probing the explanatory power of alternative approaches to the study of legitimacy and Global Civil Society. Second, the EU’s external trade policymaking environment is increasingly populated by a multiplicity of actors who have a stake in proposed trade deals. By mapping changes in the EU-level political opportunity structure, I assess how the balance of participation of a wide range of CSOs has changed since the conclusion of the Uruguay Round of Multilateral Trade

36 Drezner 2005, 8.
37 Zurn 1998.
Negotiations. In doing so, I generate new information about the ways in which NGOs navigate the EU’s multilevel policymaking environment relative to other actors.

Third, I aim to draw causal inferences about who is empowered and disempowered by the recent changes in the EU’s external trade policymaking process. Under what conditions is the involvement of NGOs likely to produce more legitimate external trade policymaking in the EU? Moreover, while this study will not produce definitive generalizations about political processes in other WTO members or the role of NGOs therein, the results will allow us to generate some contingent hypotheses that could be tested in other environments. In particular, the study is designed to generate insight into the conditions under which NGOs do indeed serve as conduits for democracy and social justice in global or regional governance arrangements. This objective is part of a wider move in European Studies towards the use of International Political Economy’s (IPE) comparative toolkit and its “diverse theoretical frameworks…[to] facilitate an implicit or explicit comparison of the European Integration process with other processes”. In the next stages of my research, I will use the insights generated in this study to move beyond an exclusive focus on the EU to examine the role of CSOs in the EU’s external trade policymaking as part of a more general phenomenon. The remainder of this introduction discusses precisely how the dissertation approaches these objectives.

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39 Political opportunity structure refers to the institutional environment in which CSOs, including NGOs, are embedded. In this study, I am concerned with the most basic dimension of the POS, access. First coined by Sidney Tarrow (1994, 18), POS refers to “dimensions of the political environment which either encourage or discourage people from using collective action” by affecting peoples’ expectations for success or failure. These dimensions include: the degree of openness or closedness of the polity; the stability or instability of political alignments; the presence or absence of allies; and divisions among elites. Aspinwall and Scheider (2000) provide an even broader conceptualization. For them, the POS is comprised of both formal elements, such as voting or participation rules, as well as informal elements, including norms, common practices, or institutional culture.

40 Verdun 2003, 95. For a detailed appraisal of diverse IPE perspectives on different aspects of European Integration see Jones and Verdun 2005.
A. Theoretical Framework

Clear indicators are required to evaluate whether the growing involvement of NGOs in the EU’s external trade policymaking process works to improve the legitimacy of policymaking. In Chapter 2, I borrow insight from the recent proliferation of IR literature that takes a moral or principled view of legitimacy to construct a benchmark against which external trade policymaking in the EU can be evaluated. Cosmopolitans envision a vital role for Global Civil Society in general, and progressive NGOs in particular, in post-national governing arrangements. Legitimacy, in this view, occurs along two axes: the way policy is made (procedural legitimacy) and the projected outcomes of policy (substantive legitimacy). We must arrive at policies through democratic process AND they must pursue just, equitable and fair objectives.

In Chapter 2, I delineate a number of indicators along the procedural and substantive axes that will help me to identify improvements in legitimacy that may result from the growing involvement of NGOs in the EU’s external trade policymaking process. If improvements in procedural legitimacy result from changes in political opportunity structures for NGOs we should see, amongst other things, enhanced public education activities and public awareness campaigns, more public debates and deliberations about substantive policy issues, growing empowerment and involvement of otherwise marginalized people, more transparent decision-making, and greater public accountability.

Given the post-national character of policymaking in the EU, any conception of legitimacy is incomplete without some consideration of the projected outcomes or consequences of policy for the world’s poorest people. In this respect, I draw insight
from Cosmopolitan International Morality and argue that if Cosmopolitan accounts of the promise of progressive NGOs ring true, we should see improved efforts to redress persistent economic inequalities between the north and south and widespread social injustices resulting from previous rounds of multilateral trade negotiations. More precisely, we should see EU policymakers responding to NGO demands to redistribute the benefits and burdens associated with membership in the WTO, to enshrine fair trade policies in the WTO Agreements, and to develop policies that respond to social and environmental concerns, not just economic demands.

Throughout the study, I employ the multiple theory controlled-competitive model of theory application.\textsuperscript{41} At its core, this model is intended not only to evaluate one set of claims against the evidence, but against the most commonly accepted rival theories as well. The Cosmopolitan account of the role of NGOs in global and regional governance is the most dominant explanation in the field. Indeed, in some circles it has come to constitute conventional wisdom about the value of integrating NGOs into policymaking. The multiple theory controlled-competitive model of theory application establishes the basis for assessing the strengths of different explanations by controlling for the variables in rival theories. In this way, it aims to help improve confidence in causal inferences drawn. According to Andrew Moravcsik, the benefits of the multiple theory controlled-competitive model of theory application are as follows:

Testing of alternative hypotheses encourages the analyst to develop clear, defensible standards by which to weigh confirming and disconfirming evidence, with the aim of greater objectivity, reliability, replicability, and precision. Rather than simply demonstrating some supporting evidence exists for a particular theory---an exceptionally weak standard that almost any plausible conjecture can meet---the analyst must show that this evidence outweighs the evidence favoring

\textsuperscript{41} Jupille, Caporaso, Checkel 2003.
competing explanations. The results are more reliable because it is more difficult for analysts to confirm any particular hypothesis; simultaneous consideration of competing hypotheses also helps us calibrate how much evidence ought to be required to confirm a theory.\textsuperscript{42}

In Chapter 2, I present two alternative accounts of the role of NGOs in policymaking. Each envisions fundamentally different patterns of empowerment for a range of actors with a vested interest in the outcome of external trade negotiations. The first, a Neoliberal Institutionalist account drawn from recent Legalization scholarship, argues that institutional change determines patterns of empowerment and thus who has a voice in policymaking. In particular, the shift towards legalization improves the quality, volume and access to information regarding the distributional consequences of trade agreements. Prior to the conclusion of new trade deals, these scholars predict that societal actors and protectionists will be empowered relative to stakeholders advocating in favour of free trade policies. This may have the unintended effect of stunting progressive trade liberalization. Nevertheless, legalization also has the intended effect of making commitments more credible. Policymakers will uphold legal trade commitments even when it is unpopular or costly to do so. In this way, legalization serves to further liberalization and therefore privileges the interests of corporate actors and investors.

In Chapter 2, I discuss at length various limitations of this explanation. Foremost among them is the presumption that more free trade is the inevitable and best possible outcome of ongoing trade negotiations. Moreover, although the Legalization explanation may provide a great deal of insight into patterns of empowerment and the conditions under which we get more or less free trade, it is silent on democratic principles and questions of justice and fairness. As I elaborate in the following pages, this explanation

\textsuperscript{42} Moravcsik 1998, 77.
is unable to reflect on whether new trade rules serve to entrench unequal access to decision-making processes or entrench rights for powerful economic and/or private actors – key focal points of this study. Therefore, the alternative explanation that I will test in this study is a Constructivist one.

The second explanation grounded in Constructivism considers how the deepest level of the ideational world or the lenses through which we view the world interact with claims to democracy, justice and fairness. As I discuss in detail in Chapter 2, epistemes are comprised of shared, intersubjective or taken-for-granted causal and evaluative assumptions about how the world works. They constitute the building blocks of global governance. They contain background knowledge and establish boundaries within which people reason and make choices. In Chapter 2, I argue that a legal/liberal episteme has been entrenched in the international trade regime since the conclusion of the Uruguay Round of Multilateral Trade Negotiations. I discuss the key features of this episteme in detail. Amongst them is the belief that open markets and free trade are panaceas for economic growth and development. Legalization, resulting from the shift from GATT to WTO, is the rule of law counterpart to these free market principles. This move, “shifted power to the legal, adding a new layer of judicial authority expected to increase the legitimacy of the organization by ensuring the rule of law would triumph over political considerations”.

According to this explanation, a legal/liberal episteme and not information or institutional change explains patterns of empowerment in the external trade policymaking process in the EU following the shift from GATT to WTO. Epistemes endow some with

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43 Adler and Bernstein 2004, 27.
the authority to determine valid knowledge and/or to reproduce the knowledge on which an episteme is based. Technocrats and experts are particularly advantaged relative to other actors. Technocrats are highly skilled people with special knowledge or ability and who hold an official bureaucratic position in government. They possess an authoritative claim on knowledge; the more technical the issue area, the more functional authority or decisive power shifts to experts and technocrats. Functional authority refers to the ability of technocrats to shape the terms of debate, and to initiate and execute critical decisions. By working to ensure rules rest on sound liberal and legal epistemic foundations, experts and technocrats serve as gatekeepers determining who has a voice in governance. The precise role of NGOs in external trade policymaking is therefore determined by the “fitness” of their demands and grievances with the prevailing legal/liberal episteme.

Building on these ideas, I argue that policymakers are likely to respond in significant ways to demands for improvements on the input side of policymaking. In an effort to reproduce and legitimize the legal/liberal episteme, policymakers will take steps to make policymaking more transparent, accountable and open to participation by a wider range of civil society actors. These new opportunities for access and participation will enable actors who accept the main tenets of the legal/liberal episteme to serve as interlocutors in the policymaking process; where discussions concern the broad trajectory of policy, these actors will play the role of educators and agenda setters. However, where policy discussions concern the nuts and bolts of trade agreements and/or highlight technical aspects of trade negotiations, policymakers will “pull away” from broadly participatory processes; the more technical (as opposed to political) the issue, the more functional power rests in the hands of experts and technocrats as opposed to either
corporate actors or NGOs. As stated above, the legal dimension of the episteme is designed to protect against political interference with the free functioning of the market. Therefore, political compromises will only be struck when they are necessary to further the core goals of the episteme. Since technocrats and experts are themselves the product of the dominant episteme, they will work to co-opt and absorb forces of civil society that resist or reject the main tenets of the legal/liberal episteme. Actors who operate on the margins of the governing arrangement or who reject the legal/liberal episteme wholesale are cast as outsiders; they are marginalized by people in a position of power (technocrats and experts), who will work to de-legitimize their grievances through “they just don’t understand” tactics.

B. **Descriptive Analysis**

Chapters 3 and 4 contain heavy descriptive elements required for further inquiry into the precise role of NGOs in the EU’s external trade policymaking process. Chapter 3 is concerned with mapping new access and participatory mechanisms at the EU level designed to improve the political opportunity structure for a broad base of civil society organizations developed since the conclusion of the Uruguay Round of Multilateral Trade Negotiations. Here, I evaluate the changing role of NGOs in comparison to other actors with a vested stake in proposed international trade deals. Chapter 4 maps the evolution of the Agreement on Trade Related Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Services (GATS) in the WTO and related controversies surrounding access to medicines and water.

As a framework for evaluating the EU’s consultative process, I draw heavily on the project, initiated by Sylvia Ostry et al., entitled, “The Trade Policy-making Process:
Level One of the Two Level Game, Country Studies in the Western Hemisphere”. This project established a useful methodology for investigating how CSOs participate in the formulation of national trade policies and negotiating agendas. While this study is not concerned with the national process per se, Ostry et al. provide a useful framework for identifying and evaluating the instruments of consultation. By using Ostry et al.’s framework as a guide, I conducted a combination of documentary analyses and extensive, elite, semi-structured interviews with key Eurocrats, including permanent member state representatives, members of the European Economic and Social Committee, various officials working in the Secretariat General, DG Trade, DG Enterprise and DG External Market, and a wide range of economic and non-economic actors with a vested interest in ongoing trade negotiations. I determined that despite significant, remaining disparities in access enjoyed by economic and non-economic actors, there have been notable aggregate improvements in access and participatory conditions for a wide range of CSOs at the EU level since the conclusion of the Uruguay Round of Multilateral Trade Negotiations. Given these changes in the political opportunity structure for CSOs, I establish a clear baseline from which to explore the conditions under which NGOs are actually empowered in the political process and when their involvement is likely to produce more legitimate external trade policymaking in Chapters 5 and 6.

As I discuss at length in Chapter 4, the Uruguay Round of Multilateral Trade Negotiations applied trade concepts to services and intellectual property rights for the first time. In doing so, these new areas became firmly entrenched in the legal/liberal episteme that structures ongoing trade policy negotiations. The purpose of this

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44 Ostry et al. 2003.
discussion is to establish the context within which GCS is clamoring for a voice in the EU’s external trade policymaking process and to highlight the constraints encountered by EU policymakers when negotiating new trade rules. I relied heavily on documentary research and secondary sources to develop this chapter.

C. Case Selection and Methods

This dissertation is designed as a small-n comparative case study. Although prima facie a large-n statistical analysis may be a superior methodological approach, it is inappropriate for the intents and purposes of this study.\(^{45}\) The need for a small-n comparative case study stems from the unique, complex, and multi-faceted relationship under review. The EU’s relationship with the international trade regime is unlike any other WTO member. The EU grapples with a host of distinct issues, not least of which is its so-called legitimacy deficit and NGOs are traversing a unique multi-level environment not encountered elsewhere. A small-n comparative case study permits an in-depth investigation of the consultative and participatory mechanisms at work in the EU, it allows me to trace the precise role of NGOs in the EU’s external trade policymaking and to examine the operation of causal mechanisms in detail.\(^{46}\) Of course, the conclusions drawn in this study are particular to the EU and I am unable to draw causal inferences about the role of NGOs in political processes in other WTO members. However, once a clear understanding about their precise role in the EU following improvements in

\(^{45}\) King, Keohane and Verba 1994.

\(^{46}\) George and Bennett (2005) discuss at length the various benefits of case study research focusing particularly on the ways in which it can contribute to developing and testing theory in ways that incorporate attention to causal processes at work in political life.
participatory and access conditions is established, I will generate some contingent hypotheses that can be tested in other environments.

In addition, the external trade relations of the EU comprise an enormous subject. Analyzing the role of NGOs in all related areas would be the ideal strategy to employ in order to minimize case selection bias. Unfortunately, this would prove to be an insurmountable task for a study of this size. Indeed, even looking at the role of economic and non-economic actors with a vested outcome in negotiations pertaining to an entire WTO Agreement such as the GATS or the TRIPS would be a tremendous endeavour since these agreements cover an enormous range of issue areas. Moreover, NGOs are most active in trade policy areas that have social, environmental or cultural impacts. Many aspects of the GATS and TRIPS thus do not garner much attention. For example, NGOs have little concern for the outcome of GATS 2000 negotiations on trade in voice-mail telecommunications or space transport. Similarly, trademarks and geographical indicators are not focal points for concern. For these reasons, the appropriate methodological approach for my purposes is a small-n comparative case study.

In Chapters 5 and 6, I test the Cosmopolitan and Epistemic explanations in two key case studies. The first concerns the role of NGOs in the formulation of the European Communities’ (EC) position on trade related intellectual property rights and access to medicines. The second concerns the role of NGOs in the EC’s requests for water services liberalization in the context of GATS 2000 negotiations. In each case, I employ a process tracing method and then compare the results across cases. Process tracing is a set of

methodological tools designed to assess causation by examining causal processes.

According to George and Bennett,

In process tracing, the researcher examines histories, archival documents, interview transcripts, and other sources to see whether the causal process a theory hypothesizes or implies in a case is in fact evident in the sequence and values of the intervening variables in that case.\(^{48}\)

The process tracing method attempts to identify the intervening causal process – the causal chain and causal mechanism -- between an independent variable (or variables) and the outcome of the dependent variable.\(^{49}\)

In order to collect data for each case, I conducted documentary analysis of three types of materials: 1) NGO campaign materials, press releases and position papers; 2) WTO Agreements, negotiating documents, submissions by WTO member states, press releases; 3) EC legislation, GATS requests and offers including proposals and final documents, submissions to the WTO, White and Green papers, transcripts of European Commission Civil Society Dialogue sessions, transcripts of European Parliament plenary sessions, Committee 133 meeting notes, EU press releases. I also conducted over 40 semi-structured elite interviews in Brussels and Geneva.

The purpose of the elite interviews was to corroborate documentary research; to generate a detailed understanding about the thoughts and attitudes of key elites concerning the central issues in question; to uncover the conduct of key participants in the political process in order to reconstruct the decisions and actions that lay behind the events or decisions in question and; to draw inferences about the beliefs, attitudes and behaviour of a group of key actors involved in the EU’s external trade policymaking

\(^{48}\) George and Bennett 2005, 6.

\(^{49}\) George and Bennett 2005, 206.
process. However, the objective was not to generalize the results to the wider population but rather to generate insights into very specific decision-making events with a limited set of clearly identifiable actors. Therefore, random sampling was both an inappropriate and unnecessary method of selecting interview participants.\(^{50}\) Instead, I used a combination of purposive\(^{51}\) and snowball or chain-referral\(^{52}\) sampling to interview actors who had the most direct involvement and who were critical players in the two cases.

There are obvious risks of bias in snowball sampling since interview participants are likely to recommend people who share similar views, roles or beliefs. This problem was minimized in my study by selecting interview participants in the first round who played fundamentally different roles in the policymaking process and who represented a wide range of vested interests in the outcome of trade negotiations. I conducted three rounds of interviews, each of which built on the chain of contacts built in the previous round. For each case study, I interviewed Member State representatives working in Committee 133, the body responsible for helping the European Commission coordinate trade policy; and COREPER, the working group that conducts preparatory work for the Council; Commission officials working in various Directorate-Generals (DGs) including Trade, Enterprise and Development; members of the European Economic and Social Committee and; a range of economic and non-economic stakeholders including NGOs, trade unions, industry associations, and consumer organizations.

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\(^{50}\) For further discussion of random sampling in elite interviewing see Berry 2002.

\(^{51}\) Purposive sampling involves interviewing a pre-defined and visible set of actors who are most involved in the event in question. See Judd, Smith and Kidder 1991.

\(^{52}\) This method involves establishing a sample of interview participants based on reputational criteria. The researcher determines who are the political actors most involved in the case in question. Since the most influential actors are not always the most visible, the snowballing technique initiates a process of chain-referral whereby a first round of interview participants are then asked to provide a list of people they feel are influential in the same field.
These two cases were selected because they vary significantly on the degree to which NGOs are involved in the external trade policymaking process. Since the conclusion of the Uruguay Round of Multilateral Trade Negotiations, NGOs involved in the TRIPS: Access to Medicines Campaign have experienced sustained improvements in participatory and access conditions in the EU’s external trade policymaking process. They are widely celebrated by EU policymakers as essential interlocutors in ongoing international trade negotiations. The global Access to Medicines Campaign has been heralded by scholars and activists alike as evidence of NGOs’ ability to influence international public policy. This assumption, taken together with the growing involvement of NGOs in the EU’s external trade policymaking process, would lead Cosmopolitans to expect notable improvements in both substantive and procedural legitimacy to occur over time.

By contrast, NGOs working on GATS and Water, with the exception of access to information requests, launched a public education/outreach campaign that operated almost entirely outside the context of newly created avenues for access and participation at the EU level. If this account of policymaking holds, NGOs working on GATS and Water will be much less successful in empowering marginalized people, encouraging the global redistribution of economic and political resources, generating and widening public debate, educating the public, and bringing about more transparent and accountable policymaking than those NGOs working on TRIPS and Access to Medicines.

In this study, I find that variations in access and participatory conditions for NGOs cannot account for patterns of empowerment or policy outcomes observed across the two cases; NGOs working on TRIPS: Access to Medicines and GATS: Water brought
about similar improvements on the input side of policymaking despite differences in the degree to which they are formally integrated into the policymaking process. In both cases, NGOs brought about notable improvements in procedural legitimacy albeit in fundamentally different ways.

However, there are no plausible causal links between the demands made by NGOs and more just, equitable or fair external trade policies pursued by the EU in either case. This finding undercuts earlier assessments of the achievements of the Global Access to Medicines Campaign. In Chapter 5, I argue that these studies prematurely celebrated the outcome of TRIPS and Access to Medicines negotiations and thereby grossly exaggerated the role played by NGOs in entrenching a public health norm in the international Intellectual Property Rights (IPR) regime. Instead, NGOs were co-opted by incremental changes in the international IPR regime to maintain a forward momentum in WTO negotiations. Once the pressure from developing countries and the Access to Medicines Campaign lessened, EU policymakers shifted back to their preferred set of outcomes. Similarly, NGOs working on GATS and Water were unable to convince EU policymakers to withdraw their requests for water services liberalization in several key developing countries. In both cases, NGO efforts have not resulted in improved efforts to redress persistent economic inequalities between the north and south and widespread social injustices resulting from previous rounds of multilateral trade negotiations as many had hoped. Indeed, from the point of view of NGOs working in both cases, EU external trade policies in these areas will further exacerbate those injustices. The Epistemic explanation outlined above, I will conclude, best accounts for the observed pattern of outcomes.
Experts and technocrats, and not NGOs, are empowered in the EU’s external trade policymaking process, despite changes in the political opportunity structure since the conclusion of the Uruguay Round of Multilateral Trade Negotiations. Instead, the precise role of NGOs in external trade policymaking, patterns of empowerment and related improvements in legitimacy hinge on the “fitness” of their demands and grievances with the prevailing legal/liberal episteme. As trade negotiations became more complex or centered on highly technical issue areas, experts and technocrats gained greater functional authority. NGOs working on TRIPS: Access to Medicines experienced a diminishing role in policymaking over time despite progressive improvements in formal participatory and access conditions. EU technocrats pulled away from the participatory process and substantive policy discussions as the issues became more complex and NGOs became more critical of the neoliberal direction of policy. Technocrats and experts introduced small concessions and compromises in areas of least vital importance in an effort to stifle resistance and criticism within civil society. NGOs which had previously enjoyed a position of privilege as “interlocutors” were soon relegated to the margins of policy debates when it became clear that they could no longer be co-opted. In the end, EU policymakers pursued a policy line diametrically opposed to the demands of the NGOs involved in the TRIPS: Access to Medicines Campaign. Moreover, since the interests of the European pharmaceutical industry were contradictory in this case, EU technocrats pursued a policy line that, in their view, struck a middle road between the strategic demands of patent-holders and generic industries.

NGOs working on GATS: Water started from a fundamentally different baseline than those working on TRIPS: Access to Medicines. From the outset, these NGOs
rejected wholesale the legal/liberal episteme in which the GATS Agreement is embedded. Given fundamental disagreements over basic economic principles, the relationship between these NGOs and EU technocrats was adversarial from the start. It was apparent to all parties that neither common understanding nor compromise would be possible on this issue. Therefore, the pattern of engagement between NGOs and technocrats in this case differed initially from the one observed in the previous case. Rather than inviting them to serve as interlocutors in the policymaking process, the European technocrats and trade experts in a position of power worked to marginalize and de-legitimize NGOs campaigning against the inclusion of Water in the EC’s GATS requests by emphasizing fundamental flaws, hyperbole or misunderstandings in their grievances. This activity did not show up until much later in the TRIPS: Access to Medicines case when it became apparent that NGO demands could not “fit” with the prevailing episteme. In contrast, the core activities of NGOs working on the GATS: Water issue occurred outside EU level mechanisms designed to improve access, participation and transparency of external trade policymaking. Their extra-institutional activities were as much a response to the credibility campaign launched against them by EU technocrats as it was a protracted effort to avoid co-optation.

As in the TRIPS: Access to Medicines case, EU technocrats continue to pursue a policy line that runs contrary to the demands of NGOs. Despite the NGO-led public awareness campaign, diminishing public support from the EU’s water industry, and pressure by Members of the European Parliament and several key EU member states including the UK and Belgium, EU technocrats remain committed to including water services in the GATS 2000 negotiations. This puzzling outcome is best explained by the
fact that EU technocrats clung to the legal/liberal episteme within which GATS negotiations are embedded. They are in a position to do so because GATS negotiations are incredibly complex, fraught with minute technical details and require a high degree of secrecy. Moreover, business interests were contradictory and diffuse in this case and thus opened up opportunities for bureaucratic creativity. In response, EU technocrats anticipated the strategic interests of the European water industry by keeping the door open for water services liberalization. This pooling of functional authority in the hands of European technocrats and trade experts is compounded by the offer-request format of country-by-country services negotiations and EU technocrats could justify pulling away from the broadly participatory process as the issues at stake became more technical.

Ultimately, this comparative case study shows that NGOs have brought about fundamental improvements in procedural legitimacy both when they are formally integrated into the policymaking process and when they operate on the margins of the governing arrangement. In both cases, they played the roles of educators and agenda setters, generating awareness and giving a voice to broader societal concerns. They stimulated public debate and worked both through newly created formal channels at the EU level and through informal networks to empower marginalized people and to encourage the redistribution of both economic and political resources. Although differential access to EU policymakers remains, NGOs worked to make the EU’s consultative arrangements more transparent and they pushed EU policymakers to take greater public responsibility for their actions. Therefore, the external trade policymaking process is certainly more procedurally legitimate and qualitatively enhanced than it would be in their absence. The outlook, particularly for developing countries would be
worse in the absence of a robust civil society in the EU. However, neither group of NGOs was instrumental in bringing about more substantively legitimate external trade policy outputs despite variations in levels of formal engagement with policymakers; there are no causal links between the activities of NGOs in these cases and improvements in substantive legitimacy. Instead, the legal/liberal episteme conflicted with NGO efforts to achieve more just, equitable and fair trade policies in the EU.

II. Outline of the Study

In order to understand the evolving role of NGOs, to explain patterns of empowerment and to assess whether the changes in political opportunity structure leads to more legitimate external trade policymaking in the European Union, I begin Chapter 2 by detailing a clear working conception of legitimacy. A post-national, principled conception of legitimacy based in Cosmopolitan IR literature serves as a benchmark in this study against which the evidence is measured. Cosmopolitans expect that increasing NGO’s participation and access to policymaking should, in principle, improve the legitimacy of policymaking along both procedural and substantive lines. In the second part of this chapter, I advance two alternative accounts of policymaking that expect very different patterns of empowerment following the shift from GATT to the WTO, despite changes in the political opportunity structure at the EU-level. I argue the Epistemic explanation in particular best accounts for the role of NGOs in the EU’s external trade policymaking process.

Chapters 3 and 4 map the policymaking environment within which NGOs are clamoring for a voice. Chapter 3 traces the evolution of the EU-level political
opportunity structure, outlines new access and participatory mechanisms designed to increase the involvement of a broad base of civil society and identifies remaining disparities in access encountered by economic and non-economic actors. Chapter 4 provides a detailed historical account of the entrenchment of services and intellectual property rights inside the legal/liberal episteme and outlines the role of the EU in this context.

Chapters 5 and 6 test the Cosmopolitan and Epistemic explanations in the two case studies. The first concerns the role of NGOs in the formulation of the EC’s position on TRIPS and Access to Medicines. The second concerns the role of NGOs in the EC’s position on water services liberalization in the context of GATS 2000 negotiations.

The concluding chapter discusses some of the implications of my findings for the theoretical understanding of post-national governance, for the promise of Global Civil Society more generally, and for the empirical and political realities in which NGOs operate.
Chapter Two:  
Cosmopolitanism, Legalization and Epistemes -
Envisaging Patterns of Empowerment in the EU’s External Trade Policymaking Process

I. Introduction

In the European Union, do improvements in participatory and access conditions for Non-governmental Organizations (NGOs) result in more legitimate external trade policymaking? This is an important question, the answer to which has wide implications. However, a clear conception of legitimacy must be established before it can be answered effectively.

Three controversial theories of political legitimacy are central to discussions of the so-called “legitimacy deficit” in the EU: input legitimacy, output legitimacy and

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1 For example see Beetham (1991) who details three components of legitimacy in liberal democratic societies: the performance of institutions; their conformity to democratic values of consent, representation and accountability; and political identity, without which citizens may question the right of a particular collectivity to make decisions on their behalf.

2 Also coined “direct legitimation”, this theory is grounded in individualism; equal autonomy and rights as well as the equal and effective participation of individual citizens are core tenets. Robert Dahl (1998, 37-87) lists five criteria which must be fulfilled: effective participation of the citizens, voting equality at the decisive stage, an enlightened understanding of the matters to be decided, citizen control of the agenda, and inclusion of all adults subject to the binding collective decisions of the association. This approach also qualifies that the citizens must hold governors accountable, powers must be divided and the executive power must be checked and balanced.

3 Output legitimacy is at the core of utilitarian theories of legitimate rule. It emphasizes democracy as “government for the people”, not “government by the people”. How the democratic process is organized is secondary to what it achieves for its citizens. From this perspective, a system of rule derives its legitimacy from its capacity. System capacity is the capacity of a polity to respond fully to the collective preferences of its citizens. The higher this capacity, the greater the legitimacy. In this perspective, the EU is conceived of as merely a problem-solving agency whose outputs create legitimacy. It is the performance of the system, its ability to procure services and solve problems for the Member States that provide the basis for legitimacy. What is required is no more than the perception of a range of common interests that is sufficiently broad and stable to justify institutional arrangements for collective action. For a more comprehensive look at the output legitimacy approach and its application to the EU, see Dahl and Tuft 1973; Scharpf 1999.
social legitimacy. EU scholars have long been preoccupied with drawing up typologies which are primarily prescriptive in nature or at least focus on institutional means of legitimation. Chief among these are: Indirect Legitimacy, Output Legitimacy, and Procedural Legitimacy.

These approaches tend to assess the problem solving capacities of national systems of governance and their transformation by European integration. They are predicated upon components of legitimacy in liberal democratic states. Underlying each is the assumption that either legitimate forms of governance cannot exist beyond the state or that post-national governance structures ought to mimic the Westphalian notion of a liberal democratic state. In what follows, I aim to move beyond a state-oriented mode of thinking to devise a post-national conception of legitimacy.

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4 In this view, according to Schimmelfennig (1996), the legitimacy of a political order depends on the degree of social homogeneity, the strength of civil society institutions and the existence of a collective identity amongst citizens. Accordingly, he claims, a) Legitimate rule depends on the strength of civil society. Individualistic, majoritarian democracy requires a well-organized civil society. In its absence, the subjects of democracy are those collectives which possess a strong internal civil society; (b) Legitimate rule depends on social homogeneity. Individualistic, majoritarian democracy requires a high degree of homogeneity. In heterogeneous societies, the subjects of democracy are the homogeneous collectives. (c) Legitimate rule depends on collective identity. Individualistic, majoritarian democracy requires a sustainable collective identity. In societies with fragmented identities, the subjects of democracy are the collectives towards which the identity of the citizens is primarily oriented. See also Bernstein 2004; Cederman 2001; Laffan 1996.

5 See for example, Lord and Magnette 2004; Föllesdal 2006; Jachtenfuchs, Diez and Jung 1998; Beetham and Lord 1998; Höreth 1999.

6 Fritz Scharpf (1999) for instance denies that input legitimacy can be achieved at the European level in the absence of a European “demos”.

7 Jachtenfuchs, Diez and Jung (1998) also rely on the tripartite understanding of legitimacy to study the development of competing normative ideas about a legitimate political order. However, by devising a “catch-all” analytical scheme and isolating (180) single items or indicators of legitimacy they effectively break free of the state-oriented mode of thinking.

8 This approach shares much in common with Grande and Beck’s (2007) recent work which conceives of Europe as a new type of Cosmopolitan Empire. Key features of this new political vision include an asymmetrical political order; an open, variable spatial structure; a multinational societal structure; integration through law, consensus and cooperation; welfare and security priorities; horizontal and vertical institutional integration; network power; and cosmopolitan sovereignty. It also includes a new post-national
governance, in this study, refers to “collective efforts to identify, address or understand problems that go beyond the capacity of individual states to resolve”. It is the exercise of power and influence outside or on the boundary of government structures through interactions among various political, social, and economic actors. Governance occurs when the traditional government institutions – legislatures, bureaucracies, or executives – are not exercising power exclusively but are engaged in partnerships with networks and coalitions, with agencies, [MNCs], and CSOs.

Post-national governance is, thus, distinct from traditional notions of government in which the institutions, and processes of public policymaking, regulation, and adjudication are the monopoly of the state. This distinction is particularly important for studying policymaking in an area such as international trade where many actors with a vested interest in the impact of policies and negotiations are no longer territorially bound.

Moreover, it is widely agreed that indirect and/or output legitimacy are no longer adequate bases for authoritative decision-making in the EU, at least in areas where the EU retains exclusive competence. In the former, policy is indirectly legitimated through state consent. On the input side of policymaking, EU policies are legitimate to the extent that states have authorized EU level decisions and any “autonomy of Union institutions is not evidence of their independent legitimacy, but of where it suits states to confer limited discretion on a supranational agent, according to a contract that is contingent, calculated

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9 Thakur and Weiss forthcoming.
10 Clarkson and Torres-Ruiz 2005, 7. For similar conceptualizations, see Hewson and Sinclair 1999, ch.1; Rosenau 1992.
11 Ibid.
and controlled”. Thus, policy outputs are indirectly legitimated when they reflect state preferences.

In the case of the latter, the legitimacy of EU policy outputs are evaluated solely in terms of their problem solving capacity, their ability to efficiently achieve common objectives that would otherwise be unattainable had states acted on their own. In this vein, the EU is conceived as a problem-solving agency or technocratic “fourth branch of government” which produces outputs that are Pareto-Efficient, rather than redistributive or value-allocative. Indeed, in order to achieve output legitimacy, regulatory policymaking is intentionally isolated from the democratic process or capture by majoritarian interests.

Majone makes an especially strong case for why non-elected bodies such as the European Commission cannot be held to democratic standards of accountability. In his view, accountability is rendered on the basis of good performance and democratic controls would inevitably interfere with the Commission’s capacity to achieve quality outputs. Instead, he suggests a range of procedural controls can reconcile the independence of agencies like the European Commission with public accountability. The necessary procedural controls include: clear and limited statutory objectives for providing unambiguous performance standards; reason-giving and transparency requirements for facilitating judicial review and public participation; due process provisions for ensuring fairness among the inevitable losers from regulatory decisions; and professionalism for withstanding external interference and reducing the risk of an

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12 Lord and Magnette 2004, 185.
13 Banchoff and Smith 1999; Majone 1998b, 22-23.
arbitrary use of agency discretion.\textsuperscript{14} Ultimately, according to Majone, these procedural controls are sufficient to limit bureaucratic drift, “the ability of the agent to enact outcomes different from the policies preferred by those who originally delegated powers” and to hold non-majoritarian decision-making bodies accountable to the European public.\textsuperscript{15}

Recent changes to EU trade policymaking clearly indicate that indirect and output legitimacy are no longer considered adequate bases of political authority in the EU; the onus in Europe is on improving the democratic quality of policymaking. Values such as autonomy, democratic accountability, transparency and inclusive participation underpin efforts to reform EU-level policymaking. The changes in access and participatory conditions for a wide range of CSOs have been characterized as an attempt to plug “a gap in technocratic perspectives that imply that improved problem-solving can be sufficient without normative agreement on how groups and individuals should be treated in efficiency-improving decision-making processes”.\textsuperscript{16} Indeed, this is consistent with the view that “[n]o democratic society accepts the legitimacy of discarding democratic processes in favour of efficiency”.\textsuperscript{17} Given this turn in emphasis, we require a clear, post-national analytical framework to evaluate the relative success of these efforts.

In the first section of this chapter, I borrow insights from the recent proliferation of IR literature that takes a moral or principled view of legitimacy, as opposed to a legal

\textsuperscript{14} Majone 1996, 300.

\textsuperscript{15} Majone 2001, 103. Also see Majone 1998a, 2002. For additional discussion of accountability in the EU see Fisher 2004; Harlow 2002. The author thanks Grace Skogstad for highlighting these insights.

\textsuperscript{16} Lord and Magnette 2004, 187.

\textsuperscript{17} Bernstein 2004, 17.
or sociological conception to construct a benchmark against which external trade policymaking in the EU can be evaluated. Legitimacy, in this view, occurs along two axes: procedural and substantive. We must arrive at policies through democratic process AND they must pursue just, equitable and fair objectives. So, on one hand, the more opportunities for participation, open debate, rational reflection and democratic empowerment are integrated into the system the more legitimacy is attained. However, policy that entrenches unequal distribution of consequences, power relations and unfair terms cannot be considered legitimate, even if arrived at through democratic processes. Ultimately, this conception of legitimacy looks beyond good governance discourse and state consent as a source of legitimacy.

Having established clear conceptions of Post-National procedural and substantive legitimacy, I tease out hypotheses drawn from the democratic and normative theory regarding what role we can expect NGOs to play in achieving Post-National Legitimacy. At its core, this perspective conceives of NGOs as conduits for democracy and social justice in global and/or regional governance. Increasing their participation and access to policymaking should, in principle, lead to improvements in legitimacy.

In section two, I advance two alternative accounts of policymaking that predict very different patterns of empowerment and policy outputs following the shift from GATT to the WTO, despite changes in the political opportunity structure for NGOs at the EU-level. The first, a Neoliberal Institutionalist account drawn from recent Legalization scholarship, argues that institutional change determines patterns of empowerment and thus who has a voice in policymaking. The second explanation, grounded in Constructivism, considers how the deepest level of the ideational world or the lenses

\[^{18}\] For an in-depth analysis of the sociological and legal conceptions of legitimacy see Bernstein 2004.
through which we view the world interact with claims to democracy, justice and fairness. This explanation contends that a legal/liberal episteme and not information or institutional change explains patterns of empowerment in external trade policymaking in the EU. All three accounts predict some improvements in procedural legitimacy to accompany the shift from GATT to the WTO but they have fundamentally different expectations about the causal mechanisms at work and about the substance of policy outputs. Ultimately, it is virtually impossible to disentangle which causal variables account for improved access or participatory conditions for NGOs (global democratic norms, legalization etc). Indeed this is not the focus of this study. Nonetheless, research presented later in this study shows that NGOs have been instrumental in providing education, raising awareness, generating debate about the social, health-related and environmental aspects of [proposed] trade deals but they have been unable to reaffirm social prerequisites over the dominant legal/liberal paradigm. Instead, the deepest level of the ideational world, epistemes, conflicts with their attempts to achieve more just, equitable and fair external trade policies in the EU.

II. Principled, Post-National Legitimacy\textsuperscript{19}: A Benchmark for Analysis

A. Post-National Procedural Legitimacy

In an increasingly globalized world, a concern for the democratic quality of suprastate agencies and institutions has spawned a veritable cottage industry, and the existence of a so-called democratic deficit in global governance is gaining resonance.\textsuperscript{20} These developments are the consequence of the changing nature and locus of political authority

\textsuperscript{19} The term is borrowed from Habermas (2001a).

\textsuperscript{20} Moravcsik (2004) is a notable exception to this view.
under conditions of globalization and civil society organizations, NGOs in particular, are widely conceived as conduits for democratic governance beyond the state. In this vein, individual rights, democracy and deliberative principles constitute the ideal foundation for an international order wherein political decisions made on the transnational level increasingly affect people and public policy.

i. Why a Post-National Conception of Procedural Legitimacy?

Under conditions of contemporary globalization, the locus of political authority no longer corresponds neatly with territorial boundaries and national sovereignty has been reconfigured such that a state no longer has “absolute, supreme, unilateral, comprehensive authority over its territory and the population living there”. In other words, states are losing their capacity for self-determination and, in many cases, forfeiting their regulatory autonomy. Arguably, states have not ceased to be important actors in world affairs, but increasingly they are unable to manage key global issues on their own. As a response, competency and decision-making powers are shifting upwards to multilateral and/or supranational institutions and downwards to local and regional authorities who often bypass

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21 Scholte qtd in Soron 2004. According to Jan Aart Scholte (2001, 14-15), globalization “refers to a process whereby many social relations become relatively de-linked from territorial geography, so that human lives are increasingly played out in the world as a single place. ‘Social relations’ span many dimensions including culture, ecology, economics, and politics such that people are more connected with one another across the planet. Under conditions of globalization, social relations transcend territorial boundaries leading to a condition coined ‘supraterritoriality’. While states and territorial boundaries arguably still exist, they do so alongside new global spaces; states and territorial boundaries no longer have “a monopoly on social geography”. (Scholte 2002, 286-287)

22 This decentralization and diffusion of political authority in contemporary global governance is well documented. See for instance, Grande and Pauly 2005; Kahler and Lake 2003; Rosenau and Czempiel 1992; Rosenau 2006, 1995; Slaughter 2004; Nye 2004; Murphy 2000.

23 For a sense of the debate over whether the state is increasingly redundant under conditions of globalization, see Drezner 2007; Vogel and Kagan 2004; Cerny 2005; Held et. al 1999; Garrett 1998; Hay 2000, Hirst and Thompson 2003; Ohmae 1996; Strange 1996.
national governments altogether.\textsuperscript{24} Private and public-private partnerships are working alongside public instruments to manage global problems.\textsuperscript{25} And finally, new forms of governance, where authority rests primarily in the marketplace, are becoming more prevalent each day.\textsuperscript{26} For Lipschutz these developments, coupled with the emergence of global civil society, have culminated in the “fading away” of anarchy among states and its replacement by an increasingly norm-governed global system.\textsuperscript{27}

The fragmentation and decentralization of political authority is widely thought to result in the “hollowing out of the state”\textsuperscript{28}, or the emergence of a global democratic deficit. Democratic governance is conceived as “participatory, consultative, transparent and publicly accountable”.\textsuperscript{29} State-based legitimate governance, “rests minimally on consent of the people governed or popular sovereignty, and, increasingly, on democratic process and participation, accountability, and some basic political and citizenship rights”.\textsuperscript{30} However, within the state, there is limited public consultation on global issues\textsuperscript{31} and in the absence of a single center of authority located in the state, decisions taken elsewhere increasingly rest on very limited explicit consent from affected peoples. The transfer of political authority

\textsuperscript{24} One of the clearest examples of governance being shifted downwards and by-passing national governments is the European Committee of the Regions (CoR), “the political assembly that provides local and regional authorities with a voice at the heart of the European Union”. For an overview of the role and function of the CoR see \url{http://www.cor.europa.eu/en/index.htm}

\textsuperscript{25} Cutler, Haufler and Porter 1999; Hall and Biersteker 2002; Ruggie 2001; Clapp 1998; Ronit and Schneider 2001.

\textsuperscript{26} Bernstein and Cashore 2007; Conroy 2002.

\textsuperscript{27} Lipschutz 1992, 392.

\textsuperscript{28} For further elaboration on this expression see Jessop 2004.

\textsuperscript{29} Scholte 2002, 285.

\textsuperscript{30} Bernstein 2004, 6.

\textsuperscript{31} Scholte 2002, 290-291.
away from the national level has weakened democratic influence and control because they have not been compensated by equally strong democratic institutions at the global and/or regional levels.\textsuperscript{32}

Accountability requires transparency and public scrutiny of decisions taken. It also requires, “mechanisms for steady and reliable information and communication between decision-makers and stakeholders as well as mechanisms for imposing penalties”.\textsuperscript{33} However, officials working in supra-national institutions are not elected by popular vote and no international institution to date has created a popularly elected legislative body.\textsuperscript{34} Few governments have held referenda on global issues and unlike domestic political arrangements, citizens rarely have the opportunity to ask courts to mediate grievances against global governance officials.\textsuperscript{35} Formal external policy evaluations or impact assessments are also uncommon at the supranational level.\textsuperscript{36}

So, while procedural democracy is a core value and the dominant principle legitimating political authority,\textsuperscript{37} “contemporary global spaces”, as clearly articulated by Jan Aart Scholte, “are not democratic spaces. Post-national governance is not democratically/procedurally legitimate. We do not have a situation where the governed


\textsuperscript{33} Held and Koenig-Archibugi 2002, 127.

\textsuperscript{34} Although the European Parliament is directly elected and has the power to reject, amend or propose legislation, the appointed European Commission exclusively retains legislative initiative in the EU.

\textsuperscript{35} Scholte 2004a, 211.

\textsuperscript{36} The exception being some modest efforts by the World Bank and the IMF.

\textsuperscript{37} According to Held (1995, 1), “Democracy bestows an aura of legitimacy on modern political life: laws, rules, and policies appear justified when they are democratic”.


have accorded the right of rule to existing regimes." Ultimately, democratic mechanisms remain nested in the domestic sphere even as increasingly sensitive decisions are taken at regional and global levels. This is precisely why post-national criteria for procedural legitimacy are required: to serve as a benchmark against which new democratic/participatory mechanisms beyond the state can be evaluated and to provide normative insight into how post-national governance can be reconfigured to achieve these standards.

Critics charge that the democratic deficit in post-national governance is illusionary. For institutions, such as the EU or the WTO, whose memberships are comprised of states, decision-making authority is domestically authorized by and originates from the popular authority of Member States themselves. As I established above, this is no longer accepted as an adequate basis of authority in the EU.

Some critics go so far as to argue that global or regional “democracy” is an oxymoron since democracy is a form of governance under which the power to govern lies with the people, the demos. Democracy requires a community of people who share a collective identity, sentiment, solidarity and a degree of social cohesion; the legitimacy of the political order depends on the existence of social homogeniety between its members. Demos is pre-political and pre-constitutional; such a community of people

38 Scholte 2002, 292.
40 This is a view held by most communitarians. For a sense of the communitarian position see, Thompson 1992; Kymlicka 1999; Calhoun 2003; Bellamy and Castiglioni 1998. For the argument that the absence of a global demos renders the notion of a global democracy problematic see Greven and Pauly 2000; Axtmann 2002; Thaa 2001; Morgan 2003; Urbinati 2003. Zürn (2000) and Habermas (2001a, 2001b) arrive at a different conclusion by finding contingencies in the meaning of “demos”.
41 Laffan 1996, 95.
creates a polity that is ordered around its common values and norms. Rules are designed to protect members of the community and proponents doubt whether a community may be socialized to derive common values from a particular political culture that caters to and fosters multiple sources of identification. Instead, the autonomy of clearly demarcated, territorially-based political communities must be protected by an exclusive and minimal allocation of competencies to supranational bodies.

However, proponents of global democratic norms argue this position is untenable in a globalizing world. Outcomes of supranational decision-making are no longer exclusively technocratic or instrumental; instead, post-national decision-making authority extends to sensitive issue areas that tend to be of greatest concern to citizens and have dramatic social and political as well as economic consequences. The link between national parliaments and supranational institutions is often weak. National parliaments rarely conduct appraisals or exercise oversight of supranational decision-making, except when they are required to accept or reject agreements through ratification. Global governance issues rarely figure prominently in national political party election platforms and when they do it is most often with respect to broad policy lines rather than clear prerogatives that could be channeled upwards or downwards for that matter to specific institutions.\footnote{Scholte 2004, 211-212.} The de facto ability of citizens to influence national legislation or debates in the national parliament varies dramatically across countries and many citizens cite the absence of adequate access points or opportunities to voice their concerns over global issues. It is even questionable whether a common interest amongst member states of Intergovernmental Organizations (IGOs) can be formed in the absence of some measure of deliberation or active consent amongst
actors, particularly where there are power differentials between member states.\textsuperscript{43} Therefore, indirect and/or output legitimacy are insufficient bases for the formation of the “collective will” or consensual notion of the public interest.

Moreover, traditional state-based forms of democracy cannot simply be transposed to global or regional governance arrangements nor does it make sense to speak about autonomous, homogenous and/or exclusively territorially-bounded political communities.\textsuperscript{44} Under conditions of globalization, collective destinies and states’ territorial boundaries no longer neatly coincide; the contours of who constitutes “the people” are fluid as people increasingly identify with those living elsewhere. According to David Held, “the idea of a political community of fate – of a self-determining collectivity- can no longer be meaningfully located within the boundaries of a single nation-state alone”.\textsuperscript{45} These developments beg the question of whether procedural legitimacy beyond the state requires a demos and if so what conditions are necessary to form social cohesiveness and/or a “post-national” collective identity.

Proponents of global democratic norms generally do not deny the importance of a political community in establishing democratic political authority. Rather, improved opportunities for participation, political debate and direct engagement with decision-makers may catalyze the development of a new public sphere and political culture at the

\textsuperscript{43} This issue is particularly problematic in international institutions such as the WTO where many developing country members lack the resources and technical know-how to participate effectively in agenda setting and decision-making. Although the WTO operates on the one-country-one vote principle, there remain vast disparities in the ability of members to shape the terms of debate.

\textsuperscript{44} Linklater 1998.

\textsuperscript{45} Held 1997, 260.
supranational or regional level.\textsuperscript{46} The more open debate, rational reflection and democratic empowerment are integrated into the system, the more likely it is that people will share a common bond and common purpose. Therefore, the key objective is “to globalize democracy, while at the same time, democratizing globalization”\textsuperscript{47} through new means. To date, our best hope rests with global civil society.

\textit{ii. What Role for NGOs in Post-National Procedural Legitimacy?}

According to Richard Falk, global civil society, “recasts our understanding of sovereignty” as “the modernist stress on territorial sovereignty as the exclusive basis of political community and identity [is] displaced by more local and distinct groupings and by association with the reality of global civil society without boundaries”.\textsuperscript{48} In other words, global civil society is comprised of non-state actors whose activities transcend the state.\textsuperscript{49} Lipschutz goes on to argue that global civil society challenges the authority of the state from below and its existence marks, “an ongoing project…to reconstruct, re-imagine, or re-map world politics”.\textsuperscript{50}

The emergence of global civil society can be understood, on one hand, to be a response to the changing nature of political authority under conditions of globalization.

\textsuperscript{46} Bernstein 2004, 20-21. For this argument, see especially Habermas (2001b, 16-17) who argues the European Constitution, voted on through referendum, will lead to “the emergence of a European civil society; the construction of a European-wide public sphere; and the shaping of a political culture that can be shared by all”. For further discussion of what factors would constitute a “European” public sphere see Cederman 2001.

\textsuperscript{47} Archibugi 2004, 438.

\textsuperscript{48} Falk 1995, 100.

\textsuperscript{49} See also Köhler 1998.

\textsuperscript{50} Lipschutz 1992, 391.
and on the other hand as a conduit for global or regional democracy. By challenging perceived shifts in authority away from the state and demanding a voice in world politics, global civil society, and NGOs in particular, is becoming a constitutive part of a global democratic order. Indeed, Ann Florini and P.J. Simmons claim that “transnational civil society is a piece—and an increasingly important piece—of the larger problem of global governance.” This may even mark the emergence of what Wapner coins “world civic politics”. In this sense, the emergence of global civil society is best characterized as both an outcome and a catalyst of change.

As an agent of change, global civil society is engaged in a struggle for a global ethic, a struggle for a norm-governed system where democratic values infuse all levels of decision-making. So on one hand, the dissemination of global democratic norms begins from the ground up and is becoming more pervasive and influential as the moral authority of global civil society organizations is more widely accepted.

On the other hand, members of global civil society, including NGOs, can be viewed as a subject of global or regional democratic governance. According to Steven Bernstein, Cosmopolitan proponents of global democracy reason that “if individual autonomy, rights and consent are the basis of legitimate rule, then governance at any level can only be legitimated based on consent of individuals, public participation in and access to transparent decision-making processes that affect them, and accountability to them, with decision-

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51 On the emergence of global civil society see: Florini 2000; Boli and Thomas 1999; Lipschutz 2006; Germain and Kenny 2005; Matthews 1997; Shaw 1994. Mary Kaldor et. al (2005) also track the rise, ongoing activities and related issues of global civil society organizations in an annual yearbook.

52 Florini and Simmons 2000, 3.

makers perhaps even being subject to removal." It follows then that procedural legitimacy beyond the state requires the formation of inclusive participatory mechanisms (at the subnational, regional and supranational level) and public forums in which all citizens affected by the output of governance have equal opportunities to advance and debate their views. Indeed, proponents of cosmopolitan democracy envision the construction of an altogether new global polity which consists of multiple sites of authority and decision-making designed to protect individual rights and enhance democratic decision-making. For instance, David Held and his interlocutors propose a democratic political order characterized by overlapping communities of fate where individuals enjoy multiple citizenships. They conceive of democratization as a “double-sided process” – involving the deepening of democracy within the state on the one hand and the extension of democratic forms and processes across territorial boundaries on the other.

Post-national procedural legitimacy also requires “a situation where persuasion is possible and common understanding is the goal.” In this sense, it moves beyond the aggregation of pre-determined preferences of individuals into collective actions to procedural norms that encourage the alteration and evolution of preferences through active engagement. The formations of public and inclusive deliberative contexts (at the subnational, regional and supranational levels) should provide forums for all members of

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54 Bernstein 2004, 17.
55 Held 1995.
57 Held et. al 1999, 450.
58 Bernstein 2004, 19.
civil society who are affected by the outputs of governance to articulate their point of view.

Communicative or Argumentative rationality refers to a deliberation process in which actors engage in truth-seeking; “where actors argue or deliberate about whether norms are appropriate or can be justified.” Actors argue in relation to intersubjective standards regarding what is fair, in the public interest or the common good, in order to obtain consensus agreement and, ultimately to override egoistic or strategic interests. According to Steven Bernstein, “[l]egitimacy does not require heroic assumptions that “ideal” situations prevail, only that participants of different rank or capabilities adhere to conditions that make deliberations “argumentative rather than strategic (i.e., they refrain from pulling rank or coercive tactics).” The overarching objective is to construct mutually agreed, shared understandings and thereby authoritative answers to fundamental questions. Actors deliberate to reach consensus about normative ideas and they do so under the notion that all arguments are equally subject to scrutiny. It is, thus, a means to integrate justice and fairness, as well as democratic empowerment into the prevailing governance structure. Essentially, Post-National legitimacy encourages the alteration of preferences where the force of better arguments sway actors to harmonize their interests

59 Held 1995, ix; Habermas 1999, 49. Though widely held, the so-called “Symmetry Principle” is not without its critics. See Agné (2006, 433) who argues, “this principle is too strong to fit with the meaning of democracy, leads to tautological arguments, is indeterminate in politically important cases and, if its indeterminacy is rectified, fails to support ideas of political equality and accountability”.

60 Bernstein 2004, 19.

61 According to Baier (1958, 189-190) the moral point of view is “a point of view that furnishes a court of arbitration for conflicts of interests. Hence it cannot (logically) be identical with the point of view of self-interest”.


and theoretically reach an uncoerced consensus or at least better understandings about “sources and terms of disagreement behind basic value conflicts.” It also provides the forum in which authorities must justify their actions in an inclusive, public sphere. Ultimately, governance will be characterized by actors deliberating publicly, presenting arguments and evidence, and probing and challenging them in a broadly participatory process. Argumentative Rationality is thus an important source of Post-National Procedural legitimacy.

Global civil society is an essential feature of this model of legitimacy since it constitutes the public sphere beyond the state and is thus a subject of post-national democratic governance. Following insight from Jan Aart Scholte, if efforts to improve access and participation of NGOs improve the procedural legitimacy of external trade policymaking in the EU, then we would expect to see the following observable implications:

1) Education

NGOs may engage in public education activities, disseminating information and generating public awareness of key trade-related issues. Fostering knowledgeable or informed citizens is viewed as key to democracy and public officials may facilitate the transfer of ideas and information between civil society organizations and citizens of the EU.

2) Public Debate and Deliberation

NGOs will be instrumental in generating and publicizing debate about substantive policy issues, normative ideas about what is fair and about the democratic quality of governance.

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64 Bernstein 2004, 23.

65 The following hypotheses draw heavily from Scholte 2002, 293-295; Scholte 2004; 38-50.
itself. Since “openings for dissent are as necessary to democracy as security consent”\textsuperscript{66} then policy debates will be widened to accommodate the expression of multiple views, even where they challenge prevailing policy orthodoxy. At its core, dialogue means to engage in an informal exchange of ideas or views with the intent to learn, integrate multiple perspectives and to uncover and examine assumptions. A growing range of actors will debate publicly presented arguments and evidence, probing and challenging them in a broadly participatory process. Deliberations will increasingly be “argumentative” rather than strategic. Actors will be reluctant to fall back on strategic action to achieve their objectives because it is seen to undermine the authority of European institutions. Instead, actors aim to reach consensus on fundamental questions or at least better understandings about basic value conflicts.

3) Public Participation/Voice

NGOs will give a voice to otherwise marginalized groups in the political process. Improved access and new channels of participation will empower a broad range of stakeholders and, for civil society organizations participating directly in the policymaking process, will shift governance towards greater participatory democracy. EU officials will consult widely with all stakeholders who have a vested interest in the outcome of external trade negotiations.

4) Transparency

Decision-making will be more visible to EU citizens to allow for public scrutiny. We should see a gradual opening of access to documents and formal external (third party) policy evaluations or impact assessments will provide steady and reliable information. Procedures for consultation will also be made public. Preferential or differential access to policy-

\textsuperscript{66} Scholte 2002, 294.
makers will be reduced or at least publicized. Also, mandatory and binding lobby disclosure rules may be implemented to improve greater stakeholder transparency.

5) Public Accountability and Responsiveness

NGOs may “push authorities to take greater public responsibility for their actions and policies”. NGOs will publicize grievances in the media (otherwise known as naming and shaming) and these efforts may even be facilitated by EU policy-makers through access to information. Over time, formal mechanisms may be created to allow citizens to monitor and express concern through, “auditors, ombudspersons, parliaments [and] courts” and/or to allow EU officials to respond to concerns.67

6) Redistribution

NGOs will work both through official democratic channels and informal networks to empower marginalized people by encouraging the redistribution of both economic and political resources. They will promote policies that encourage a fair distribution of resources in the global economy. They will generate public awareness of injustices through education. Finally, NGOs will launch independent projects designed to lessen worldwide inequality.

B. Post-National Substantive Legitimacy

It is also necessary to look beyond the process through which policy is developed to question the projected outcomes or consequences of policy. In this vein, policies that entrench unequal distribution of consequences, power relations and unfair terms cannot be considered legitimate even if they were arrived at through democratic process.

67 Scholte 2004, 47.
Critical theorists have long considered global justice a key requirement of a legitimate political order. The Neo-Gramscian “Approach”, in particular, integrates questions of justice, social exclusion and moral credibility into their analyses of global politics. Scholars advocate in favour of the construction of ethical social relations in which “personal development, rational reflection, open debate, democratic empowerment and economic and social liberation are attainable”. Global civil society, in this vein, may constitute the basis of an alternative world order. In other words, global civil society holds the latent potential to transform the prevailing structure of power relations and replace state-based political authority by instituting an alternative social order at local, regional and global levels through what Neo-Gramscians refer to as a “counter-hegemonic” movement.

However, while “civil society has become the crucial battleground for recovering citizen control of public life”, it is not certain that adding more NGOs and stirring will

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68 Gill 2000a; Cox 1983, 1986; Murphy 2000. Louis Pauly (2002) makes a similar point, arguing that legitimacy requires social justice. However, for Pauly, this linkage precludes the transfer of political authority to the global level. Instead, states are limited to temporarily delegating authority while ultimately retaining the option of reasserting their regulatory autonomy in tough times.

69 There have emerged a range of studies along Neo-Gramscian lines and a tendency to conflate these developments as producing a cohesive “Neo-Gramscian” school or orthodoxy. This tendency potentially undermines the original “critical” intentions of Neo-Gramscian research and minimizes the diversity of the contributions. For discussion see Morton 2001. Nonetheless, The Neo-Gramscian approach, in all its manifestations, is concerned with the transformation of world orders. It identifies the world political system as multilayered and complex, comprising structures of authority at the macro-regional, state and micro-regional levels. It views political processes as no longer restricted to relations within or between states, as transnationalized domestic interests or social forces engage in political and social struggles on global and regional non-territorial space. Most recent contributions seek to identify and assess the normative implications of an emerging neo-liberal discourse. For a sense of the range of Neo-Gramscian research see Rupert 1995, 2000; Rupert and Solomon 2006; Morton 2007; Beiler and Morton 2001; van Apeldoorn 2003; van der Pijl 1998; Overbeek 1993, 2003; Gill 1991a, 1991b, 2003; Cox 1987; Cox and Sinclair 1996.

70 Gill 1993, 25.


74 Cox 1999, 27.
inevitably result in more just or equitable policies, at least in the near term. The precise role of global civil society in bringing about more just, fair or equitable policies may be more promissory than actual. Even if NGOs advocate in favour of redistributive policies, there is no guarantee that they will influence policy choice in this direction. Even in the event of what Falk refers to as “normative renewal” there is a risk that improvements in post-national procedural legitimacy will not be matched by genuine substantive policy changes. Indeed as David Kennedy asks, “Why are we limited to celebrating the expansion of participation in an emasculated policy process?” This is precisely the pitfall this study aims to avoid.

i. Why a Post-National Conception of Substantive Legitimacy?

Post-national substantive legitimacy is anchored to a global consciousness and the belief that social justice is not and should not be the sole responsibility of the state in a globalizing world. Under contemporary conditions, human lives are increasingly played out in the world as a single place; the life chances of individuals in developed, developing and least developed countries are interdependent and we all have universal obligations to one another. At a minimum, post-national substantive legitimacy requires an awareness of these changes and a concern for how our actions respond to and shape what is occurring elsewhere in the world. As Thomas Pogge argues, “We must reflect upon social institutions and the roles and offices that they involve as one [global] scheme, against the background of feasible alternative schemes. This reflection is highly abstract,

75 Falk 1999, 46.
76 Buchanan 2003.
77 Kennedy 1999, 54.
but without it we cannot even begin to understand what we are doing to others, how we are involved in their lives, and what concrete responsibilities we might have towards them. Indeed, this conception of legitimacy resonates with the work of Andrew Linklater and his notion of “triple transformation”. In particular, it is grounded in the universal quest for greater moral and economic equality whilst remaining sensitive to cultural difference. Indeed, there is a growing global social responsibility to secure justice and equitable policies under contemporary conditions of globalization.

At bottom, the precise criteria for social justice and equitable policies or post-national substantive legitimacy are part of a wider Cosmopolitan International Morality. The global application of Rawls’ theory of distributive justice is therefore useful. In this respect, Thomas Pogge and Charles Beitz provide insight. They both reject the notion that states are analogous to individuals in domestic society in having rights of autonomy that insulate them from external moral judgment and political interference. Instead, both scholars advance a consequence-based type of global distributive justice that applies to individuals (regardless of nationality) whose life chances and prospects are affected by a common institutional structure. According to Beitz, “the requirements of justice apply

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80 Indeed, many argue the social contract or “social bond” between citizens and governments has weakened under conditions of neo-liberal economic globalization. See for instance, Devetak and Higgott 1999.

81 Notably, the idea that the scope of distributive justice is coextensive with the impact of rules and institutions departs significantly from Rawls’ understanding of distributive justice as fair reciprocity. According to Rawls, principles of distributive justice apply only to those who contributed to the creation of certain benefits. See Rawls 1971, 342-343. Pogge and Beitz aim to correct the exclusivity of Rawls’ theory by placing emphasis on the degree to which individuals are affected by institutional rules and norms.

82 This position can be distinguished from those who argue that principles of distributive justice apply to all on the basis of the equal moral status of human beings regardless of the extensity of social relations/cooperation or interdependence. For this view see Richards 1971, 1982. Both Beitz and Pogge
to institutions and practices…in which social activity produces relative and absolute benefits and burdens that would not exist if the social activity did not take place.”

Furthermore, “If evidence of global economic and political interconnectedness shows the existence of a scheme of social cooperation, we should not view national boundaries as having fundamental moral significance. Since boundaries are not co-extensive with the scope of social cooperation, they do not mark the limits of social obligations.”

To date, the global “rules of the game” have produced radical inequalities between people. Nowhere is this more in evidence than in the asymmetries in the international trade regime. It is widely accepted that the vast majority of welfare gains from successive rounds of multilateral trade negotiations have accrued to developed countries. Many suggest developing and least developed countries are actually worse off as a result of their participation in the international trade regime. For nearly 50 years, the agenda of trade negotiations has reflected the priorities of developed countries. In turn, developing countries shoulder a disproportionate range of obligations and responsibilities. The extension of trade rules into new areas, such as investment, services and intellectual property rights has produced a knowledge or capacity deficit between

83 Beitz, 1979, 131.
84 Beitz 1979, 51.
85 Pogge 1989, 274.
developed and developing countries. Promises to redress these imbalances have remained unfulfilled.\textsuperscript{87}

Pogge and Beitz argue that feasible, institutional alternatives that do not engender injustice and radical inequalities can be achieved through the global application of Rawls’ difference principle.\textsuperscript{88} In particular, Beitz argues that international rules and institutions should be reorganized to achieve a more just distribution of benefits and burdens (regardless of individuals’ particular contributions) amongst affected individuals; global distributive justice requires that “social and economic inequalities are to be arranged so that they are…to the greatest benefit of the least advantaged”. It is the globally least advantaged persons whose positions should be maximized.

\textit{ii. What Role for NGOs in Post-national Substantive Legitimacy?}

Given the conception of substantive legitimacy advanced above, we can expect NGOs to be key advocates of redistributive external trade policies. If the involvement of NGOs improves the substantive legitimacy of EU external trade policymaking, I expect to find improved efforts to redress persistent economic inequalities between the north and south and widespread social injustices resulting from previous rounds of multilateral trade negotiations. In particular, if more just, equitable and fair external trade policies/proposals result from their efforts, we should see EU policymakers respond in the following ways:

\textsuperscript{87} Stiglitz and Charlton 2005, ch.2; Watkins and Fowler 2002.

\textsuperscript{88} As Bernstein (2004, 18) notes, “Rawls explicitly rejects its international application in both \textit{Theory} and \textit{Law of Peoples}, instead arguing only for “a duty to assist other peoples living under unfavourable conditions that prevent them from having a just or decent political social regime”. Indeed, for Rawls (1971, 114-118 and 333-342), natural duties are the only international moral requirements. However, Pogge (1989, 276) argues obligations of global distributive justice arise because “a global institutional scheme is imposed by all of us on each of us.”
1) EU policymakers devise policy proposals that respond to social and environmental concerns and not just economic demands;

2) EU policymakers pursue policies aimed at redistributing the benefits associated with international trade from the North to the Global South;

3) EU policymakers pursue policies aimed at redistributing the burdens associated with international trade from the Global South to the North;

4) EU policymakers pursue Fair Trade\(^8^9\) policy proposals.

As I will demonstrate in the following chapters of this study, the Cosmopolitan account of the role of NGOs in external trade policymaking in the EU falls down when assessed against the empirical record. Below I offer two alternative accounts of external trade policymaking that envisage fundamentally different patterns of empowerment in the EU’s external trade policymaking process following the shift from GATT to the WTO.

### III Alternative Accounts

#### A. Legalization

Legalization scholarship provides a potentially powerful, alternative account of the role of different actors, including NGOs, in the EU’s external trade policymaking process. Legalization refers to a set of characteristics, defined along three dimensions, that institutions may possess: “the degree to which rules are obligatory, the precision of those rules, and the delegation of some functions of interpretation, monitoring, and implementation to a third party.”\(^9^0\) In this sense, legalization is distinct from less formal

\(^8^9\) LeClair 2003; Watkins and Fowler 2002.

\(^9^0\) Goldstein et al. 2001, 385-399.
norms and principles that constitute standards of appropriate behaviour in international regimes. Very broadly:

government commitments are more credible under precise agreements of high obligation; delegated authority to interpret those commitments may also strengthen compliance. Legalization may be particularly important in providing an institutional solution to commitments fulfilled over an extended period of time.

Scholars have recently highlighted three important questions related to legalization. First, what factors explain why governments choose legalized institutions over other forms of institutions? Second, does legalization significantly change the way actors behave? Third, who is empowered and disempowered by the growing expansion of legalization? The shift from GATT to WTO in 1995 marks one of the most significant advances towards legally rigorous economic integration in the global political economy. Indeed, according to Abbott et al., the World Trade Organization approaches “the ideal type of full legalization, as in highly developed domestic legal systems.”

Judith Goldstein and Lisa Martin’s work on legalization offers a comprehensive explanatory framework for who has access and who has influence over the trade policymaking process following the shift from GATT to WTO. In their formulation,

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91 Krasner 1983.

92 Kahler 2001, 279.

93 Goldstein et al. 2001.


96 See Alter 2001; Goldstein and Martin 2000.

international institutional design exerts an independent causal effect on external trade policymaking. They argue legalization may have the positive, intended effect of reducing members’ incentives to behave opportunistically thereby furthering the liberalization imperative in the international trade regime. Greater precision and transparency about the legal obligations of members, together with the delegation of monitoring and dispute resolution functions to centralized organizational agents, will lead to more effective enforcement and disincentives to renege on commitments.\(^{98}\) Where members have hitherto been granted the flexibility to temporarily deviate from their commitments by invoking safeguards and escape clauses, legalization increases the likelihood that members will comply with the obligations proscribed under law.

However, legalization also has unintended effects. While pressure from free trade advocates will encourage states to uphold existing legal commitments, increased information and determinacy about the effects of proposed new rules may prompt free trade critics to mobilize in light of certain losses and ultimately stunt the progressive liberalization of international trade. The logic behind these hypotheses is as follows.

1) Increased availability of information prior to the conclusion of trade agreements will provide protectionists with certainty of lost goals and free traders with uncertain gains, thereby increasing the expected utility of mobilization for protectionists.\(^{99}\) (unintended consequence)

2) Prior to the conclusion of trade agreements, there will be an increase in mobilization of protectionists relative to supporters since the latter “are almost fully mobilized and are already participating in the political process… [T]he increase in information should lead to a relatively greater mobilization of the less involved, the antitrade group.”\(^{100}\) (unintended consequence)

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\(^{98}\) Goldstein and Martin 2000.

\(^{99}\) Goldstein and Martin 2000, 608.

\(^{100}\) Goldstein and Martin 2000, 608.
3) Prior to the conclusion of legalized agreements, stakeholders who benefit from the status quo will gain veto power and, hence, be more likely to have their interests included in the negotiating agenda; The prospect of legalized agreements will serve to deter the conclusion of new cooperative trade deals. (unintended consequence)

4) During the implementation of legalized trade agreements the logic of information provides a different outcome. Because penalties for non-compliance are more determinate under conditions of legalization, free traders will mobilize in greater force than protectionists to ensure compliance with trade agreements: “the effect of a more legalized regime may be to mobilize exporters in cases of certain market losses ex post.” (intended consequence)

5) Supporters of free trade will be relatively more successful than protectionists in having their interests translated into the EU’s external trade negotiating agenda under conditions of greater legalization thereby furthering the liberalization imperative in the international trade regime. (intended consequence)

Despite these provocative insights into trade policymaking, this explanation suffers from several conceptual pitfalls. While some issues can be overcome through slight modifications to the theory, others ultimately render it inappropriate for determining whether improvements in access and participatory mechanisms for NGOs produce more legitimate external trade policymaking in the EU.

First, Goldstein and Martin’s formulation focuses exclusively on the consequences of legalization for domestic politics. This poses a potential challenge to a study that focuses on a political process that, in many respects, exists both above and

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101 According to Goldstein and Martin (2000, 608), “The status quo favours protected groups, not potential new exporters. Since changes from the status quo require explicit affirmation – for example, ratification of a treaty—those who benefit from the status quo gain veto power. Thus typical institutional procedures that privilege the status quo will tend to privilege protectionist over liberalizing interests”.

102 As Goldstein and Martin (2000, 608-609) explain: Although information may mobilize import competitors before the conclusion of an agreement the effect of a more legalized regime may be to mobilize exporters in cases of certain market losses ex post. In this case, precision about which exporters will bear the cost of retaliation in a trade dispute works to mobilize exporting interests who would otherwise have no involvement in the trade dispute. Given the potential of a market loss they will press governments to uphold trade rules—increased determinacy can undermine trade deals by activating import competing groups with veto power. Conversely, precise rules regarding responses to rule breaches will result in more trade liberalization by activating export groups in the offending country.
below the state. This neglect cannot be attributed to underlying assumptions of the theory. Indeed, neoliberal institutionalism assumes a central role for non-state/transnational actors. Though recent formulations have been criticized for shifting focus exclusively to states as unified rational actors, neoliberal institutionalism was originally conceived, in part, as an explanatory framework that could provide insight into how non-state actors/transnational actors participated in and are affected by international institutions. While Neoliberal Institutionalists assume all actors in the international system, including state and non-state actors, are rational and calculating, assessing the constraints and incentives that are created by international institutions is a central research focus. Moreover, given that external trade policy is one of the most deeply integrated policy in the EU and, with few exceptions, the EU retains exclusive competence over trade policy, it is reasonable to conceive of trade politics in the EU as at least partially resembling the national process. As such, it may be possible to test Goldstein and Martin’s hypotheses in this environment without significant alteration.

The second major issue with Goldstein and Martin’s explanation is also conceptual; their explanatory framework presents a dichotomous picture of trade politics by limiting its scope to competition between free-trade and protectionist interest groups. By placing disproportionate emphasis on the role of economic actors typically associated with the “trade establishment”, these scholars potentially ignore a host of other actors that may influence external trade policy. Prior to the creation of the WTO, trade was largely confined to manufactured goods and primary products; stakeholders could be narrowly...
identified as industrial lobbies that consisted of import competing sectors seeking protection and export competing sectors pushing for the opening of foreign markets.\textsuperscript{105} Given the expansive scope of the WTO Agreements, it is now possible to identify a much wider range of interested parties. “Stakeholder” includes many non-economic entities such as farmers, labour, and non-governmental organizations that see free trade in these new areas as a potential concern. Therefore, anti-free trade coalitions cannot be reduced to “economic protectionists”. Moreover, the extension of trade law into sensitive regulatory areas that have conventionally been the domain of domestic policymakers has produced a new kind of actor, one that is concerned more about the overall social, economic, environmental and cultural impact of trade liberalization for an entire community, than about the distributional implications for particular sectors. Any explanation aimed at explaining external trade policy must account for the role of these actors.

This false dichotomy does not necessarily mean that the underlying logic cannot apply to non-economic, societal actors or NGOs. Indeed, the study of non-state actors in the EU’s political process is also a well- and long-established area of empirical inquiry for Neo-Liberal Institutionalists.\textsuperscript{106} At its core, Goldstein and Martin’s explanation assumes actors are rational and self-interested. The expected utility of organizing and demanding that certain interests are attended to increases as agreements become more legalized. Actors mobilize in greater force and find it easier to engage in collective

\textsuperscript{105} Ostry 2004; Ostry, Hakim and Taccone 2003.

\textsuperscript{106} For a sense of the breadth of this body of scholarship, see Pollack 1997; Streeck Schmitter 1991; Greenwood, Strangward Stanceich 1999; Kohler-Koch 1994; Marks and McAdam 1996; van Apeldoorn 2000; Joachim and Locher 2006.
action when they stand to lose the most. They become increasingly aware of what is at stake under conditions of legalization. The perceived or certain losses need not be limited to market share for this logic to apply. Although it is impossible to quantify, critics of free trade may in fact attach more value to the environment, democratic process or cultural/social welfare than exporters who value increases in market share. In other words, it matters naught whether actors are motivated primarily by material or principled goals—only whether the proposed trade agreement will facilitate or impinge upon the achievement of those goals. \(^\text{107}\) Given these caveats, it would be possible to broaden the parameters of Goldstein and Martin’s theory to include a wider range of actors, including NGOs.

But where Goldstein and Martin’s explanation ultimately falls down is on the question of legitimacy – the dependent variable in this study. On the one hand, Goldstein and Martin attribute the rise of social resistance and anti-free trade sentiments to increasingly legalized agreements. They caution that unless legalized agreements leave room for some policy flexibility to acquiesce to some of these demands, the conclusion of new cooperative deals may be hampered (they suggest Seattle was caused by legalization) or policymakers may renege on existing trade agreements. \(^\text{108}\) In this sense, they concede that the legalization of new trade rules may have the effect of entrenching unfair terms, may tend to prioritize economic over social goods or at least may distribute the benefits and burdens of free trade unequally. Despite these caveats however,

\(^{107}\) See Sell and Prakash (2004) who argue business and NGO networks deploy fundamentally similar strategies and activities to achieve their goals. In their estimation, they are competing interest groups who are both driven by a combination of normative ideals and material concerns. In a similar vein but arriving at a different conclusion, Cooley and Ron (2002) utilize a political economy approach and characterize international NGOs as market/instrumental actors, motivated primarily by material concerns.

\(^{108}\) Goldstein and Martin 2000, 631.
Goldstein and Martin take for granted the idea that more free trade is necessarily good. This presumption precludes reflexive consideration on the substantive impact of trade policy – particularly for developing countries. It also falls short of a progressive notion of fair trade i.e. the idea that a larger share of the benefits accrue to the poorest countries.

The debate over whether more free trade is the path to development and economic growth will not be settled soon. What is clear, however, is that Goldstein and Martin’s explanatory framework is silent on democratic principles and questions of justice and fairness. Indeed, some suggest all the authors in the IO volume have closed the door on tackling why legalization matters in the first place by simply equating legalization with legitimacy. Three problems stand out in this respect. First, by “assuming that the degree of obligation, precision and delegation indicate the normative force of a rule” legalization scholars are unable or uninterested in questioning why actors comply with the rules. Some have attributed this fault to a general reluctance to operationalize the three features of legalization in a meaningful way.

Second, by equating legalization with legitimacy, these scholars are unable to inquire into whether new rules serve to entrench unequal access to decision-making processes or entrench rights for powerful economic and/or private actors. For example, many are concerned that a shift towards legalization will be accompanied by a rise in judicial activism and a pooling of regulatory authority in the hands of unelected trade lawyers. As we will see in the next section, others are convinced that legalization

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111 Koremenos 2006; Finnemore and Toope 2001.
entrenches the structural power of investors and corporate actors. Goldstein and Martin’s framework is blind to such potentialities because it is silent on questions related to principled legitimacy. Third, equating legitimacy with legality makes questions concerning the substantive aspects of the rule moot; Goldstein and Martin’s framework effectively negates the responsibility to study the projected outcomes of proposed policies or new trade rules. Therefore, while they may provide a useful framework for studying the conditions under which we get more or less free trade it is inappropriate for studying the dependent variable in this study: legitimacy defined along procedural and substantive lines.

B. Epistemes

In this section, I argue that legalization or the “rule of law” matters in significant but fundamentally different ways than those envisaged by Goldstein and Martin. I also argue that the rule of law constitutes only part of the story. Below, I outline a Constructivist explanation and make three basic points. First, epistemes define the “limits of the possible”. They serve to enable and delimit agency and the ability of actors to play a meaningful role in policymaking is contingent upon their acceptance and willingness to work within dominant epistemes; their ideas and proposals must “fit” within prevailing social structures and when they do not, actors risk being co-opted, denied resources, marginalized or delegitimized. Second, the shift from GATT to the WTO served to institutionalize or further entrench a legal/liberal episteme and this ultimately has implications for external trade policy governance in the EU.

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112 For this debate see Weiler 2001; Esserman and Howse 2003.

113 Adler and Bernstein 2005.
Finally, epistemes empower technocrats and experts; as the episteme gains resonance these actors gain power (functional authority). Their work serves to maintain and reinforce dominant and largely universal norms, intersubjective ideas, rules of appropriate behaviour, consensual scientific knowledge and ideological beliefs. They are themselves the product of the dominant episteme and they work to co-opt and absorb forces of global civil society who resist or reject the prevailing episteme. According to Stephen Gill, a prominent Neo-Gramscian scholar, this strategy is a “tactic to legitimate the attenuation of democracy in economic policy by increasing participation [of global civil society] in safely channeled areas”. Through co-optation, technocrats will acquiesce to marginal or politically insignificant demand made by members of global civil society, thereby serving to further legitimize the status quo. In this sense, members of global civil society, including NGOs, may serve to maintain or reinforce existing global inequities rather than call them into question; their ability to stand apart from the prevailing order and ask whether it is just, fair and equitable may be thereby impeded. However, those who cannot be co-opted may be marginalized and their work delegitimized. If I find that this account of policymaking in the EU is convincing, then the precise role of NGOs in bringing about more legitimate policymaking is more promissory than actual despite improvements in participation and access.

114 “Functional authority” is defined on page 17, in Chapter 1.

115 Gill 2000a, 18.

116 Cox 1999.
The episteme concept has gained currency in recent scholarship. John Ruggie\textsuperscript{117} in particular is credited with introducing the concept to International Relations and generating a small cottage industry focused on the epistemic dimension of world politics.\textsuperscript{118} The epistemic communities’ literature has gained considerable traction in IR since the mid-1990s.\textsuperscript{119} Generally speaking, this body of scholarship views epistemes as “the attribute of science-based agents…who seek to socially construct policy in their image of the truth and principled beliefs” in order to promote international cooperation.\textsuperscript{120}

I build upon a much broader conceptualization of the term developed by Emanuel Adler and Steven Bernstein.\textsuperscript{121} Accordingly, epistemes constitute the deepest level of the ideational world. They are comprised of shared, intersubjective or taken for granted causal and evaluative assumptions about how the world works. At bottom, they are invisible lenses that allow human beings to interpret and make sense of the world; people are rarely conscious of the fundamental assumptions that comprise the episteme except at critical junctures.\textsuperscript{122} They are so powerful precisely because they are generally taken for granted and unamenable to scrutiny as a whole. Essentially, epistemes help people categorize, simplify and systematize what they experience in the world. Epistemes are

\textsuperscript{117} Ruggie 1975. See Antoniades (2003, 23-24) for an overview of Ruggie’s early contributions to this approach to world politics.

\textsuperscript{118} Adler and Haas 1992; Ruggie 1993; Legro 2000.

\textsuperscript{119} Haas (1992) revived Ruggie’s earlier efforts by presenting epistemic communities as an alternative IR approach to international policy making and coordination.

\textsuperscript{120} Adler and Bernstein 2004, 3. For a rigorous overview and critique of the epistemic communities literature see Antoniades 2003.

\textsuperscript{121} Adler and Bernstein 2004.

\textsuperscript{122} Kornprobst 2003.
embedded in a common discourse through which people communicate about the world and thus define the range of problems that can be addressed. According to Adler and Bernstein, “Episteme thus refers to the “bubble” within which people happen to live, the way people construe their reality, their basic understandings of the causes of things, their normative beliefs, and their identity, the understanding of self in terms of others”.\(^{123}\)

Notably, epistemes are numerous and permeable; the predominant episteme is just one among several possible sets of lenses through which to view the world. Although an interesting and important subject, the dynamics of epistemes – the study of why and how some epistemes are created and come to dominate social reality - is not the focus of this study. Instead, it is the power of epistemes – their ability to enable and delimit agency or empower particular actors over others – that is the focus here.

Bernstein and Adler delineate several dimensions or building blocks of governance that are constituted by contingent and ever-evolving epistemes. One dimension in particular performs the heavy lifting in this analysis, offering a more convincing account of observed patterns of inputs and outputs in EU external trade policymaking than does Goldstein and Martin’s information-based explanation outlined above. In particular, epistemic validity or “legitimate” knowledge is a core building block of governance. Epistemes dispose human beings to behave in particular ways and delineate the limits of the possible; they contain “background knowledge” or boundaries within which people reason and make choices. These boundaries may consist of “widely held accepted norms, consensual scientific knowledge, ideological beliefs deeply

\(^{123}\) Adler and Bernstein 2004, 4.
accepted by the collective, and so on”. Essentially, epistemes structure which actions and practices are conceivable and which are unimaginable. Moreover, epistemes endow some with the authority to determine valid knowledge and/or to reproduce the knowledge on which an episteme is based. Technocrats and experts are particularly advantaged relative to other actors. They possess an authoritative claim on knowledge; the more technical the issue area, the more functional authority or decisive power shifts to experts and technocrats. According to Adler and Bernstein, experts and technocrats gain functional authority under three conditions:

1) where they are required to make authoritative interpretations of the rules;

2) where they are required to develop standards in technical areas or;

3) through specialized cause-effect knowledge where their [policy] prescriptions gain legitimacy as focal points for cooperation, or the bases for new rules.126

In this sense, experts and technocrats exercise decisive power when they work to reproduce the episteme. This is not to suggest however that epistemes preclude agency. Indeed, “agents may [actively] resist attempts at controlling their behaviour”. However, epistemes also define who is friend or foe. As is the case with Anderson’s in-group and out-group distinction128, epistemes provide people with social identity, a political language/discourse, a political agenda and standards of legitimate political action. Those who reject the knowledge on which the episteme is based ultimately

124 Adler and Bernstein 2004, 12.
125 Adler and Bernstein 2004, 4.
126 Adler and Bernstein 2004, 14.
127 Adler and Bernstein 2004.
128 Anderson 1983.
relinquish membership in “communities of the like minded” and should either be re-educated or cast as enemies of the episteme and denied political resources lest they undermine or form backlash against predominant values, norms and beliefs. In this way, technocrats and experts ensure governance rests on “sound” or acceptable epistemic foundations.

A hybrid episteme, containing both legal and liberal dimensions, is entrenched in the international trade regime and this ultimately has implications for governance in the EU. The liberal aspects of the episteme are well known and its tenets are beyond reproach in the international trade regime. At its core is a philosophy about the market and the belief that open markets and free trade are a panacea for development and economic growth. It prioritizes efficiency and maximizing profits by achieving freer movement of goods and services, resources and enterprises. It is concerned with making transactions between actors easier and less costly. It is underscored by the belief that free and open markets are prerequisites for democracy and allow wealth to trickle down to the poorest recesses of the world. Moreover, economic globalization is considered the inevitable and rational consequence of capitalism since it is expansionary in nature; it requires ever-bigger markets, more consumers with a taste for a larger-range of products. Indeed, this endpoint characterizes the final stage of capitalism and the highest stage of human progress. Adler and Bernstein qualify, “policy prescriptions have varied significantly over the history of the [international trade] regime but they only reflected ‘political compromises’ … to the degree they create the necessary stability to further the goals of liberalization.”

The primary objective of the so-called Doha Development Round, as articulated in the Ministerial Declaration\textsuperscript{130} in Qatar in 2001, is to reform the international trade regime to promote economic growth and sustainable development in the poorest regions of the world. Paragraph 1 of the Declaration establishes that progressive elimination of barriers to trade is the coveted path to achieving these goals.

The multilateral trading system embodied in the World Trade Organization has contributed significantly to economic growth, development and employment throughout the past fifty years. We are determined, particularly in the light of the global economic slowdown, to maintain the process of reform and liberalization of trade policies, thus ensuring that the system plays its full part in promoting recovery, growth and development. We therefore strongly reaffirm the principles and objectives set out in the Marrakech Agreement Establishing the World Trade Organization, and pledge to reject the use of protectionism.\textsuperscript{131}

Paragraph 2 also explicitly recognizes “the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trade regime generates”.\textsuperscript{132} WTO members agreed to develop policy that would distribute the benefits and wealth derived from international trade more evenly thereby reducing disparities between the north and south. The needs and interests of developing countries were to be placed at the heart of the Work Programme adopted by the Doha Declaration provided they are consistent with the principles outlined in Paragraph 1. A glance at key items pertaining to development in the Work Program confirms that the Doha Agenda fits inside the liberal “bubble” described above.

\textsuperscript{130} WTO 2001b.

\textsuperscript{131} WTO 2001b, Para. 1.

\textsuperscript{132} WTO 2001b, Para. 2.
Since nearly 70% of the world’s population lives in rural areas and commodity production constitutes the livelihood of over 2.5 billion people, there is no question that agriculture is the single most important issue for development in the current round of multilateral trade negotiations.\textsuperscript{133} Indeed, it is widely viewed as the key to unlocking poverty in the global south. In 1999, UNCTAD estimated that an extra $700 billion in export earnings could be gained by developing countries if low-tech and low-resource-based industries were not protected in the North and agriculture would factor significantly into that figure.\textsuperscript{134} According to Oxfam, total subsidies and farm aid to domestic producers in [the US and the EU] amount to more than $1 billion a day.\textsuperscript{135} Subsidies generate over-production and lead to export dumping, the practice of selling goods at a price less than the cost of production, which drives down world market prices and undermines agricultural production in developing countries. In order to correct this incongruity, WTO members made an explicit commitment in the Doha Ministerial Declaration to make, “substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support.”

WTO members also promised to improve the terms of trade and market access for non-agricultural products. In the declaration, developed countries signaled their willingness to reduce non-tariff barriers and to reduce or completely eliminate tariffs,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{133} FAO 2003.
\item \textsuperscript{134} UNCTAD 1999, IX.
\item \textsuperscript{135} Watkins and Fowler 2002, 11.
\end{itemize}
\end{footnotesize}
including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, on products of strategic export interest to developing countries.

Special attention was paid to least developed countries\textsuperscript{136} and small and vulnerable economies with the intent to integrate them deeper into the international trade regime while providing enhanced opportunities for them to reap related benefits.\textsuperscript{137} Chief among these was the promise to extend duty-free and quota-free market access to least-developed countries and the principle of “less than full reciprocity”. These were mechanisms designed to take into account the special needs and interests of developing and least-developed countries and ultimately to even the playing field between the north and the south.

Trade-related technical assistance was promised in the interest of filling the capacity-deficit. WTO members acknowledged the need to improve the volume and quality of developing and least-developed country participation in trade negotiations and to help them make effective use of the flexibilities contained in existing Agreements. These measures can also be viewed as an attempt to socialize developing countries to the liberal episteme. In this vein, WTO members also promised to address implementation-related issues raised by the Like-Minded Group of developing countries concerning

\textsuperscript{136} According to Stiglitz and Charlton (2005, 87), “least developed countries are characterized by their exposure to a series of vulnerabilities and constraints, such as limited human capital and productive capacity; weak institutions; geographic handicaps including poor soils, vulnerability to natural disasters, and communicable diseases; poorly diversified industries and underdeveloped markets for many goods and services; limited access to education, health, and other social services; poor infrastructure; and lack of access to information and communication technologies. For a list of least-developed countries see: \url{http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm}

\textsuperscript{137} WTO 2001b, paras. 42-43.
imbalances in the WTO Agreements.\textsuperscript{138} Essentially, the LMG raised almost 100 items of concern that centered around difficulties experienced by least-developed and developing countries in implementing their commitments and failure of developed countries to implement certain commitments and obligations including Special and Differential Treatment Provisions.\textsuperscript{139} Though much controversy remains, special and differential treatment was ultimately enshrined in the Declaration as an integral part of the WTO Agreements.\textsuperscript{140}

Many suggest that developing countries paid a heavy price for the inclusion of these items in the Doha Agenda.\textsuperscript{141} This is not the place to engage in such a debate. Instead, it is prudent to highlight that the Declaration constitutes a framework agreement; the Doha Declaration did not specify the precise content of negotiations and subsequent agreements. As we have witnessed in past Rounds of trade negotiations, the track record of developed countries in holding up their end of the bargain is poor. A closer examination of negotiations in subsequent chapters will provide better insight into these important issues. Nonetheless, it is clear that a liberal episteme is firmly entrenched in the international trade regime and this is the context for EU external trade policymaking.

\textsuperscript{138} For an overview of the activities of the LMG in the run up to Doha as they relate to implementation-related issues see Narlikar and Odell 2006.

\textsuperscript{139} According to the WTO (2001a), 40 of the 100 issues raised were addressed at the Doha Ministerial Conference in the Decision on Implementation-Related Issues and Concerns. The remaining items are the subject of current negotiations. For an assessment see ICTSD 2003.

\textsuperscript{140} WTO 2001b, Para. 44. Special and differential treatment provisions include: longer time periods for implementing Agreements and commitments; measures to increase trading opportunities for these countries; provisions requiring all WTO members to safeguard the trade interests of developing countries; support to help developing countries build the infrastructure for WTO work, handle disputes, and implement technical standards, and provisions related to Least Developed Country (LDC) Members. See CTD 2005 for further details about work on Special and Differential Treatment.

\textsuperscript{141} Critics argue the work program continues to reflect the priorities of the developed world and fails to address key points of interest to developing countries. For this point of view see Lal Das 2003; Khor 2002.
We are less familiar with the implications of the legal aspects of the episteme since the trend toward legalization in the international political economy is a quite recent phenomenon. The shift from GATT to the WTO did not only serve to further entrench the liberal episteme in the international trade regime. It also, “shifted power to the legal, adding a new layer of judicial authority expected to increase the legitimacy of the organization by ensuring the rule of law would triumph over political considerations”.\textsuperscript{142}

I outlined in detail the definition and rational behind “legalization” in the previous section. In brief, the imposition of international legal constraints on governments is intended to make commitments more credible and transparent. Compliance with the rule of law “identifies acceptable versus unacceptable forms of governance, privileges a particular kind of knowledge and discourse (legal-rational), and defines insiders and outsiders – those who follow the “rule of law” and those who do not”.\textsuperscript{143} Legal constraints also ensure fair and consistent application of the rules and make the business environment for traders and investors more stable and predictable. They also work to dis-embed market transactions from social and environmental regulation. In this sense, the rule of law and liberal epistemes are inherently linked; legalization is, in essence, the rule of law counterpart to the liberal or free market episteme described above.\textsuperscript{144}

\textsuperscript{142} Adler and Bernstein 2004, 27.

\textsuperscript{143} Adler and Bernstein 2004, 21.

\textsuperscript{144} Stephen Gill (1998, 24-27) refers to this phenomenon on “New Constitutionalism” - the politico-legal dimension of a disciplinary neo-liberalism. It reflects government’s willingness to subordinate popular democratic accountability to the demands of the most powerful market forces through formal contracts underpinning the disciplinary power of capital. It involves three interrelated mechanisms which are “locking in” long term economic reforms: (1) Measures to reconfigure state apparatuses; the locking in of already adopted free market policies through the use of legal guarantees and sanctions; (2) Measures to construct and extend liberal capital markets vis à vis internal and external constitutional or legal controls; (3) Measures for dealing with dislocations and contradictions; mechanisms to co-opt and channel opposition so they do not form political backlash against economic liberalization. See also Gill 2000, 2003.
ultimately serves to institutionalize rules that entrench rights for investors and corporations and serves as the focal point for resistance and growing demands for a voice in policymaking,

…an expanded discourse of legalization empowers societal groups to participate, or at least make claims for a right to participate, more directly in negotiations and judicial proceedings formerly viewed as servicing only the market, because they would subsequently be viewed as part of a broader governing arrangement affecting society as a whole.\textsuperscript{145}

Like the Epistemic account of external trade policymaking in the EU, Goldstein and Martin predict that the rule of law serves to entrench rights for corporate actors. They also predict that the legal entrenchment of economic as opposed to social or environmental rights empowers societal groups to make claims for a right to participate in rule making. Nonetheless, they miss an important step in the causal chain. While it is clear that corporations and investors want a stable, transparent and rule governed business environment, experts and technocrats are empowered relative to all other actors in the policymaking process to maintain and reinforce that status quo. As legalization becomes further entrenched and extends into more complex and technical areas, experts and technocrats gain greater functional authority. Experts and technocrats work to ensure rules rest on sound liberal and legal epistemic foundations and in effect serve as gatekeepers who control who has a voice in governance.

I argue that the role of NGOs in external trade policymaking is determined by the fitness of their demands and grievances with the prevailing legal/liberal episteme. If the epistemic explanation best accounts for external trade policymaking in the EU, I would

\textsuperscript{145} Adler and Bernstein 2004, 22.
expect to see the following observable implications following the shift from GATT to WTO:

1) In order to legitimize the prevailing episteme and make it sustainable, policymakers will respond positively to increased demands by societal groups (read NGOs) for improved transparency and public accountability, opportunities for access and participation in the external trade policy making process. (improved procedural legitimacy)

2) Societal groups who are both willing and able to work within the parameters of the dominant episteme will serve as interlocutors; improvements in access and participation enable them to play the roles of educators and agenda setters, generating awareness and giving a voice to broader societal concerns.

3) The integration and implementation of the range of substantive disciplines contained in the WTO Agreements constrain the range of policy options considered appropriate by policy makers in the EU. Where policy discussions concern the nuts and bolts of trade agreements we will observe a “pulling away” from deliberative or broadly participatory processes.

4) The agreements conferred under the WTO are juridically protected to prevent deviation from the liberal market principles already widely entrenched in policymaking circles and to prevent public and/or political interference with the free functioning of the market. Political compromises will be struck only when they are necessary to further core goals of the episteme.

5) The more technical (as opposed to political) the issue, the more functional power pools in the hands of experts and technocrats. This is especially the case when: 1) they are required to make authoritative interpretations of the rules; 2) they are required to develop standards in technical areas or; 3) through specialized cause-effect knowledge where their [policy] prescriptions gain legitimacy as focal points for cooperation, or the bases for new rules.\(^{146}\)

6) Technocrats and experts will attempt to socialize, co-opt and safely channel potential opposition from societal groups such as NGOs so they do not form political backlash against the dominant episteme. Concessions and compromises will be offered in least vital areas in an effort to suppress resistance.

7) By contrast, NGOs which cannot be co-opted, who reject the episteme wholesale, who operate on the margins of the governing arrangement are cast as outsiders; they are marginalized and people in a position of power (technocrats and experts) aim to de-legitimize their grievances through “they just don’t understand” tactics.

\(^{146}\) Adler and Bernstein 2003, 14.
IV Conclusion

In this chapter, I advanced a working definition of Post-National Legitimacy and presented three accounts of policymaking in the EU following the shift from GATT to WTO. The Cosmopolitan, the Legalization and the Epistemic explanations each envisage fundamentally different patterns of empowerment and outcomes in the external trade policymaking process following this shift. These patterns have significant implications for whether improving access and participatory conditions for NGOs leads to improvements in Post-National legitimacy in Europe. Cosmopolitans, basing their insights in democratic and normative theory, predict causal links between increasing the formal involvement of NGOs in policymaking and more democratic, just, fair and equitable policymaking. The Epistemic explanation, by contrast, looks to the deepest level of the ideational world, epistemes, for insight into the policymaking process. According to this account, experts and technocrats, not NGOs, are empowered in the external trade policymaking process, despite improvements in participatory and access conditions. As I will show in Chapters 4 and 5, while the activities of NGOs certainly do lead to a range of improvements in procedural legitimacy, this can only be thinly linked to their formal involvement in policymaking. Where their activities concern the substantive aspects of policy, they have been unable to affirm broader social values and purposes over the legal/liberal episteme.

As I discuss in detail above, the Legalization explanation will not be tested in subsequent chapters. Instead, I will test both the Cosmopolitan and Epistemic explanations in two case studies in Chapters 5 and 6. The first concerns the formulation of the European Communities’ (EC) position on trade related intellectual property rights
and access to medicines. The second concerns the EC’s requests for water services liberalization in the context of GATS 2000 negotiations. In advance of these case studies, I provide a detailed appraisal of the policymaking environment within which NGOs are clamouring for a voice. Chapter 3 maps the external trade policymaking environment in the EU and highlights significant changes since the conclusion of the Uruguay Round of Multilateral Trade Negotiations. Chapter 4 provides a detailed historical discussion of the entrenchment of services and intellectual property rights in the international trade regime. This discussion serves to highlight the ideational and legal constraints under which EU policymakers make decisions.
Chapter Three: Mapping the Role of Civil Society Organizations in the EU’s External Trade Policymaking Environment

I. Introduction

This chapter maps key changes in European Union-level trade policymaking since 1995, paying particular attention to new mechanisms designed to increase the balance of participation by members of civil society. It details and evaluates changes in the balance and nature of participation of a wide range of key stakeholders in the formulation of the EU’s external trade negotiating agenda since the conclusion of the Uruguay Round of Multilateral Trade Negotiations. This analysis illustrates the context within which NGOs are demanding a voice in policymaking and lays the foundation for further inquiry into the relationship between access and participatory mechanisms on one hand and Post-National legitimacy on the other.

The following analysis is divided into three parts. Part 1 outlines the evolution of trade policy governance in the EU. It details the “two-tier” delegation of authority that characterizes the external trade policymaking process. I also explore several points of controversy surrounding the delegation of exclusive competency to the supranational level following the extension of international trade rules into new areas such as intellectual property rights and services. It is the role of NGOs at the second level of delegation (day to day negotiations) that is the central concern of this study.

Part 2 maps the evolution of the role of CSOs, including business forums, trade unions, farmers, consumer organizations, faith-based organizations and NGOs in the EU’s external trade policymaking process since 1995. It examines the changing political opportunity structure by looking at access and participatory conditions in the major EU
institutions, the Council of the European Union, the European Parliament and the European Commission. I pay particular attention to the evolving consultative process in DG Trade and compare the experiences of economic and non-economic actors in this context. I conclude with some reflection on the implications of this analysis for the themes of this study.

II. The Evolution of Trade Policy Governance in the EU

External trade has a history as one of the longest and most deeply integrated policy area in the EU. Indeed, it comes second only to the internal market. In bilateral, regional or multilateral trade negotiations, the EU formally speaks with one voice and negotiates through one agent, the European Commission.

The Treaty of Rome, 1957, called for an internal market with no obstacles to trade and strong competition, as well as for multilateral liberalization. The first major step towards internal liberalization was achieved with the Customs Union formed in 1968. The Customs Union is the cornerstone of EU trade policy. The basic rules of the EC Customs Union are:

1) Free Circulation of goods originating in the EC Member States;
2) Adoption of a common customs tariff and Common Commercial Policy;
3) As a consequence of the implementation of the above two concepts, the free circulation of products originating in third countries inside the EC once they have been customs cleared in whatever port of entry of the EC custom territory.¹

These rules would come to establish the Single European Market. Also, according to Article 3(a) of the Treaty Establishing the European Community², trade policy should

¹ Inama and Vermulst 1999, 5.
aim to achieve an open market economy with free competition. In addition, the aims of Art. 131 are “to achieve the harmonious development of world trade, the progressive abandonment of restrictions on international trade and the lowering of customs barriers”.

Despite these overtures, it was never clearly articulated to what extent the EU should liberalize trade. As I will discuss below, this ambiguity would have serious implications for decision-making when the scope of international trade rules extended to services and intellectual property rights.

From the outset, the EU was granted exclusive competency to elaborate, negotiate and enforce all aspects of trade relations with third countries.3 Article 133 EC states that the EU retains exclusive competency over the Common Commercial Policy (CCP) which contains the provisions of EU external economic relations. Historically, the GATT provided the foundation and framework for the CCP. Although the EU was not a contracting party to the GATT in 1947, all the Member States were. Over the years the EU had acquired, for all intents and purposes, the status of a contracting party. The Commission negotiated on behalf of Member States in successive Rounds; the substantive and procedural provisions of the Agreements treat the EU as a single entity. Since 1970, the EU accepted most agreements negotiated within the GATT framework without acceptance by the individual member states as independent contractors.5

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3 As opposed to a system of mixed competence where authority is granted on “an ad hoc basis and for negotiating purposes...[and] individual member states retain a veto both through unanimity voting in the Council and through ratification by their own national parliaments”. Meunier and Nicolaïdis 1999, 482.

4 The Amsterdam Treaty (1997) renumbered many treaty articles and Article 113 (CCP) became 133. This also meant that Committee 113 became Committee 133.

5 With the exception of two agreements at the end of the Tokyo Round of multilateral trade negotiations and the part of the Tariff Protocol relating to the ECSC products. See Bourgeois 1982, 22 for further discussion.
The EU’s long established system of exclusive competency is modeled after the practice of trade delegation to the collective level in advanced industrial democracies, notably the United States, “where it had been shown that such delegation helped insulate the policymaking process from domestic pressures, thus promoting a more liberal trade order”. The fiduciary logic of delegation also helps explain this system of competency. According to Majone, the European Commission is both an agent and a fiduciary or trustee to whom a certain measure of independence is granted in the interest of achieving better quality policy outputs than would be possible if the European Commission only carried out Member State directives. According to this logic, the fiduciary, in this case the European Commission, is insulated from democratic notions of accountability that would inevitably constrain the quality of outputs it is able to produce. Essentially, this system was designed to increase the EU’s external influence in the creation and conclusion of trade agreements with third countries by presenting a common, unified front.

This system is characterized by a two-tier delegation of authority. In the first stage, the development of the EC’s external trade negotiating mandates, EU Member States delegate competency to the supranational level where the Council of the European Union works together with the Commission. The Commission, and particularly Directorate-General Trade (DG Trade), has the right of initiative to propose EU positions in trade agreements. It its responsible for drafting the intial negotiating mandate for the European Communities (EC). In doing so, the Commission must also conduct key policy

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6 Meunier 1998.

7 See especially, Majone 2001.
discussions with a special committee of the Council, “Committee 133”.\(^8\) This committee comprises senior civil servants and trade experts from the Member States as well as Commission representatives. The purpose of this committee is to communicate Member States’ positions to the Commission. Its formal role is consultative only and the agenda is set by the Commission but the Commission tends to follow the advice of Member State representatives at this stage. Committee 133 amends Commission proposals by consensus and transmits the initial negotiating mandate to the Committee of Permanent Representatives (COREPER).

COREPER plays a decisive and fascinating role at this stage of agenda-setting since it carries out the preparatory work for the Council. In this capacity, it scrutinizes the dossiers on the Council’s agenda including proposals and drafts for acts tabled by the Commission and Committee 133. It consists of two arms, COREPER I which consists of deputy permanent representatives and CORERPER II which is comprised of senior ambassadors and deals with matters pertaining to general affairs and external relations, economic and financial matters including external trade policy, and justice and home affairs.\(^9\) COREPER II is also responsible for the preparation of summits. Although it has no autonomous decision-making powers, COREPER plays a powerful role in the articulation of national preferences. It aims to reach consensus on each dossier or proposal and when an agreement is reached, items are forwarded to the Council as A points, to be approved by national Ministers without discussion. In the event that COREPER is unable to reach an agreement on a particular dossier, members will submit

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8 Named after Art. 133.

9 According to Article 207 EC Treaty, COREPER I is responsible for Employment, social policy, health and consumer affairs; Competitiveness (internal market, industry, and research); Transport, telecommunications and energy; Agriculture and fisheries; Environment; Education, youth and culture.
items for discussion to the Council as B points along with a set of guidelines, options or
suggestions. Items are also sometimes submitted to the Council as “False B Points”.
These items are internally described as such since they have already been negotiated and
agreed upon by COREPER but Ministers want to give the public impression that items
are being debated in the Council of the European Union. Negotiating mandates are
finally approved by qualified majority voting in the General Affairs Council (GAC) of
Ministers of Member States.\textsuperscript{10}

In the second phase, the Council of the European Union delegates competency to
the European Commission to conduct day to day negotiations; as long as the Commission
negotiates within the broad parameters set by the negotiating mandate agreed to by the
Council of the European Union and consults regularly with Committee 133\textsuperscript{11}, the
Commission (especially DG Trade) is exclusively responsible for devising the day to day
agenda and for negotiating on behalf of the EC. It is the role of Civil Society
Organizations at the second level of delegation (day to day negotiations) that is the
central concern of this study.

The role of Committee 133 at this stage is to make amendements to Commission
proposals for EC positions in ongoing external trade negotiations. Given this important
function, Committee 133 is often characterized as the most active and powerful Council
committee. Because it rarely makes its agenda public and the proceedings are kept

\textsuperscript{10} For a more intensive look at the delegation of competencies, see Meunier and Nicolaïdis 1999; Peterson
and Blomberg 1999, 90-115. According to Meunier and Nicolaïdis 1999, “In practice, Member States have
always managed to reach consensus on common text at this stage of the process” 480.

\textsuperscript{11} Committee 133 operates at two levels: the deputy level (meets weekly) and the full member level or top
configuration level (meets monthly). The former is comprised of one or two economic/trade counselors
from the permanent representation in Brussels and two to three trade experts from national capitals.
behind closed doors, it is often portrayed by members of civil society\textsuperscript{12} as a secret, technocratic decision-making body in the scheme of EU trade policymaking. These suspicions are compounded by its opportunity to review unpublished Commission proposals. Moreover, its recommendations, particularly those that pertain to more technical issues, are often accepted by national trade ministers without further debate in the Council.\textsuperscript{13} Some Commission officials whom I interviewed concur, claiming that Member States, as represented in Committee 133, are the Commission’s most important stakeholders who wield considerable influence over the day to day operations of the Commission.\textsuperscript{14} However, several permanent Member State representatives, who are also members of Committee 133, claim it is nearly impossible to influence the Commission on the substance of the day to day negotiating agenda. Only when there is a real and significant difference of opinion between a majority of Member States, including the biggest ones, can Member States really influence the Commission.\textsuperscript{15} One Permanent Member State Representative and Member of Committee 133, explained, “[Committee 133] is Commission dominated…Member States want a strong Commission. Sometimes the best way is not to tie its hands. This is good from the EU’s point of view. Member States feel effective, they want to discuss things and want to offer opinions, but they

\textsuperscript{12} See WWF 2003 for example.

\textsuperscript{13} As mentioned above, non-controversial issues, called A-points, are not discussed further by the Council once approved by COREPER.

\textsuperscript{14} Senior Trade Policy Official, Unit DG Trade, G1 - Trade in Services and Investment; GATS and Investment. Interview by author. 8 October 2004.

\textsuperscript{15} Permanent Member State Representative; Former Chair of Committee 133. Interview conducted by author, 4 October 2004.
don’t really have influence”. Moreover, several candid senior Commission officials supported the following view of one of their colleagues:

Negotiating mandates are ambiguous. EU Member States are not decisive over the substance of negotiating mandates. Member States are in the driving seat when setting parameters. Should the EU be willing to give up some agricultural subsidies? This is determined by Member States. The Commission is in the driving seat for the day to day decision-making based on what is feasible for one country or a group of countries to swallow. I have been struck by how unimportant… or how little attention Commission officials give Member States, as long as their work falls within the parameters set by Member States…The Commission must keep Member States at arm’s length in order to function.

Since Committee 133 operates on the basis of consensus, enlargement to 27 members is likely to reduce the overall influence of the Committee since blocking initiatives or requiring amendments will become much more difficult. Furthermore, during his tenure as DG Trade Commissioner, Lamy turned Commission attention away from spending large amounts of time and funds to coordinate Member State preferences. In the past, “the Commission would spend around 80% of its resources trying to coordinate Member State preferences and 20% of its time and resources would be spent on external affairs. Under Lamy, the opposite has been true”. So far there is no indication that this trend will change under Mendelsohn’s leadership.

Ultimately, where the Commission retains exclusive competence it also retains a good deal of autonomy to do as it pleases on a day to day basis. The European

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16 Permanent Member State Representative, Member of Committee 133; Council of the European Union; Department of Enterprise, Trade and Employment Counsellor. Interview conducted by author, 11 October 2004.

17 Desk Officer - Policy and negotiations, DG Trade, Unit F1- Coordination of WTO, OECD, Trade Related Assistance; GATT; and 133 Committee. Interview conducted by author, 12 October 2004.

18 Desk Officer, DG Trade, G1 - Trade in Services and Investment; Gats and Investment. Interview conducted by author, 8 October 2004.
Parliament plays no formal role in either the development of the negotiating mandate or the day to day negotiating agendas. The European Parliament is not formally consulted on trade agreements concluded under Article 133.\(^{19}\) There are provisions for non-binding consultations with Parliament for trade deals concluded under Article 300\(^{20}\) (formerly 228) but the Council has the right to act without Parliament’s opinion.\(^{21}\) Although the European Commission formally supports qualitatively enhancing the role and decision-making powers of the European Parliament,\(^{22}\) and despite exhaustive efforts by the European Parliament\(^{23}\) itself to convince Member States to revisit the provisions of Article 133, the status quo remains intact.

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\(^{19}\) According to Article 300 EC Treaty, “The Council shall conclude agreements after consulting the European Parliament, except for the agreements referred to in Article 113(3), including cases where the agreement covers a field for which the procedure referred to in Article 189b or that referred to in Article 189c is required for the adoption of internal rules.”

\(^{20}\) Article 300 EC Treaty concerns the conclusion of trade and economic cooperation agreements that offer a third country or group of countries a privileged trade relationship with the European Union.

\(^{21}\) However, the assent of the European Parliament may be required for major treaty ratifications, particularly those that cover more than trade. For example, the European Parliament gave its consent on the creation of the WTO at the end of the Uruguay Round of Multilateral Trade Negotiations. See Art. 300(3), subparagraph 2 of EC Treaty which states, “By way of derogation from the previous subparagraph, agreements referred to in Article 310, other agreements establishing a specific institutional framework by organizing cooperation procedures, agreements having important budgetary implications for the Community and agreements entailing amendment of an act adopted under the procedure referred to in Article 251 shall be concluded after the assent of the European Parliament has been obtained.”

\(^{22}\) This commitment is evident in its efforts to systematically engage with the EP by meeting with its Committee on International Trade (INTA), setting up weekly informal consultations, and providing information at regular intervals.

\(^{23}\) See for example, European Parliament 2001a, where the EP highlights the problematic aspects of Article 133 and calls “once again therefore on Member States to revise the provisions of the EC Treaty concerning the common commercial policy so as to guarantee the 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.”
Finally, once a trade agreement is negotiated, it is ratified in the Council of the European Union by qualified majority voting. The Commission is then responsible for implementing and enforcing the agreement once it is brought into force.\textsuperscript{24}

This system of exclusive competence only became contested once the creation of the WTO significantly extended the scope of international trade. The expansion of the world trade rules into policies traditionally not “at the border” (e.g. tariffs and quotas) but inside the state (national laws and regulations) forced an explicit internal EU debate on the issue of competence.

As mentioned earlier, Article 133 grants exclusive competence to the EU’s legislative bodies (excluding the Parliament) over the Common Commercial Policy. However, other than the requirement for uniformity and generalized statements regarding the progressive abolition of restrictions on world trade, Article 133 does not explicitly define the precise objectives or scope of commercial policy. The CCP was designed to cover trade in goods. The original architects of the EU did not anticipate that the scope of international trade rules would expand as it did. Therefore, the EU encountered an important constitutional problem. The issue was not so much whether the new WTO Agreements are binding, but which bodies would be responsible for interpreting and implementing the new rules into the EU and who would negotiate for Europe in subsequent negotiations.

In an effort to bring clarity to Article 133, the European Court of Justice was asked by the European Commission for an “advisory opinion” on the issue of competence of the EU and the Member States to negotiate, conclude and implement WTO

\textsuperscript{24} Meunier and Nicolaïdis 1999, 481.
Agreements. Opinion 1/94\textsuperscript{25} determined the EU retains exclusive competency to negotiate and implement the Multilateral Agreement on Trade and Goods, but it shares mixed competence with the Member States on matters concerning the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights.\textsuperscript{26} This opinion is pursuant to the ECJ ruling that, “Only in so far as common rules have been established at the internal level does the external competence of the Community become exclusive”\textsuperscript{27}. Therefore in order to avoid future competency disputes, the EU would have to amend the treaty either by enshrining mixed competency in the text or by explicitly expanding Art. 133 to include “new issues”.

In 1996-1997, the Commission lobbied Member States for extension of the EU’s competency in all areas covered by the WTO Agreements on the basis that services account for over two-thirds of the European economy. The Commission insisted that all future trade deals would involve services and eventually Member States would hold veto power over trade negotiations.\textsuperscript{28} The Commission suggested it should be granted the exclusive authority to negotiate trade agreements on all types of services and intellectual property because shared competency made the creation of mandates inefficient and hindered the EU’s bargaining strength in international negotiations.\textsuperscript{29} The result was an amendment to Article 133 made by the Treaty of Amsterdam that permitted the extension

\textsuperscript{25} European Community 1994.

\textsuperscript{26} For a legal analysis of the Court’s advisory opinion see, Bourgeois 1995; Hilf 1995.

\textsuperscript{27} European Community 1994 at para. 77. However, in para. 85, the Court accepts that very exceptional external powers may become exclusive without a prior exercise of internal powers.

\textsuperscript{28} See Cremona 2000 for a more thorough analysis of the legislative history and the scope of Article 133 and the implications of its amendment for the future of European external economic policy.

of the CCP to services and intellectual property rights without treaty reform, but only by a unanimous Council decision.\(^{30}\)

Between 1994 and 2000, Member States were reluctant to extend competency over trade in services and intellectual property to the EU. However, the Nice Summit 2001 ushered in a new phase of trade policymaking authority in the EU, headed by French trade commissioner, Pascal Lamy, who once again raised the issue. Ultimately, the Nice Summit achieved a compromise between the minimalist option that would retain the mixed competency status quo and the maximalist option that would communitarize all trade in services and intellectual property rights. Exclusive competency became the general rule for trade in services. Competence is shared only where “provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules”.\(^{31}\) Also, a “cultural exception clause” was introduced to the Treaty which states “the agreements concerning the harmonization of cultural, audiovisual services, education services, social services and health services continue to be the subject of responsibility shared with the Member States”.\(^{32}\)

Intellectual property was divided into two parts. The commercial aspects of intellectual property fall under exclusive competence and all other aspects of intellectual property are shared. The Council can decide by unanimity to extend exclusive competence to the latter.

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\(^{30}\) The new Art. 133(5) reads as follows: The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property rights insofar as they are not covered by these paragraphs.

\(^{31}\) Art. 133(5) EC Treaty.

\(^{32}\) Art 133(6) subparagraph 2 EC Treaty.
This system of trade policy competence is typically cited as evidence of the broad separation of economic policies from political accountability. Critics cite the technocratic nature of the Commission, qualified majority voting in the Council and, mere consultative courtesy extended to the Parliament once a mandate is formulated, as clear indications that public concerns are excluded from this process. However, the European Union has gone to great lengths to correct this perception by enhancing the role of CSOs in day to day external trade policymaking.

III. The Evolution of Civil Society’s Role in the External Trade Policymaking Process Since 1995

Trade liberalization has become politically contested as it reaches further into traditional domestic policy. In response to this reality, EU policymakers now identify and actively engage with a range of new actors who are more concerned about the overall social, economic, environmental and cultural impact of trade liberalization for entire communities, than about the distributional implications for particular sectors. These new actors are also increasingly aware that an ever-growing number of decisions that affect their lives are taken at the supranational level and are binding on their governments. As I discuss in detail in Chapters 1 and 2, a general feeling of exclusion from this process has led to widespread criticism of the democratic quality of trade policymaking. Many new actors are mobilizing, not to ensure particular sectors are protected or insulated from the costs of trade liberalization, but to demand that the process through which trade-related decisions are made involves broader civil society.

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33 The method used in the following section to describe and evaluate the consultative process in EU external trade policy draws heavily from Ostry et al. 2003.
Despite the shortcomings of particular mechanisms, it is clear that EU level policymakers have responded in significant and dramatic ways to these new demands for access and participation, especially in the area of external trade policymaking. Indeed, the Commission acknowledges that the economic justification for delegating trade policymaking to an executive in order to avoid capture by protectionist interests no longer holds. Overall, there has been an aggregate improvement in access and participation of members of civil society since 1995.

A. Council of the European Union

Stakeholders organized at the EU level do not enjoy any formal channels of consultation with the European Council and its various components such as COREPER, the Council Secretariat and Committee 133. The Council is characterized by a general unwillingness to engage with CSOs. This is largely due to the fact that the Council represents the interests and preferences of the Member States. Member State positions reflect various stakeholders’ aggregated interests and preferences that have already been expressed at the national level. At the EU level, Member State representatives engage in intense bargaining and often the decisions taken by Council bodies reflect the lowest common denominator between the most powerful EU Member States.

34 Often informally referred to as the “Council of Ministers”.

35 Notably, liberal institutionalists disagree over the precise source of domestic preferences. Some believe that patterns of economic interests in the domestic sphere determine whose interests are ultimately reflected in the national platform. For more on the commercial liberal view see Moravcsik 1997. Others argue that while economic incentives are necessary, they are not a sufficient explanation of domestic preference formation. Instead, republican liberal theorists argue domestic political institutions will determine whose interests are reflected in the national platform. See Moravcsik 2003 and, especially, Milner 1988; Alt and Gilligan 1994.

Some stakeholders have launched aggressive initiatives calling for more transparency in Committee 133 meetings. For example, in 2003, the World Wide Fund for Nature (WWF) called for the inclusion of parliamentarians from Member States and from the European Parliament in Committee 133 meetings. Many CSOs recommend that parliamentary reviews of the proceedings should occur at regular junctures. They also demand the publication of Committee 133 agendas, records of decisions taken, and lists of all participants. A coalition of European CSOs issued a Joint Statement that echoes these demands. The signatories also claim the rules of procedure guiding the work of Committee 133 do not allow for sufficient opportunity for other bodies to make effective input into their deliberations. As it stands, members of Committee 133 are allowed 10 days to consult with relevant experts at the national level. CSOs view this as inadequate and call for more time to allow for thorough consultations at the member state level and with other, relevant Directorate-Generals.

In a more extreme move, the WWF-European Policy Office launched a court case at the European Court of Justice against the Council of the European Union after it was denied access to minutes, resolutions and recommendations of Committee 133 meetings following the failure of the WTO talks at Cancun. The WWF-European Policy Office challenges the legal basis of Committee 133 and claims documents were wrongly withheld. The court case is still pending but since Committee 133 is an advisory

37 WWF 2003.

38 This call for parliamentary involvement in committee 133 proceedings echoes the European Parliament’s (2001) Resolution on Openness and Democracy in International Trade.


40 The 10 day rule was introduced under the Spanish Presidency in 2002 in response to the view that Member States were being pressured by the Commission to accept proposals. WWF 2003.
committee, not a decision-making body as the WWF implies in its case, it is unlikely that the case will be successful. Ultimately and despite these actions, no new provisions, formal consultative procedures or time allocations have been developed to improve feedback to Member States.

According to senior level EU officials, these demands for transparency in Committee 133 are ill founded and demonstrate a fundamental misunderstanding of trade negotiations. As one official explains, “…you cannot do trade policy fully transparently or we are only a postal service. Strategy must be private. We must have space to negotiate. There are so many leaks already coming out of Committee 133 that the most contentious issues are not discussed there. If tomorrow, Committee 133 was forced to become even more transparent, fewer and fewer issues would be discussed there”. Essentially, EU Commission officials and Member State representatives agree that negotiations must be allowed to occur between Member State representatives without having every bottom line revealed. To do otherwise would serve to weaken the EU’s power in international negotiations.

Moreover, holding talks behind closed doors allows Member State representatives the façade of appearing to represent their own constituencies, even when they are compelled to do otherwise (e.g. unable to get a

41 Senior Official, DG Trade Unit A2 – Inter-institutional Relations and Communications Policy. Interview by author. 29 September 2004.

42 For instance, a Desk Officer working in DG Trade, F1-Coordination of WTO, OECD, Trade related assistance, GATT, and Committee 133 suggests, “The problem is the Americans. They can very easily see the constellation of interests in Europe. The US can target particular Member States who have positions that hurt the US position. If these documents were public it would be much more easy for the US to divide and rule when there is a dispute. It is interesting in terms of international relations. This is why discussions of Iraq policy are not public. You have to weigh the domestic policy requirements against the international policy requirements for trade policy. This makes it a little more difficult.” Interview by author. 12 October 2004.
qualified majority of states to force revision of Commission proposal).\(^{43}\) To date, there are no opportunities provided for any stakeholders (including business, industry, trade unions, consumer organizations, CSOs) to have a formal voice in the Council.

Even so, some CSOs charge that industry associations participate directly in Committee 133 meetings. For example, Jonathan Stevenson of Social Europe claims that leaked documents reveal, “the European Services Forum (ESF), a corporate lobby group established in 1999, were routinely invited to take part in meetings of 133 Committee services.”\(^{44}\) According to Commission officials and the director of the European Services Forum, this claim is categorically false. Moreover, both Mr. Stevensen and the Corporate Europe Observatory, the institute where these documents are said to be filed, have denied me access to this evidence. However, there is clear evidence of an informal relationship developing between Members of Committee 133 and business/industry associations. While the ESF does not sit in on Committee 133 meetings, it does organize biannual meetings where it invites members of Committee 133 and Commission officials to its head office.\(^{45}\) Similarly, as Christina Deckwirth of World Economy, Ecology and Development (WEED) reports, the Commission has orchestrated informal meetings between water companies, such as RWE/Thames and Members of Committee 133.\(^{46}\) In their defense, EU officials claim it is really up to stakeholders to generate such informal

\(^{43}\) Senior Trade Policy Official, Unit DG Trade, G1 - Trade in Services and Investment; GATS and Investment. Interview by author. 8 October 2004.

\(^{44}\) Stevenson 2005, 45.

\(^{45}\) Email Joao Machado Aguiar, Head of Unit DG Trade, G1 – Trade in Services and Investment; GATS and Investment to Pascal Kerneis, Director of the European Services Forum, 31 October 2003. This correspondence was confirmed as accurate by a Senior Trade Policy Official working in DG Trade, G1 - Trade in Services and Investment; GATS and Investment. Interview by author. 14 June 2005.

\(^{46}\) Deckwirth 2006, 4.
relationships. CSOs could orchestrate meetings with Commission officials and Members of Committee 133, just as industry does. In fact, some stakeholders have made it a practice to approach trade counselors at the permanent representation in Brussels. Some well-established NGOs (ie Oxfam) in particular try to contact incoming, rotating presidencies of the Council. These groups aim to assess the goals of incoming presidencies in order to prioritize their work appropriately. Nonetheless this practice is really more the exception than the rule amongst trade and development NGOs.

**B. European Parliament**

The European Parliament may discuss issues pertaining to external trade policy in plenary or in committee. The Committee on International Trade (INTA) compiles reports on various aspects of the EU’s external trade relations with third countries. As discussed above, with the exception of the right of assent for major treaty ratifications provided for in Article 300, the European Parliament has no formal decision-making powers over external trade policy. This is despite efforts to extend co-decision at both the Nice Summit and in the failed European Constitution. However, during Pascal Lamy’s tenure as Trade Commissioner (1999-2004), the Commission developed the practice of involving the European Parliament in the day to day discussions regarding external trade policy. DG Trade tries to keep the EP abreast of all major developments and to give members of the INTA all or at least the most important documents and proposals for review. Essentially, they are trying to engage the EP through information


and consultation. However, while members of the EP and Commission officials all testify to the value and importance of this relationship, consultation is not an institutionalized practice and could fall away in the absence of more formal treaty amendments.

This highlights a peculiar relationship between access and policymaking power in the European Union. While the EP lacks any formal decision-making powers over external trade, CSOs enjoy a great deal of access to European parliamentarians. In fact, parliamentarians often actively pursue input from CSOs. On one hand, this can be linked to the democratic imperative; an effort by elected officials to convey the broader concerns of the public in trade policy discussions and recommendations. However, others attribute this to the general lack of technical expertise amongst those working for the European Parliament. For instance, one of the more vocal critics of the proposal to extend co-decision powers to the European Parliament claims, “The day the constitution is ratified and the EP gets a vote is the demise of the EU trade policymaking process. It will become similar to the US Congress. There will be big competency problems, especially regarding services.”

According to a Senior Commission Official, “The EP is an oddity in the constitutional setup of the EU. It does not have any substantive power but the Commission [is now trying to] compensate for this by including them in trade policymaking by offering information. Lamy meets with the EP two times a month and other Commission officials attend the Parliament when their expertise is requested. [The Commission] transmits them all documents and policy papers, except secret initiatives, before they are passed. Lamy and other Commission officials participate in plenary before WTO ministerial meetings. They key point is, the EP has no power of assent but the Commission [now] treats them as if they do...In addition, a group of MEPs comprises part of the EU delegation at WTO ministerial meetings. In Mr. Lamy’s view, this reinforces the legitimacy of the negotiator (Commission +Lamy) when other members of the WTO see that the EU has the support of the European Parliament.” Interview by author. 29 September 2004.

Pascal Kerneis, Director of the European Services Forum. Interview by author. 24 September 2004. Concerns about MEPs’ trade policy competence are echoed in several interviews with EU officials and Permanent Member State Representatives but the general view amongst them is once the EP has more power its members will have more incentive to educate themselves.
The jury is still out on the possible consequences of co-decision powers for the EP. However, it is clear the European Parliament is a voracious consumer of CSO papers and proposals, sometimes cutting and pasting entire arguments from their submissions into their reports. While this practice is obviously welcomed by many CSOs, it sometimes plays out in ironic ways. In one reported instance, a Commission official helped an NGO draft an amendment for Members of the European Parliament (MEPs) who were working on a Community Regulation. Members of INTA subsequently copied and pasted the NGO paper into a report and submitted it to Commission officials during a plenary. In response, the Commission rescinded its position, allowing the amendment to pass. Ultimately, dependence on CSO expertise should work to further CSO goals. However, in the absence of critical assessments of incoming reports, the EP (and not Committee 133) risks becoming little more than a postal service in the scheme of EU comitology. In addition, many are optimistic that increased decision-making powers for the EP will translate into more and qualitatively enhanced voice for CSOs. In the meantime however, the voice of the European Parliament and thus the actors who contribute to its positions is best characterized as a tempest in a teapot in comparison to the power of the Commission and the interests it represents (at least at the second level of trade policy delegation).

C. European Commission

The European Commission is comprised of the College (Commissioners in charge of each dossier or Directorate-General and President), the Cabinet of each Commissioner, the Directorates-General (DGs) and the Commission Services (desk officers). The Secretariat-General is responsible for the horizontal coordination of the Directorates-
General. It develops the general approach of the Commission to civil society and works to establish guiding principles for consultation. Since the Commission is decentralized, each DG conducts consultations and dialogues with Civil Society independently. In this respect the Secretariat-General plays a soft coordinating role; it sets minimum standards of consultation which establish and/or confirm the basic principles in order to ensure some consistency across the DGs. Each DG then chooses its own consultative mechanisms according to its needs. Therefore, any understanding of the changes in consultative mechanisms developed and implemented by DG Trade must begin with a discussion of efforts taken by the Secretariat-General to improve the Commission’s transparency, openness and dialogues with Civil Society.

Article 2 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality (EC Treaty) instructs the Commission to conduct wide consultations before proposing new legislation and to publish consultation documents when appropriate. However, widespread concern about public involvement, openness and access to documents emerged in the mid-1990s. Most concerns were directed at the European Commission and cited its technocratic style of operations as the source of its problems. The resignation of the European Commission in 1999, the Irish “No” vote in its Nice Treaty ratification, and the low voter turnout and lack of public debate preceding the Nice Summit only served to exacerbate the Commission’s so-called legitimacy crisis. In partial response, the Commission launched a series of assessments and consultations on civil society’s involvement in EU governance beginning in 1999.

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51 Senior Official, Secretariat-General Directorate B: Relations with Civil Society. Interview by author, 10 June 2005.
The Commission created a “Governance Team” which solicited views from a wide range of interested parties on how to improve their involvement in policymaking. This preliminary work served to form the basis of a series of recommendations in the 2001 *White Paper on European Governance*. These recommendations were further developed in a 2002 Commission Communication entitled, *Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission*. As of January, 2003 all DG’ are required to apply the following General Principles and Minimum Standards.

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52 The Commission’s consultations targeted members of civil society which includes, “…labor and management organizations (the “social interlocutors”), in addition to non-governmental associations, charity organizations, grass-roots organizations, and organizations fostering citizen participation in local and municipal life, with a special contribution by churches and religious communities.” See European Commission 2001c, footnote 9.

53 European Commission 2001d, identifies three key clusters of comments and suggestions voiced at the various hearings held by the working group:

Firstly, all representatives of the different civil society organizations involved stressed the need for the Commission to adopt a *more systematic and coherent approach* to its consultation processes…[they] urged the Commission to establish an *overall framework* by setting out *principles* and criteria to give structure to consultation policy….

Secondly, it was unanimously argued that the functioning of existing *formalized or structured consultation arrangements* (i.e. advisory committees, expert groups or other consultation forums consisting of civil society representatives) should be made *more transparent* as well as properly *evaluated*.

Finally, some NGOs called up the Commission to propose a *legal base* for a structured dialogue with the NGO community (in the form of an Article in the Treaties or a Council Regulation).

54 European Commission 2001c.

Table 1: General Principles and Minimum Standards for European Commission Consultations with Interested Parties

General Principles

- **Participation**
  - “The quality […] of the EU policies implies wide participation by the citizens in each and every one of the different phases of the process, from policy conception to policy implementation.”

- **Openness and Accountability**
  - “The [European] institutions should work in a more open manner […] in order to improve the confidence in complex institutions.”
  - “Each of the EU institutions must explain and take responsibility for what it does in Europe.”

- **Effectiveness**
  - “Policies must be effective and timely, delivering what is needed”.

- **Coherence**
  - “Policies and actions must be coherent”

Minimum Standards

- **Clear Content of the Consultation Process**
  - “All communications relating to consultations should be clear and concise, and should include all necessary information to facilitate response”

- **Consultation Target Groups**
  - “When defining the target group(s) in a consultation process, the Commission should ensure that relevant parties have an opportunity to express their opinions”

- **Publication**
  - “The Commission should ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of target audiences. Without excluding other communication tools, open public consultations should be published on the internet and announced in a “single access point”

- **Time Limits for Participation**
  - “The Commission should provide sufficient time for planning and responses to invitations and written contributions. The Commission should strive to allow at least 8 weeks for reception of responses to written public consultations and 20 working days notice for meetings.

- **Acknowledgement and Feedback**
  - “Receipt of contributions should be acknowledged. Results of open public consultation should be displayed on websites linked to the single access point on the internet”

Since the DGs are autonomous units, there is no Commission-wide or uniform approach to implementing these principles and standards. This has led to “a patchy picture of civil society dialogue” emerging across the DGs. However, the Commission has developed a number of mechanisms designed to help the DGs meet these broadly defined “soft” policy objectives. For example, the Commission’s “Better Lawmaking”

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56 Fazi and Smith 2006.
activities help the DGs develop more coherent policy proposals.\textsuperscript{57} In this vein, the Commission conducts assessments of the likely social, environmental and economic impact of proposed policy actions and regulations.\textsuperscript{58} The purpose is to generate a “culture of feedback and review to learn from the successes and mistakes of the past…[and to] ensure proposals do not over-regulate and that the decisions are taken and implemented at the appropriate level”.\textsuperscript{59} In part, impact assessments are intended to structure and generate broad debates with a range of interested parties over proposed policies and regulations.\textsuperscript{60}

The Commission created “Your Voice in Europe”\textsuperscript{61} as part of the Interactive Policymaking Initiative (IPM)\textsuperscript{62}, thereby following through with its commitment to develop a single access point through which it could communicate with interested parties. This internet portal enables the Commission to solicit participation in and publish the results of public consultations, gives EU citizens, consumers and businesses the opportunity to express their opinions about proposed EU policies, facilitates chat sessions between EU citizens and EU officials, and permits personal testimony regarding “on the ground” impacts of EU policies. Internet consultation is really a revolutionary and unprecedented effort to bridge the gap between ordinary citizens and policymakers.

\textsuperscript{57} European Commission 2001d. See also European Commission 2006a for the development and current status of the Better Lawmaking action plan.

\textsuperscript{58} See European Commission 2005a.

\textsuperscript{59} European Commission 2001b.

\textsuperscript{60} European Communities 2001a.

\textsuperscript{61} Available at: http://ec.europa.eu/yourvoice/

\textsuperscript{62} See European Commission 2001c. For main developments since the inception of the Interactive Policymaking Initiative see: http://ec.europa.eu/yourvoice/ipm/timeline/index_en.htm#2001
which, since its inception\textsuperscript{63}, has dramatically increased public involvement in EU policymaking.\textsuperscript{64}

On 30 May, 2001 the European Union also implemented Article 255(1) EC through Regulation 1049/2001.\textsuperscript{65} This regulation effectively grants “a right of access to European Parliament, Council and Commission documents” to any Union citizen and to any natural or legal person residing, or having its registered office, in a Member State.\textsuperscript{66} The current level of access to documents is unprecedented.\textsuperscript{67} However, some Commission officials complain that this level of transparency is overly burdensome. For example, it was reported to me that 60\% of all requests for access to documents come from one NGO whose only function is to support a website that criticizes governance in the EU.\textsuperscript{68} Nonetheless, this move was welcomed by most as a vital step on the road to closing the democratic deficit.

\textsuperscript{63} The first online consultation took place in June 2001 but Your Voice in Europe was not officially launched until 22 October 2001.

\textsuperscript{64} Senior Official, Secretariat-General Directorate B: Relations with Civil Society. Interview by author, 10 June 2005.

\textsuperscript{65} See European Communities 2001\textsuperscript{a}.


\textsuperscript{67} Regulation (EC) 1049/2001 replaced Decision 94/90 (see European Commission 1994) on public access to Commission documents. Although the new regulation is similar in coverage to Decision 94/90, it introduces a number of new and innovative ways to increase transparency and public access. In particular, according to European Communities 2001\textsuperscript{a},

- access is extended to documents originating with third parties (the Member States, the other institutions, the public)
- a document protected by an exception (other than the protection of public interest or of privacy) can still be released where serving the public interest is more important than protecting the document
- time limits for replies are reduced to 15 working days
- a document register will be made available to the public in the first half of 2002.

\textsuperscript{68} Senior Official, DG Trade: Unit A2 – Inter-institutional Relations and Communications Policy. Interview by author. 29 September 2004.
In 2005, against the backlash of the French and Dutch “no” votes to the European Constitutional Treaty, the European Commission launched a new approach to communicating with European citizens in its *Action Plan to Improve Communicating Europe*. Dubbed “Listen, Communicate, Go Local”, the Commission’s new approach included 50 actions and a corresponding timeline for implementation aimed at improving the quality of dialogue. Notably, the Commission aimed to improve its relationship with European citizens through more and qualitatively enhanced, formal consultations and to ensure results and feedback of formal consultations are made public. The framework for debate on the future of Europe, set out in the Commission’s *Plan D for Democracy, Dialogue and Debate*, also stressed the importance of “wider public debate, to promote citizens’ participation and to generate a real dialogue on European policies.” The *White Paper on European Communication Policy* further articulated the European Commission’s commitment to enhancing dialogue with civil society and proposed, “a decisive move away from one-way communication to reinforced dialogue, from an institution-centered to a citizen-centred communication, from a Brussels based to a more decentralized approach.” In 2006 and 2007, the European Commission has expanded upon these commitments by launching a new plan entitled, *Debate Europe – Building on*

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69 European Commission 2005c.

70 At its core, communication was conceived as “more than information: it establishes a relationship and initiates dialogue with European Citizens, it listens carefully and it connects people.” European Commission 2005c, 2.

71 The actions are detailed in the Annex, European Commission 2005d.

72 European Commission 2005e.

73 European Commission 2005f.

74 European Commission 2006.
the Experience of Plan D for Democracy, Dialogue and Debate. Subsequently, the Commission co-sponsoring a series of 6 Pan-European consultation projects run by CSOs in 2006 and 2007 where thousands of European citizens debated both physically and virtually about the future of Europe.\(^75\) Fundamentally, dialogues with civil society are viewed as a means to keep a finger on the pulse of European public opinion and all of these initiatives reflect an ever growing commitment to a policy of open governance in the EU.

Looking forward, and running parallel to efforts to improve its communications strategy, the Commission re-affirmed its commitment to improving opportunities for stakeholders to actively participate in EU policymaking in its Strategic Objectives for 2005-2009.\(^76\) As part of the wider effort to “renew” Europe, the Vice-President of the European Commission in charge of Administrative Affairs, Audit and Anti-Fraud, Siim Kallas, is leading the Transparency Initiative.\(^77\) Aimed at restoring citizens’ trust, this initiative launched in November 2005 proposes mechanisms to improve the integrity and credibility of EU policymaking in four key areas: 1) Information on Beneficiaries of EU Funds; 2) Fighting Fraud; 3) Lobby Transparency; 4) Ethical Standards and Accountability of EU Law Makers.\(^78\) In May 2006, the Commission launched a public debate on the initiative with the publication of the Green Paper on a European Transparency Initiative.

\(^{75}\) The results of these consultations are available at: [http://ec.europa.eu/commission_barroso/wallstrom/communicating/conference/dialogue/index_en.htm](http://ec.europa.eu/commission_barroso/wallstrom/communicating/conference/dialogue/index_en.htm)

\(^{76}\) European Commission 2005b.

\(^{77}\) Kallas (2005a) first introduced the idea of a Transparency Initiative while delivering a speech at Nottingham University on 3 March, 2005.

\(^{78}\) Kallas et al., 2005.
The Green Paper centers on three aspects of transparency in the European Union.\(^{79}\) First, and perhaps most significantly, it aims to generate debate on the activities of the 15,000 lobbyists in the EU. In a similar vein, it also asks for input on the application of the Commission’s minimum standards for consultation. Finally, the Green Paper seeks to generate a debate over the publication of data about the recipients of various EU funds managed by the Commission in partnership with the Member States (i.e., Structural Funds, CAP). The Green Paper proposes a number of actions that could improve transparency in these areas and then solicits the views of stakeholders through a range of structured questions on these topics. The debate concluded on 31 August, 2006.\(^{80}\) The Commission subsequently adopted a Communication on Standards of Professional Ethics\(^ {81}\) for its staff in March 2008 and proposed a Common Code of Conduct for all lobbyists and interest representatives that will be finalized in Spring 2008, following further public consultations.\(^ {82}\)

In general, the launch of the Transparency Initiative was welcomed and supported by members of civil society who have long been calling for more transparent

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\(^{79}\) According to the European Commission (2006b) two other areas of action identified in the European Transparency Initiative were left out of the Green Paper. First, some items did not require further consultation since the Commission decided to take immediate action to improve “the coverage of its register of documents, in particular with a view to making more documents directly available.” The Commission also set up a website providing details about the beneficiaries of EU funds. Second, some items will be decided on the basis of consultation with other EU institutions. These include:

- the rules and standards on professional ethics of public office holders in the European institutions
- the review of the access to documents legislation
- revision of the legal framework for the EU’s Anti-Fraud Office (OLAF)

\(^{80}\) All contributions to the debate are published at: [http://ec.europa.eu/comm/eti/contributions.htm](http://ec.europa.eu/comm/eti/contributions.htm)

\(^{81}\) European Commission 2008a.

\(^{82}\) European Commission 2007, 2008b.
policymaking in Brussels.83 Foremost among them is the Alliance for Lobbying Transparency and Ethics Regulation (ALTER-EU)84, a coalition of 140 civil society groups, trade unions and public affairs firms led by the Corporate Europe Observatory (CEO). The ALTER-EU advocates for the introduction of mandatory and binding lobby disclosure rules.85 They argue this is the only way to curb what they cite as “privileged access and undue influence granted to corporate lobbyists”.86 They charge that the current voluntary code of conduct developed and administered by the Society of European Public Affairs Practitioners is too narrow and inadequate.87 Instead, they suggest a compulsory registration system with a fully searchable public register detailing all lobbyists with a lobbying budget of over 20 000 euros per year or 5000 euros for three months.88

Ultimately, these advocates were disappointed that the Green Paper expressed a preference for more stringent voluntary rules and a range of soft measures to improve

83 See CEO 2004.
84 See http://www.alter-eu.org/
85 For further justification of this position see CEO 2006a, 2006b; ALTER-EU 2006a, 2006b. This position resonates with some Member State governments. For instance, the Danish Parliament unanimously approved a resolution calling for a “mandatory and publicly available register of lobbyists that seek to influence the European Commission and other EU institutions” just as the Green Paper was being released for public consultation in May 2006.
86 ALTER-EU 2006b.
87 SEAP was created in 1997 and seeks to establish and manage relations between individual public affairs professionals and European institutions. SEAP’s self-regulatory code of conduct was revised in 2004 to improve the transparency of its members and, most significantly, to introduce the right to impose sanctions (expulsion from SEAP) on violators of the code. See SEAP 2006.
lobby transparency over mandatory lobby disclosure rules.\textsuperscript{89} In fact, they claim this move will lead to lowest common denominator standards. ALTER-EU commended the commitment to disclose more information about the expert groups advising the Commission through an online register but expressed frustration over the unwillingness to disclose membership lists of the expert groups\textsuperscript{90} and the failure to address Commission relationships with taskforces. They claim these constitute privileged consultations where corporate groups and not NGOs are included. ALTER-EU cites the Commission’s relationship with business lobby groups such as Cars 21, the European Services Forum, TransAtlantic Business Dialogue, and the High Level Group on Competitiveness, Energy and Environment as evidence of its failure to meet minimum standards for consultation. According to the Corporate Europe Observatory, the European Commission also fails to comply with the European Code of Good Administrative Behaviour which states that Commission officials “shall abstain from […] any preferential treatment on any grounds whatsoever”.\textsuperscript{91} Although they are unlikely allies, Roger Chorus, President of SEAP, echoed these concerns, claiming the first step to improving the integrity of decision-making is to make EU officials “less vulnerable to bribes”.\textsuperscript{92} Finally, some critics would

\begin{footnotesize}
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\item \textsuperscript{89} These include ‘soft’ measures to improve transparency in lobbying such as a voluntary registration system, a common code of conduct for all lobbyists, and a system of monitoring and sanctions. For further details, see European Commission 2006b.

\item \textsuperscript{90} Incidentally, the European Commission published the names and mandates of special advisors to EU Commissioners (55 in total) for the first time ever on 1 March 2007. This was after Rolf Linkohr failed to confirm there was no conflict of interest between his advisory role, leadership of a Brussels-based consultancy and membership on the board of two energy/power companies. He was subsequently relieved of his duties.

\item \textsuperscript{91} European Ombudsman 2005, Article 8(1).

\item \textsuperscript{92} Stevenson nd.
\end{itemize}
\end{footnotesize}
like to see the introduction of a mandatory “cooling off period” during which Commissioners and senior officials must wait to work for corporate lobbies.

It really remains to be seen how this plays out in Brussels since the new Code of Conduct will not be finalized until Fall 2008. A lot depends on how much credence is given to the Green Paper’s public consultations and to the public input provided on the precise content of the Code during consultations between October 2007 and February 2008. It is also unclear whether Commission officials and CSOs will be able to bridge their differences over the necessity for mandatory lobby disclosure rules. However, it is apparent that there is a strong commitment within the European Commission to improve the quality, transparency, integrity and credibility of decision-making in Brussels.

i. **DG Trade: Consultation with Civil Society Organizations (CSOs)**

The democratic imperative described above is nowhere more evident than in DG Trade’s efforts to broaden and deepen its relationship with civil society. Since the conclusion of the Uruguay Round of Multilateral Trade Negotiations, there have been progressive developments of various mechanisms to increase the participation of a wide range of actors in the European Union’s trade policymaking process. The Civil Society Dialogue (CSD) is perhaps the most notable innovation which introduced regular, structured consultations between senior level DG Trade officials and a very wide range of civil

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93 European Commission 2008b.


95 Though, according to Siim Kallas (2005b), there must be limits on transparency if decision-making institutions are to be more than talking shops- long on talk and short on decisions. In a speech in October 2005, Kallas defined some necessary limits on transparency claiming “Policymakers have to apply transparency, but they also need ‘space for reflection’. For example, in the preparatory stage of legislation decision-makers need to be able to discuss freely and evaluate information before submitting a proposal”.
Indeed, any not-for-profit civil society organization from the EU, candidate countries and their affiliates in developing countries are permitted to participate in the CSD. The CSD is designed to "provide the public, both sides of industry, civil society and professional circles with clear, comprehensive and up-to-date information while seeking their opinions in compliance with the rules set out in the Commission’s codes of conduct." In 1999, DG Trade delineated the key objectives of the dialogue:

   a. To consult widely; the Commission wants to take into account the views of all interested parties when drafting proposals and action.

   b. To address civil society concerns on trade policy; as globalization obviously raised concerns for many in society, the Commission wanted to find out more about these concerns, debate specific issues, answer questions where possible and take up suggestions for actions made by CSOs.

   c. To improve EU trade policymaking through structured dialogue; debating the questions that are shaping public opinion as a way of updating and strengthening the Commission’s expertise, which is important as these issues also have an impact in public acceptance of trade policy.

   d. To improve transparency; by engaging in a dialogue with civil society and making documents available on its website, DG Trade is looking to achieve greater transparency (of the trade policymaking process).

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96 DG Trade refers to the working definition of civil society organization provided in Commission 2002a: ‘Civil society organisation’… can be used as shorthand to refer to a range of organisations which include: the labour-market players (i.e. trade unions and employers federations – the "social partners"); organisations representing social and economic players, which are not social partners in the strict sense of the term (for instance, consumer organisations); NGOs (non-governmental organisations), which bring people together in a common cause, such as environmental organisations, human rights organisations, charitable organisations, educational and training organisations, etc.; CBOs (community-based organisations), i.e. organisations set up within society at grassroots level which pursue member-oriented objectives, e.g. youth organisations, family associations and all organisations through which citizens participate in local and municipal life; and religious communities.

97 DG Trade qtd. in Slob and Smakman 2006.

Taken together, the overarching objective of the CSD is to “develop a confident working relationship between all interested stakeholders in the trade policy field and to ensure that all contributions to EU trade policy can be heard.” Since 1998, the Civil Society Dialogue has evolved over four stages in an effort to meet these objectives.

NGOs had never been consulted on trade or investment policy at the EU-level before 1998. The failure of the OECD Multilateral Agreement on Investment in October 1998 and the so-called Battle of Seattle at the 1999 WTO Ministerial conference were the main catalysts of EU-level consultation and dialogue. It has been widely debated whether France’s withdrawal and the subsequent collapse of the MAI can be correctly attributed to the massive opposition of NGOs. Nonetheless, fervent opposition made it clear to policymakers that they would ignore civil society at their peril. In October and December of 1998, the OECD began consultations with NGOs,


100 The description of the first three phases of the Civil Society Dialogue draws many details from WWF 2002 and Slob and Smakman 2006. Both organizations have produced in-depth and comprehensive overviews of the CSD.

101 An “Investment Correspondent Network”, comprised of over 50 companies, was the European Commission’s key interlocutor during the MAI negotiations. In the minutes of the first meeting of the Investment Network, Commission officials defined the purpose of the network thus: “The current discussions between WTO partners show us that it will be difficult to move forward on all fronts in Geneva as regards our interests in investment issues. It is therefore crucial for EU negotiators to know where the priorities of European businesses really lie, with a view to building up a negotiating strategy in the longer term.” European Commission 1999b. The minutes of this meeting are available at http://ec.europa.eu/trade/issues/sectoral/investment/1meeinne.htm

102 For an example of those who question the actual impact of the NGO campaigns against the MAI, see Graham 2000; Drezner 2005.

103 This sentiment is reflected in the Commission’s Communication to the Council and the European Parliament on the EU Approach to the Millennium Round stating that, “In order for the new Round to succeed, we will have to make sure we carry the general public with us…The Community, both in its positions in the WTO, as in its trade and development policies more generally, seeks to reflect the views of civil society”. See European Commission 1999c.
labour unions and the private sector, marking the first encounter between European civil society organizations and EU trade officials. The insight gained from these initial discussions prompted European Trade Commissioner, Leon Brittan, to launch a series of ad hoc, general meetings between the Commissioner for Trade, top DG Trade officials and civil society in preparation for the Third Ministerial Conference of the WTO in Seattle. Civil society organizations were also included, for the first time, as part of the European delegation at Seattle.

In the aftermath of Seattle and the failed attempt to launch the Millennium Round, the new trade Commissioner, Pacal Lamy, stepped up the Commission’s commitment to integrate civil society into the external trade policymaking process. In April 2000, he orchestrated the creation of a Contact Group, comprised of a wide range of representatives drawn from civil society, including seven of the largest European NGO platforms, several business lobbies, European-level trade unions, and the European Economic and Social Committee (EESC). The Contact Group, which continues in an enlarged version today, serves as a steering committee which identifies key issues in trade negotiations on a rolling basis, and a sounding board for Commission proposals.

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104 Incidentally, consultations between the OECD and Civil Society have continued on an annual basis since 1998. The 8th annual meeting is set to take place in late October 2006. For background documents and a summary of previous OECD meetings with Civil Society see [http://www.oecd.org/document/33/0,2340,en_2649_33705_35372833_1_1_1_1,00.html](http://www.oecd.org/document/33/0,2340,en_2649_33705_35372833_1_1_1_1,00.html)

105 Civil society organizations, including NGOs, trade unions, consumer organizations and industry were consulted together on issues pertaining to transparency, development and the environment, as well as more specific sectoral issues such as intellectual property and investment. WWF 2002; Knodt 2004, 713.

106 A complete list of members of the Contact Group and their contact information is available at [http://trade-info.cec.eu.int/civilsoc/contactgroup.cfm](http://trade-info.cec.eu.int/civilsoc/contactgroup.cfm)

107 New members include chambers of commerce such as Eurochambres and Eurocommerce, and an animal protection NGO, Eurogroup for Animal Welfare. Also, as of 2005, women’s groups are represented by the Network for Women in Development, which replaced the European Public Health Alliance (EPHA), an
During the period, June 2000 to November 2001, eight key trade policy issues were identified and discussed in “Thematic Groups”, each of which met at least four times.  

Table 2: Thematic Group Meetings June 2000 – November 2001

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<tr>
<td>Trade and Public Health</td>
<td>Investments</td>
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<td>Trade in Services</td>
<td>Competition</td>
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<td>Trade in Agriculture</td>
<td>Trade-related Intellectual Property Rights</td>
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<tr>
<td>The Environment and Sustainable Development</td>
<td>WTO Reform and Transparency</td>
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</table>

Civil society groups also participated in four, bi-annual general meetings where thematic issues, the impending launch of a new round of multilateral trade negotiations, and the organization of the dialogue itself were discussed with Commissioner Lamy. Although meetings were fraught with intense and heated debate, all members of the dialogue accepted, for the very first time, the need to overcome a very steep mutual learning curve.

Following the launch of the Doha Round of Multilateral Trade Negotiations and in partial response to concerns channeled through the Contact Group, Commissioner Lamy sought to re-articulate the overarching purpose and importance of the Civil Society organization that stopped participating in the CSD meetings. For further details and assessment of the Contact Group see Slob and Smakman 2006, 33-34, 68-70.


European Commission qtd in WWF 2002, 10.

Unfortunately and despite early commitments, the Commission decided against writing “a report on each Thematic group, summarizing the conclusions it has extracted from each of them and describing how it has used such information in the drafting or modifications of its trade policies.” European Commission qtd in WWF 2002. More meeting summaries are available, though irregularly, for 2004-2006.

Many NGOs, in particular, used this forum as a platform to present their opposition to the free trade imperative. Their tactics ranged from “NGO Joint Communiqués” to radical, theatrical demonstrations.
Dialogue. In December, 2001 he assured members of civil society that they would play an important role in the DDA:

…the trade policy dialogue will maintain the same if not an even higher priority in DG Trade’s activities. You can rest assured therefore, that we will continue to make the same efforts at keeping you informed, and at organizing meetings and discussions that will be useful and appropriate. Transparency with civil society, along with the pursuit of sustainable outcomes, will be a common objective and responsibility for all those officials heading specific negotiating teams.”

In addition, the Commission responded to NGO requests and agreed to finance the participation of non-Brussels based civil society groups’ participation in the CSD. In close consultation with the Contact Group, DG Trade earmarks funds and reimburses the travel expenses of selected candidates in order to enlarge the range of participants in the CSD. DG Trade also funds CSO-led projects designed to raise awareness of trade issues. The number and value of grants has more than doubled since 2003.

Regular meetings with Commissioner Lamy continued every six months but flexibility was built into the scheduling of thematic meetings in order to enable discussion and debate on ongoing negotiations and developments at the WTO. Eight thematic groups which parallel core issues in the DDA were scheduled to meet in regular sessions at least every two months. In addition, a series of 8 ad hoc meetings were arranged on short notice to deal with issues that emerged throughout the course of trade

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112 European Commission 2001f.

113 WWF 2002, 12.

114 Information on how to apply and criteria to qualify for travel cost reimbursement are available at http://ec.europa.eu/trade/issues/global/csd/trav_exp.htm

115 For details of project grants awarded 2003-2006, see Slob and Smakman 2006, 28-30.

116 In some cases, regular meetings on thematic issues such as agriculture occurred more frequently. For a list of meetings during this period see http://trade.ec.europa.eu/civilsoc/meetlist.cfm?pastyear=2002
negotiations at the WTO. Finally, members of civil society called for structured meetings on a range of topics which did not fit into the DDA agenda. All but three of these topics were discussed in CSD at least once during this period.  


<table>
<thead>
<tr>
<th>Thematic Groups</th>
<th>Other issues of Discussion</th>
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<tr>
<td>TRIPS (registry of wines and liqueurs, TRIPS/biodiversity, TRIPS/food safety, TRIPS/access to medicines)</td>
<td>Negotiations of EU Bilateral Trade Agreements (Mercusor/Chile, ACP, Mediterranean)</td>
</tr>
<tr>
<td>Services (including environmental services)</td>
<td>Fair Trade</td>
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<tr>
<td>Agriculture (including aspects of sustainability)</td>
<td>Trade and Forests</td>
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<tr>
<td>Access to Markets (including environmental items)</td>
<td>PPMs (Production and Processing Methods)</td>
</tr>
<tr>
<td>Trade Regulations (including Regional Agreements and Fishing subsidies)</td>
<td>Trade and Social Issues</td>
</tr>
<tr>
<td>The Environment and Sustainable Development (negotiations on MEAs, CTE work program, SIA – Sustainability Impact Assessments)</td>
<td>Dispute Resolutions/WTO Reform</td>
</tr>
<tr>
<td>Development (implementation and technical assistance aspects)</td>
<td>Export loans</td>
</tr>
<tr>
<td>Other issues (general evolution of the negotiations, Singapore issues, and so forth)</td>
<td>Trade and Gender aspects</td>
</tr>
</tbody>
</table>

In an effort to increase the transparency of the CSD, the Commission created a registration database for all CSD participants. While the meetings are open to everyone, participants have been required to register with the Commission since 2000. In 2002, DG trade began requiring participants to disclose their main activities, objectives and expertise, membership numbers, main sources and types of funding, networking activities, and relationship with other Commission services. This information “may be

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117 There were no structured meetings dedicated exclusively to Production and Processing Methods, Export Loans and Trade and Gender aspects during this period, but these issues did arise during discussions on other topics.

118 European Commission qtd in WWF 2002, 11-12.
shared with other Commission departments and may, on an aggregate basis, be used publicly, but it is requested on the basis that individual responses will not otherwise be divulged outside the Commission.”

In late 2003, CSD participants reported considerable “consultation fatigue”. It was commonly felt there were too many meetings and participation levels had dropped dramatically. Participants reported the strategic value of attending the meetings was not proportional to the amount of human and financial resources required to make substantial contributions to the discussions. As I will discuss in some depth below, several NGOs in particular became disillusioned with the consultative process because the impact of their contributions was not immediately visible or traceable. At the same time, the need for improvisation increased over the course of DDA negotiations.

The Commission responded to these developments by adapting the format of the CSD. In close consultation with the Contact Group, DG Trade opted to reduce the number of meetings and abandon a rigid advance meeting schedule. The Trade Commissioner continues to call general meetings two or three times a year and regular meetings on DDA and DDA/Agriculture are held frequently but they are scheduled as events unfold in Geneva, rather than in order to respect a six-month (or other)

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119 See the disclosure policy on the registration form for new CSD participants at http://trade.ec.europa.eu/civilsoc/register.cfm?action=formnew


121 WWF 2002.

122 The number of meetings has been in decline since 2004: 2002 (14 meetings); 2003 (24 meetings); 2004 (46 meetings); 2005 (34 meetings); 2006 (24 meetings). See http://trade.ec.europa.eu/civilsoc/meetlist.cfm
fixed schedule. In addition, ad hoc meetings have become increasingly more frequent since “the process is intended to focus on issues where in a finite period of work can improve mutual understanding of concerns and better contacts among key players. The choice of topics is based on these needs, and not on the relative importance of the issues on the trade policy agenda.”

In terms of impact and responsiveness, CSD participants and DG trade officials alike identify a number of shortcomings of the CSD. First, if dialogue means to engage in an informal exchange of ideas or views with the intent to learn, integrate multiple perspectives, and to uncover and examine assumptions, then most participants agree the CSD does not live up to its name. There was a great deal of early optimism about the potential of the CSD to generate meaningful opportunities for input and debate. Participants report that the value of CSD meetings is in decline; they have become little more than de-briefing or information sessions where DG Trade officials convey their position and answer questions. Reportedly, Commission officials rarely “show the back of their tongues” during CSD meetings, the meetings are too large and there are too many people to really engage in a debate. The CSD is structured such that the people

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124 For example, during 2005, 24 of 37 meetings were ad hoc compared to 8 of 42 in 2002. So far in 2006, 13 of 24 have been ad hoc. See http://trade.ec.europa.eu/civilsoc/meetlist.cfm

125 See http://ec.europa.eu/trade/issues/global/csd/dcs_proc.htm

126 For example, “DG Trade is one of the most advanced in generating consultation with civil society. On the other hand the level of dialogue is quite weak. The CSD is essentially an information session. Most meetings include the presentation of briefs and discussions of the state of play. They have the opportunity to raise concerns and questions but they rarely receive concrete replies. There is no will from the Commission to listen to concrete proposals from members of Civil Society – particularly NGOs – in this context.” Guillaume Legaut. Trade and Food Security Advocacy Officer. Development, Coopération Internationale pour le Développement et la Solidarité (CIDSE). Interview by author. 2 June 2005.
from the Commission give an explanation and then the floor is open to questions. Usually the Commission officials try to tackle five or six questions at once. Participants feel this gives them the option of picking and choosing the parts of questions they want to answer and they feel there are inadequate opportunities to follow up on questions.\textsuperscript{127} Moreover, as negotiations move forward or as deadlines pass at the WTO, the issues become more technical and in some cases more controversial. The proceedings of CSD are made public; what DG trade officials say about the trade negotiations thus becomes part of the trade negotiations themselves. As a consequence, Commission officials feel they have less room for maneuver in dialogues with civil society as the stakes get higher in Geneva.

Second, although participation in the CSD gives stakeholders a voice, most doubt the extent to which formal dialogue leads to discernible influence over external trade policy proposals. In a candid exchange, one DG trade official explained that formal civil society consultations occur at the very last stages of policy development and consequently

Civil society is quite right if they have the perception that they cannot influence the Commission through these dialogues. Part of the reason, perhaps, is because the format of the dialogues is not conducive to influence...most of it [policy proposals] is pre-cooked... The room for maneuver to take on ideas in the context of that dialogue is quite limited, quite small. Dialogue is too late in the process for that.\textsuperscript{128}

\textsuperscript{127} European Policy Officer, Coalition of the Flemish North South Movement. Interview by author. 6 June 2005.

\textsuperscript{128} Desk Officer - Policy and negotiations, DG Trade, Unit F1- Coordination of WTO, OECD, Trade Related Assistance; GATT; and 133 Committee. Interview conducted by author. 1 June 2005.
Ultimately, unless DG Trade officials systematically report on documents and proposals as they are being prepared, rather than after they are already finalized, the strategic value of participating in CSD is limited. Moreover, a DG Trade official confided to me that the entire CSO approach, involving media campaigns and opposition politics, is flawed if they seek to have actual and long term influence over external trade policy.\textsuperscript{129}

As I will discuss below, business and industry have regular, one-on-one contact with DG trade officials. Unfortunately, very few CSOs have developed similar informal relationships. Most NGOs attribute this disparity to the EU’s so-called corporate agenda.\textsuperscript{130} However, some DG trade officials contend that there is a general unwillingness on the part of many NGOs to initiate and foster close contacts with DG Trade officials. Trade unions, business and industry often organize meetings and seminars with individual DG Trade officials. While those actors tend to ask for clarification and in-depth discussions about matters that arise throughout the course of trade negotiations, there are very few opportunities to sit down with NGOs outside of the

\textsuperscript{129} This is a where the NGOs start from the wrong starting point. They have a different and incorrect perspective on their role in the process…. if the NGOs want to be powerful [they must] change our views on what is right. If you want to influence the policy you have to start much earlier –[the] best way is to have a regular and informal relationship with individuals who are drafting proposals. In the end, their mindset and their approach to the entire issue package might be changed. So, if you are sitting in the end and looking at the proposal demanding that paragraphs 2 and 3 are changed you don’t have much chance of exercising influence. The only way for an outsider, and that’s what NGOs are, to influence a change would be to foster long term informal relationships – engage in change on a long term basis. Desk Officer - Policy and negotiations, DG Trade, Unit F1- Coordination of WTO, OECD, Trade Related Assistance; GATT; and 133 Committee. Interview conducted by author. 1 June 2005.

\textsuperscript{130} Campaigner and Researcher at Corporate European Observatory and GATSwatch. Interview by author. 23 May, 2004. Also, Guillaume Legaut claims that “Commission officials are brainwashed. They have lost sense of why they are doing politics…. Decision makers in the EU are captured by corporate interests. The Commission does not have real power to do what it wants.” Trade and Food Security Advocacy Officer, Development, Coopération Internationale pour le Développement et la Solidarité (CIDSE). Interview by author. 2 June, 2005.
CSD. By their own admission\textsuperscript{131}, many NGOs rely exclusively on the events the Commission organizes while the individual units in DG Trade lack the “resources to chase all these groups down and sit with them one-on-one…They will not engage seriously with Commission officials [anyway].”\textsuperscript{132}

DG trade officials report they are very careful when selecting their CSO interlocutors. Although the door is always open to anyone who has a concern or a question, regular and informal contact is maintained with a very small number of NGOs such as Oxfam and Médecins Sans Frontières (MSF).\textsuperscript{133} These groups are regarded as highly professional outfits, willing to compromise and play the pluralist game. Accordingly, “it is these groups, those willing to partake and play by the rules of the game who are successful in helping shape agendas and establish power of consciousness amongst policy makers.”\textsuperscript{134} Although this is the general sentiment amongst DG Trade officials with whom I spoke, it is by no means universal in the European Commission. Indeed, the very notion of “mainstreaming” a wide range of CSOs into trade policy is largely inconsistent with the recommendations made by the Governance Team during the formulation of the White Paper on European Governance which highlighted, “[t]he virtue of protest as embodied in non-organized civil society; the world of NGOs represents a

\begin{footnotesize}
\begin{enumerate}
\item For example see European Trade Policy Officer, World Wide Fund – European Policy Office. Interview by author. 4 October 2004.
\item Senior Trade Policy Official, DG Trade, G1 - Trade in Services and Investment; GATS and Investment. Interview by author. 14 June 2005.
\item Desk officer working on international aspects of intellectual property rights, including access to medicines and copyrights, DG Trade, Unit H2: New Technologies, Intellectual Property and Public Procurement. Interview by author. 15 February 2006.
\item Thomas Morgens Christensen. Policy and Negotiations Desk Officer, DG Trade, Unit F1: Coordination of WTO, OECD, Trade Related Assistance, GATT, and Committee 133. Interview by author. 21 September 2004.
\end{enumerate}
\end{footnotesize}
component rich with promise in European policy; it would be futile to tie it down in general formal structures and a pity to reduce it to the role of consensus-former”.  

Third, CSD participants expend a great deal of time and resources preparing position papers, discussion documents, letters and comments on external trade policy which they often present in the CSD. However, the impact of their input is difficult to trace. There are no formal mechanisms by which Commission officials provide individual feedback on the ways in which participants’ views and proposals are taken into account. It was determined that doing so would be practically infeasible, ineffective, and inconsistent with the Commissions’ commitment to “collegiality”. Very few stakeholders actually expect one-on-one adoption of their proposals and recommendations. However, they do expect true “dialogues” to yield the opportunity to shape the strategic direction of EU policy and negotiations. In response, DG trade officials emphasize that the CSD gives CSOs a voice not a vote; Commission officials do not take instructions from CSOs therefore there is no need or requirement to respond to input. This is widely viewed as the single most debilitating weakness of the CSD. Many CSOs no longer expect to have any impact in the CSD. In turn, this practice has led to charges that CSD meetings are mainly public relations exercises.

Finally, the most widely cited reasons for why the CSD does not work as well as it could actually have nothing to do with how the CSD is organized. Participants’

135 European Commission 2001a, 20.

136 The European Commission considered proposals that would require officials to provide feedback on an individual basis during its consultations on the General Principles and Minimum Standards for Consultation. European Commission 2002a.


138 Slob and Smakman (2006) arrive at this conclusion as well.
perceptions of one another, issues of representativeness and a general lack of trust between them are the primary sources of frustration, consultation fatigue, and corresponding decline in participation levels. The opinion of CSOs working in this portfolio, as opposed to environment for example, is very mixed. NGOs in particular provide important “on the ground” experience and testimony and often reflect public opinion. They are widely regarded as important and necessary partners. However, while the quality of their proposals has dramatically improved over the last 8 years and the tone of CSD meetings have become less aggressive and activist, every DG trade official with whom I spoke cited a lack of trade expertise as the key factor limiting the quality of debate in the CSD.

The matters discussed in the CSD are often quite complex and a good deal of time is taken up in each meeting bringing everyone up to speed on the issues. Many NGOs working on trade are generally perceived by DG trade officials and some other stakeholders as lacking the requisite technical know-how to engage in substantive policy discussions. Some NGOs reinforce this perception by focusing almost exclusively on procedural matters during thematic meetings with very limited substantive input on sectoral issues in their CSD contributions. Others attend CSD meetings to make political statements. Moreover, the trade competency of a particular NGO is very much linked to

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139 European Policy Officer, Coalition of the Flemish North South Movement. Interview by author. 6 June 2005.

140 Including other NGOs: “The major problem is these groups lack the technical understanding a) to voice their concerns in terms of established agreements; b) to really demonstrate that the rules they are worried about will actually have the effect they cite; c) to compile position papers or suggestions for ways to ‘get it right’.” European Trade Policy Officer, World Wide Fund – European Policy Office. Interview by author. 4 October 2004.
particular people. When they leave their posts the value or nature of that NGOs contributions may change.¹⁴¹

Accordingly, DG trade officials would like to see much more engagement on substance.¹⁴² This problem might be corrected if the Commission provided funding to improve the training and education of NGOs but it would need to be done in such a way as to ensure NGOs’ continued autonomy. Others suggest DG Trade should consult with business, trade unions and NGOs separately:

There is a big range of competence. It might be a good idea to discuss with different factions separately. For example, talk with specialists on technical issues, specialists on political issues, and those with very limited competence separately. The Commission’s understanding of what and who is civil society is very problematic. Some groups should not be mixed together especially if they already have other avenues for consultation available to them. Essentially this mixing produces cacophony. For example, employers groups have other ways of consulting with the Commission. Therefore, it seems their only motive for attending the CSD sessions is to bother those who don’t have access to officials.¹⁴³

However, following through with this recommendation would almost certainly raise concerns about transparency, an aspect of governance the CSD scores very well on. This would also make it difficult to achieve mutual understanding of concern amongst CSOs who would not interact otherwise.

¹⁴¹ Sabine Weyand. DG Trade, Member of Pascal Lamy’s Cabinet, Responsible for Relations with European Parliament; Social Partners and NGOs; Transport; Energy; Sustainable Development; Employment and Social Affairs; Environment; European and Social Committee (ESC) until November 2004. Interview by Author. 2 June 2005.

¹⁴² For example, “NGOs [should develop] some expertise on certain concerns or sectors or concerns regarding regulatory environments. These organizations have very competent people, very dedicated people. I can not believe that they could not, if they wanted to, invest in the substance of the particular challenges and give us some counter arguments”. Senior Trade Policy Official, DG Trade, G1 - Trade in Services and Investment; GATS and Investment. Interview by author. 14 June 2005.

Finally, the turnout at CSD meetings is systematically higher for NGOs than the business community. This is partly because industry groups have much better developed informal contacts with DG trade officials and, with the exception of the services industry, are largely content with the status of ongoing negotiations at the WTO. However, the level of industry involvement has declined significantly over the life of the CSD largely because these groups feel the environment is competitive and sometimes hostile. For example, some argued that “It is pointless to engage with radical NGOs. There is no possibility of common ground. The Civil Society Dialogue is time consuming and [we are] often under fire… NGOs are often misinformed and have a blanket hatred for any group that supports the existing system. Radical groups undermine themselves through procedural theatrics.”

Business groups also tend to challenge the representativeness and legitimacy of NGOs as actors in the democratic process and resent sitting alongside them in CSD meetings.

Some previously active NGOs have stopped investing in the CSD because they view it as a waste of time: “we pop in on our way home from work. If any effort is involved in getting there it’s just not worth it.” Other NGOs attend CSD meetings in order to receive Commission travel reimbursements. The European Trade Network, for example, schedules its meetings back to back with CSD meetings so that its members can attend for free. Finally, some argue it is necessary to attend to ensure a balance of views is represented since the “Commission has a propensity to serve corporate interests”.

Ultimately these issues of trust make true dialogue unlikely and are underlined by a

144 WTO Advisor, Union of Industrial and Employers’ Confederations of Europe (UNICE). Interview by author. 24 September 2004.

145 European Policy Officer, Coalition of the Flemish North South Movement. Interview by author. 6 June 2005.
growing concern that the current Commission under Mandelson is not as committed to the CSD process as Pascal Lamy was.\textsuperscript{146}

Despite these shortcomings, the Civil Society Dialogue has evolved into a vital component of the external trade policymaking process in the EU. A “qualified” philosophy of open governance best characterizes the initiative whereby “more people and organizations [are] involved in shaping and delivering EU policy”\textsuperscript{147}. The number of stakeholders actively engaged in trade policymaking at the EU level has dramatically increased by virtue of the CSD.\textsuperscript{148} In turn, some of the criticism of the democratic deficit has been deflected.

There is a clear commitment amongst those working with the CSD\textsuperscript{149} to engage with a range of stakeholders from all sectors and to subject policy proposals to structured, public scrutiny, at least in the latter stages of their development. DG Trade officials inform CSD participants about the development of policies, provide ongoing updates of developments and state of play in trade negotiations, and respond to questions. In this way, the CSD encourages mutual understanding of concern and demystifies international


\textsuperscript{147} European Commission 2000d, 3.

\textsuperscript{148} Slob and Smakman (2006, 31-32) analyzed the attendance lists from 2002-2006 and determined that approximately 350 organizations had attended CSD meetings. 647 organizations were registered in the CSD database as of August 2007. However, this number constantly changes as new organizations register. Also some organizations are registered twice and not all registered organizations are civil society organizations; some law firms and international organizations such as the World Bank are also registered. It is notable that over 300 of the registered organizations are Brussels based. Northern European CSOs are also disproportionately represented in the meetings, since there has been very limited participation from CSOs from new EU Member countries. DG trade has organized a number of seminars in Malta, Lithuania and Hungary in an effort to engage CSOs from new members in the CSD process.

\textsuperscript{149} Although this commitment is not consistent amongst all DG trade officials since Slob and Smakman (2006, 51) found 19% of DG trade officials who responded to their survey were not even aware of the existence of the CSD and 47% of respondents had never attended a CSD meeting.
trade negotiations. In some instances, DG Trade officials rely on stakeholders to filter
information, expertise, and public opinion upwards, thereby serving as the eyes and ears
of the Commission.

In addition to improving the mutual knowledge deficit, the CSD adds
transparency and accountability to the partnership, in part, by subjecting the dialogue to
continuous review and corresponding adjustments. It also works to lend some additional
legitimacy to trade policy proposals by opening them up to public scrutiny. Therefore,
the CSD fits well with the European Commission’s overall commitment to transparency
and good governance, discussed in the previous section and, with few exceptions (weak
feedback, confidence/trust issues), DG trade has a done a reasonably good job thus far in
meeting the core objectives of the CSD.

In further compliance with the General Principles for Consultation and its broader
commitments to Sustainable Development\textsuperscript{150}, DG Trade is also conducting Sustainability
Impact Assessments of proposed trade agreements.\textsuperscript{151} Since 1999, independent third
party contractors have been evaluating the possible social, environmental and economic
effects of proposed trade deals for both the EU countries and its trading partners. Thus
far, completed SIAs include the entire Doha Round of Multilateral Trade Negotiations\textsuperscript{152},

\textsuperscript{150} The EU Sustainable Development Strategy was first initiated by the Commission in 2001. In 2002, the
Commission added a paper emphasizing the EU’s commitment to promoting sustainable development
globally and later renewed the EU SDS initiative in June 2006 to provide a single, coherent strategy of an

\textsuperscript{151} For a full overview of SIAs, see European Commission 2006c.

\textsuperscript{152} The Institute for Development Policy and Management at the University of Manchester is the contractor
for the SIA of proposed WTO multilateral trade negotiations. The results of the three completed phases
of the SIA, information on the consultation process, and summaries of all comments and responses exchanged
with civil society are available at http://www.sia-trade.org/wto/ This is an ongoing evaluation of the
negotiations.
trade negotiations with African Caribbean and Pacific countries (ACP), Mercusor and the Gulf Cooperation Council countries.\textsuperscript{153}

According to DG Trade officials, environmental NGOs were instrumental in highlighting the need for such mechanisms.\textsuperscript{154} Indeed, a core aim of this exercise is to improve the coherence and volume of trade policy dialogue with civil society. DG Trade involves members of civil society at all stages of the SIA through the following mechanisms:

- Use of email to ensure continuous dialogue and flow of information between the contractor and stakeholders.
- Use of an international network of experts commenting on project reports.
- Use of dedicated websites to publish project reports, with facilities for submission of comments and contributions.
- Use of civil society dialogue meetings organized by the EU to discuss project reports and other relevant issues.
- Attendance at relevant conferences on impact assessment to help put the SIA initiative in a wider context.\textsuperscript{155}

Despite efforts by the European Commission to establish a comprehensive regulatory and assessment framework for SIAs in all areas, it is widely acknowledged that the SIA methodology suffers from major limitations.\textsuperscript{156} For instance, there is a real absence of good information and reliable research about the role of services in developing economies because, according to one DG Trade official “the third party researchers are starting without any established methodology… Everybody is sort of

\textsuperscript{153} Detailed information on completed SIAs can be found at http://ec.europa.eu/trade/issues/global/sia/studies.htm


\textsuperscript{155} European Commission 2006c, 9.

\textsuperscript{156} European Commission 2002f.
working in the dark… The absence of good information leads to the tendency for people to speak through their prejudices. We need a more factually based criticism.”\textsuperscript{157} Also, where a concluded or negotiated multilateral trade agreement is found to be unsustainable, the primary recourse available to EU policymakers is to take the issue to the WTO where a second impact assessment may be conducted. The EU is unlikely to act unilaterally on global policy issues. Instead it will negotiate and discuss the issues with other WTO members. This may have the effect of “watering down” the input of civil society in the EU’s SIA procedure. Essentially, “The EU may listen to a broad base of concerns from civil society but the WTO does not.”\textsuperscript{158} Moreover, some members of civil society claim SIAs are biased in favour of further liberalization and they have been especially critical of the SIA indicators of sustainability\textsuperscript{159}, citing them as overly limited and somewhat arbitrary.\textsuperscript{160} In light of these limitations and criticisms, DG Trade consults with member states and civil society\textsuperscript{161} on SIA methodology and makes revisions on an ongoing basis in an effort to improve the quality of information and the accuracy of the assessments.\textsuperscript{162} Overall and despite its shortcomings, the SIA process clearly reflects the

\textsuperscript{157} Policy Desk Officer, DG Trade, Unit G1: Trade in Services and Investment, GATS and Investment. Interview by author. 8 October 2004.

\textsuperscript{158} Thomas Morgens Christensen. Policy and Negotiations Desk Officer, DG Trade, Unit F1: Coordination of WTO, OECD, Trade Related Assistance, GATT, and Committee 133. Interview by author. 21 September 2004.

\textsuperscript{159} Sustainability indicators include “variables such as average real income, employment, net fixed capital formation, equity and poverty, health and education, gender inequality, environmental quality of air, water and land, biological diversity and other natural resource stocks.” European Commission 2006c, 9.

\textsuperscript{160} These sentiments are expressed by Oxfam GB, WWF-European Policy Office, Save the Children and ActionAid in Richardson 2000.

\textsuperscript{161} See for example European Commission 2004b. For NGOs’ response to the Commission’s Handbook for Sustainability Impact Assessments see Friends of the Earth et al. 2005.

\textsuperscript{162} European Commission 2006c.
political will within DG Trade to improve the volume and coherence of dialogue with civil society.

**ii. DG Trade: Consultation and Dialogue with Economic Actors**

An assessment of opportunities for CSO access and participation in EU-level trade policymaking is incomplete in the absence of some discussion of how this compares to the role played by more traditional, economic stakeholders. DG Trade has maintained a tradition of consulting the so-called European Social Partners, especially UNICE, since before the conclusion of the Uruguay Round of Multilateral Trade Negotiations. Indeed, there is long standing and deeply institutionalized relationship between all of the European institutions and the European Social Partners. UNICE/UEAPME (created in 1958) works to promote the interests of European businesses and to help achieve growth and competitiveness in Europe. Essentially it is a lobby organization representing the interests of national (not sectoral) federations on issues falling within the purview of EU competence. CEEP (created in 1961), represents public sector employers and enterprises providing services of general interest. The common interests of European workers are

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163 The European Social Partners are the Union of Industrial and Employers’ Confederations of Europe (UNICE), European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP), and the European Trade Union Confederation (ETUC).

164 However, the dominant status of these organizations as “social partners” in cross-sectoral social dialogue has not gone uncontested. For example, in European Court of First Instance (1998), the legality of a framework agreement on parental leave was brought into question by challenging the status of UNICE, CEEP, and ETUC as Social Partners.

165 It aims to do so by improving the functioning of the internal market, ensuring the stability of EMU, promoting coherent competition rules, encouraging EU enlargement, supporting innovation and promoting the further liberalization of world trade and investment. See [www.unice.org](http://www.unice.org)
represented by the ETUC (created in 1973) through its efforts to promote the European Social Model.  

The European Social Partners engage in collective action in order to affect decisions taken at the European level that concern employment, social affairs and macroeconomic policy. Their relationship with the EU institutions is unique compared to other organizations, lobbies or interest groups organized at the EU-level because their purpose and rights are clearly defined in the EC Treaty under the terms of the European Social Dialogue. The idea of a European Social Dialogue was conceived by Jacques Delors alongside the launch of the internal market in 1985. The European Commission is required to consult with and facilitate dialogue between the Social Partners on matters concerning social policy. The various DGs in the Commission frequently consult the Social Partners on proposed regulations and directives. In turn the Social Partners regularly produce opinions and send representatives to the various committees and consultative bodies of all the EU Institutions.

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166 The European Social Model envisions “a society combining sustainable economic growth with ever-improving living and working standards, including full employment, social protection, equal opportunities, good quality jobs, social inclusion, and an open and democratic policymaking process that involves citizens fully in the decisions that affect them”. See [http://www.etuc.org/r/2](http://www.etuc.org/r/2)


168 See Article I-48 and Article 138(1-4) EC Treaty. As the EU has evolved, the European Commission has made several motions to enhance and improve dialogue with the Social Partners. See, for example, European Commission 2000; 2002; 2004a.

169 For example and amongst many other thing the ETUC takes part in the annual Tripartite Social Summit each spring, to assess progress on the 2000-2010 Lisbon Agenda; works closely with a cross-party Intergroup of MEPs in the European Parliament; coordinates trade union participation in a number of advisory bodies, including the Economic and Social Committee and the EU agencies for vocational training, living and working conditions, health and safety; participates in DG Trade’s Civil Society Dialogue. Peter Coldrick. Former Confederal Secretary of the European Trade Union Confederation. Interview by Author. 18 May 2005.
Article 139 EC Treaty gives the Social Dialogue legal character by stating that “should management and labour so desire, the dialogue between them at Community level may lead to contractual relations; including agreements.” 170 The Social Partners may engage in autonomous, collective action to devise framework agreements on social policy, especially labour and employment policy. 171 They communicate results of such dialogue to the Commission. Framework agreements can become European legislation by a Council decision (acting by qualified majority or unanimity according to the subjects) on a proposal from the Commission. In these cases the Council may not amend the content of the Framework Agreements devised by the Social Partners.

Given that the relationship between the Social Partners and the EU institutions is embedded in the fabric of the Union, it is quite natural that DG Trade consults frequently with them when formulating external trade policy. There is significant and recurrent private and personal contact between members of UNICE’s International Relations Department and DG Trade officials throughout all stages in the trade policymaking process. 172 UNICE and the ETUC in particular are routinely asked to provide input on a range of external trade-related issues. The European Commission often provides these organizations with draft proposals, sometimes long before any other stakeholders are consulted. UNICE is commonly asked to advise EU negotiators on the main barriers to

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170 The treaty does not define the precise meaning of ‘management and labour’ nor does it provide guidance on which organizations should be consulted. The Commission (1993, 1998) has since determined that organizations should: 1) be cross industry or relate to specific sectors or categories and be organized at the European level; 2) consist of organizations, which are themselves an integral and recognized part of Member State social partner structures; 3) have adequate structures to ensure their effective participation in the consultation process.

171 For examples of framework agreements that have since been ratified by the European Council of the European Union and are now part of European legislation see European Council 1996, 1997, 1999.

172 WTO Advisor, Union of Industrial and Employers’ Confederations of Europe (UNICE). Interview by author. 24 September 2004.
trade encountered by their members and it is reported that DG Trade officials read and respond carefully to Social Partner position papers. Relevant DG Trade officials meet with members of UNICE’s international relations committee for weekly and monthly meetings and briefings. UNICE is also part of the official EU delegation at WTO ministerial meetings, as are all members of the Civil Society Contact Group. The ETUC enjoys many of the same opportunities for consultation, especially in areas of particular concern to its members such as Mode 4: Movement of Natural Persons.  

The relationship between the Social Partners and DG Trade officials is a true dialogue, a two way exchange of information and ideas. The role of the Social Partners is institutionalized in the EC Treaty, trade rules have a direct impact on their members, and the Commission generally views them as partners who provide valuable expertise and experience. In recent years, however, the Social Partners feel their influence has been diluted by the increased involvement of new actors, especially NGOs, in the external trade policymaking process.  

Since 1995, the European Commission has stepped up its efforts to foster and enhance its relationship with the private sector. In part, this has involved developing intimate consultative and partnership arrangements with several business networks. Of particular note are the European Services Forum (ESF) and the Transatlantic Business Dialogue (TABD).  

173 Peter Coldrick. Former Confederal Secretary of the European Trade Union Confederation (ETUC). Interview by Author. 18 May 2005  

174 “Industry has the perception that it is losing influence and this is, in part, caused by the Civil Society Dialogue…. Industry feels it’s not being listened to…” WTO Advisor, Union of Industrial and Employers’ Confederations of Europe (UNICE). Interview by author. 24 September 2004.  

175 The European Commission also maintains loose, ad hoc relationships with the Financial Leaders Group and the Investment Correspondent Network. The former, created in 1996, makes statements at critical
The European Services Forum works to advance the interests of the European services industries in multilateral, regional and bilateral trade negotiations. Its membership is currently comprised of 40 European sectoral federations (comprising the working level policy committees) and 36 multinational corporations (MNCs) (CEOs and Chairmen comprise the European Services Leaders Group). Its core objectives are to encourage liberalized service markets throughout the world, to remove both trade and investment barriers, and to improve market access for service industries through trade negotiations. Created in 1999 at the behest of the European Commission, the ESF advises DG Trade on trade in services negotiations. At the launch of the ESF, Trade Commissioner Leon Brittan characterized the relationship between DG Trade and the ESF thus:

moments in international trade negotiations and identified a list of barriers to trade in financial services in 2002. Its main purpose is to “provide unified European-North American financial sector support to liberalising trade in financial services in the World Trade Organization”. Its input was instrumental during the negotiations on the Agreement on Financial Services in 1997. See www.flwg.org The ICN, comprised of over 50 MNCS, was set up in 1998 to assess the priorities of European businesses as they pertain to international rules on investment, especially investment protection in the aftermath of the failed MAI. In particular, they were to assess support for a future investment deal at the WTO. The ICN was also charged with assessing the impact of civil society campaigns against a MAI. For more details see European Commission 1998b. The European Commission also set up the European Community Services Group (ECSG) to advise Commission officials on services liberalization during the Uruguay Round of Multilateral Trade Negotiations. This organization was led primarily by the British financial sector.

The ESF was originally created only for the amount of time it would take to complete GATS: 2000 negotiations – 4 years. Since Cancun, the ESF attempted to extend its mandate to include regional and bilateral trade policy. Despite early concerns that the ESF lacks the means and willingness to go deeper into matters concerning the internal market, the mandate has been successfully extended. Pascal Kerneis, Managing Director, European Services Forum. Interview by author. 24 September 2004 and 15 June 2006.

A list of ESF members can be found at http://www.esf.be/002/index.html

The ESF replaced the European Tradable Services Network, a small group of European-level sectoral federations organized within UNICE. The ETSN was “weak and powerless” working alongside its industrial partners in UNICE and therefore, effectively hamstrung in its attempts to be heard by Commission officials. Pascal Kerneis. Managing Director, European Services Forum. Interview by author. 24 September 2004.
You are the driving force of the consultation system which we have established, my door is open for any matters of concern […] I am in your hand[s] to listen to what are your objectives, your priorities for liberalization […] I count on your support and input, at the company, CEO and Chairman as well as the European or National Federations levels, so that we can refine our strategy and set out clear, priority negotiating objectives which will make a difference in the international expansion of services business.  

The ESF pursues several different formal strategies in its efforts to influence the services negotiations. First, it prepares position papers\(^\text{181}\) on horizontal issues that are of concern to all its members such as Mode 4, subsidies or regulations. Second, the ESF is a member of the Civil Society Dialogue’s Contact Group (discussed above). The ESF managing director, Pascal Kerneis, participates regularly in Civil Society Dialogue meetings and accompanies DG Trade officials to WTO ministerial meetings. Members of the ESF are represented at the international level by the Global Services Coalition. In these forums, the ESF aims to help maintain momentum in services negotiations.

The ESF’s strategic interests regarding market access are not laid out in formal position papers but are sometimes delivered through press releases, speeches and letters to the Trade Commissioner.\(^\text{183}\) However, key opportunities for conveying ESF members’ strategic interests arise during private, informal meetings with DG Trade

\(\text{180}\) Brittan 1999.

\(\text{181}\) All ESF Position papers are available online at [http://www.esf.be/004/002.html](http://www.esf.be/004/002.html)

\(\text{182}\) There is a formal, internal procedure where a rapporteur writes a preliminary draft. ‘Virtual’ working parties, organized by horizontal issues then coordinate comments on the draft by email. Policy papers are put to a vote at quarterly policy committee meetings. If adopted, the policy paper cannot be amended. Members then have a choice whether to sign and endorse the policy paper or to opt out of the paper. It is notable that some members of the ESF, such as notaries or those in the audiovisual sector, are not in favour of more liberal trade rules. Pascal Kerneis. Managing Director of the European Services Forum. Interview by author. 15 June 2005.

officials. There is a well established and well known system of informal consultation between ESF secretariat staff and DG Trade officials at all stages of the policymaking process. The ESF secretariat is briefed regularly by Commission officials on the ongoing services negotiations and is invited to respond directly to any new developments such as the revised services offer in June 2005.  

DG Trade officials routinely invite the ESF members to comment on proposed requests for third country market access. This practice sparked a great deal of controversy when the EC’s requests for third country market access were leaked - 29 draft requests were leaked in April 2002 and then the full text of 109 final requests were leaked in February 2003. The European Commission had repeatedly stressed that it would not make the requests public. However, email correspondence covertly ascertained by one of the ESF’s biggest critics, the Corporate Europe Observatory, implied that while they had been kept secret from other stakeholders and most members of the European Parliament, the ESF had seen the requests in their various stages and manifestations during informal consultations with DG trade officials.

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185 Requests and reactions are available at [http://www.gatswatch.org/requests-offers.html#outgoing](http://www.gatswatch.org/requests-offers.html#outgoing)

186 Senior Trade Policy Official, Unit DG Trade, G1 - Trade in Services and Investment; GATS and Investment. Interview conducted by author, 8 October 2004.

187 For example, in one email DG Trade – Services, Head of Unit João Aguiar Machado wrote to Pascal Kerneis, Managing Director of the ESF: "(W)e would very much welcome industry's input to this exercise, both in terms of finding out where the problems currently lie and in making specific requests. Without ESF input the exercise risks becoming a purely intellectual one ..."). He then sent Pascal Kerneis a reminder, stressing "the importance to provide within the following days any input you [i.e. the ESF] may have, as we are currently finalising the draft requests that will be transmitted to Member States very soon." These emails were ascertained by CEO through access to documents requests.
It is important to clarify, however, that the ESF secretariat does not always speak for the different sectors it represents, nor is it the only stakeholder consulted on issues pertaining to trade in services. For instance, in April 2003 the EC made a conditional services offer in the context of GATS 2000 negotiations. Prior to the release of this offer, the DG Trade launched an unprecedented request for public input into how the EC should respond in its initial offer to the requests it had received from third countries.\textsuperscript{188} The European Commission received thousands of responses to the consultation document. Some included substantive recommendations\textsuperscript{189} and others criticized the EU’s handling of GATS consultations and negotiations.\textsuperscript{190} Instead of responding directly to the consultative document issued by the European Commission, the ESF secretariat made broad public statements and coordinated meetings between its members and DG Trade officials.

Members of the ESF also have informal, intensive, and autonomous relationships with DG Trade officials where they communicate key obstacles to trade and make suggestions on which sectors and countries to target in services negotiations. For example, the Council of Bars and Law Societies of Europe (CCBE) reports an intimate and active working relationship with DG Trade officials on matters pertaining to both the requests for third country market access and the EC’s services offers; it has the

\textsuperscript{188} European Commission 2002d, 2003.

\textsuperscript{189} See for example the response from the European Bureau of Library, Information and Documentation Associations (EBLIDA) available at http://www.eblida.org/position/GATS_Response_Jan03.htm

\textsuperscript{190} For example see the submission by UNI-Europa, the trade union federation for services and communication at http://www.union-network.org/uniflashes.nsf/0/bfbc95cc82f1a85e1256cad00397e4e?OpenDocument. GATSwatch also orchestrated a protest against GATS consultations, sending a barrage of emails to the European Commission. See http://www.gatswatch.org/consultation.html
“Commission’s eyes and ears” at its disposal. As such, it has no need to participate in formal consultative forums like the Civil Society Dialogue. The CCBE produces position papers independently of the ESF. It also has weekly and monthly, one-on-one meetings with DG Trade officials where they discuss both the sector specific issues and the horizontal areas of services negotiations.

Officials working at the CCBE characterize this relationship as a true partnership. On one hand, the Commission provides detailed information and attempts to appease and respond to CCBE concerns. On the other hand, the CCBE aims to provide constructive comments on Commission proposals and to keep the Commission abreast of the day to day realities of the profession they represent. The Commission devises the framework and the principles for business services liberalization but relies on CCBE experience and expertise to provide the more intricate details as they pertain to the legal profession. For instance, the CCBE was consulted on the EC’s revised requests for third country market access during GATS 2000 Negotiations and was asked to highlight the key shortfalls in market access for legal services. In total, the CCBE submitted a list of 35 countries that the Commission should target in its requests. My interviews indicate this is a

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191 Peter McNamee. Legal Advisor, Council of Bars and Law Societies of Europe (CCBE). Interview by author. 10 June 2005. The CCBE is the officially recognised representative organisation for the legal profession in the European Union (EU) and the European Economic Area (EEA). For more information see http://www.ccbe.org/

192 Note the CCBE does not support the extension of sectoral coverage of commitments for legal services to all types of legal services and to all fields of law. Rather, the CCBE only supports market opening for the provision of services in home country law and public international law.

193 Peter McNamee. Legal Advisor, Council of Bars and Law Societies of Europe (CCBE). Interview by author. 10 June 2005.
typical, informal consultative relationship between members of ESF and DG Trade
officials.  

In another effort to strengthen public-private partnerships, the TABD was created
by EU and US government officials in 1995 as part of the New Transatlantic Agenda
(NTA) and later reaffirmed in 1998 in the New Economic Partnership. The TABD
is designed to facilitate dialogue between the CEOs of European and American MNCs
and EU and US policymakers. EU Trade Commissioner at the time, Leon Brittan,
explained the impetus behind the TABD as follows: “We and the American government
(...) asked businessmen from both sides of the Atlantic to get together and see if they
could reach an agreement on what needed to be done next. […] European and American
business leaders united in demanding more and faster trade liberalization. And that had
an immediate impact.” In a similar vein, US Under Secretary of Commerce for
International Trade, Timothy Hauser explains that “The idea was simple: to identify those
barriers to trade or opportunities for liberalization on which both business communities

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194 See for example: Marc Pouw. Secretary General, Association of European Public Postal Operators
(PostEurop). Interview by author. 16 June 2005; Mark van der Horst. Chairman, Competition and Market
Reform Committee, European Express Association (EEA). Interview by author. 7 June 2005.

195 For the text of this agenda see European Union 1995a, b.

196 For details of the Transatlantic Partnership see European Commission 1998a. The creation of the
Transatlantic Consumer Dialogue (TACD) (1998) and the Transatlantic Environment Dialogue (TAED)
(1998) were also part of this initiative. The TACD is a forum for American and European Consumer
organizations to develop joint consumer policy recommendations. For more information see
http://www.tacd.org/about/about.htm. The TAED ceased to exist in 2001, largely because the US failed to
provide its share of the funding to support the dialogue. The writing on the wall was evident almost from
the beginning. At the Bonn EU/US Summit in 1999, members of the TABD were invited to meet with
President Clinton, German Chancellor Schröder and EU President Santer. The TAED was only permitted
to submit its concerns in writing as written requests from the TACD and the TAED for a meeting with
Summit leaders were ignored.

197 Sir Leon Brittan in his speech "Investment Liberalisation: A New Issue for WTO. Europe and the
1999.
could agree as targets for government action. We should put the business 'horse' before the government 'cart'." Others have attributed the initiative to a desire on the part of US officials to use European MNCs to rein in EU policymakers to pursue the free trade imperative more aggressively. Maria Cowles suggests EU MNCs have more in common with American business and government interests than with EU Commission officials. The EU Commission was viewed as too “regulation friendly” and the TABD was conceived as an instrument to activate EU business to counter-balance the Commission, at least by US officials. Regardless of how its impetus is framed, all parties agree the overarching purpose of the TABD is to further reduce barriers to trade.

Members of the TABD engage in private commercial diplomacy. They conduct private (company to company) negotiations and work to develop joint industry recommendations and reports on trade policy and regulatory reform. Most of this work is done by the TABD’s Working Group on Global Issues which deals with, among other things, matters arising at the WTO. TABD working groups are overseen by a CEO-comprised Steering Committee. In the EU, DG Enterprise and Industry coordinates relations with the TABD in cooperation with DG Trade and DG External Relations.


199 Cowles 2000.

200 For an analysis of the institutionalization of private sector influence in trade policy, see Sherman and Eliasson 2006. Maria Green Cowles (2001, 214) characterizes the relationship between the TABD and government officials as a new form of governance, whereby “the TABD blurs the traditional distinction between public and private governance, with businessmen effectively negotiating in quadrilateral forums alongside their governmental counterparts.”

Consultation with US and EU businesses takes place during a yearly conference in which over a hundred CEOs and senior level government representatives participate. A second, large-scale meeting traditionally takes place at the World Economic Forum in Davos. Frequent policy committee meetings also take place throughout the year. EU Commission officials and their American counterparts try to ensure that recommendations are directed towards those issues on which the governments are really working. They interact with members of the TABD at all stages of the policymaking process; they comment as the TABD is drafting its recommendations and they attend TABD meetings, along with UNICE, as observers.202

In addition, the Early Warning Mechanism established in 1999 is designed to help US and EU officials notify each other of potential trade disputes.203 It includes a set of principles whereby decision-makers in the EU and US are committed to taking the other side's interests into account when formulating policy, legislative, or regulatory decisions. Although any interested party may make use of the mechanism to communicate its interests, preferences or concerns204, members of the TABD have been instrumental in both identifying and mitigating potential trade conflicts. Working in tandem with the Early Warning Mechanism, Section 301 of the US Trade Act of 1974205 and the EU’s


203 See European Commission 1999a. For a list of recent Early Warning Items see http://ec.europa.eu/trade/issues/bilateral/countries/usa/lewi.htm

204 This point was clearly articulated in Pascal Lamy’s January 2002 response to charges by the TACD that the objectives of early warning is: “to subject proposed environmental and consumer protection regulations to deregulatory pressure, and to seek the elimination of health, safety and environmental regulations”. For the full text of the letter see http://www.tacd.org/docs/?id=163

Trade Barriers Regulation (TBR) effectively enable private parties, including individual firms and industry groups, to petition government officials to initiate negotiations with third countries to address barriers to trade/exports. The aim is to resolve potential trade conflicts diplomatically rather than through the WTO’s Dispute Settlement System. Since its introduction into EU legislation in 1995, the European Commission has actively encouraged industry to use the TBR measure. This is an offensive instrument designed, in part, to monitor trade partners’ compliance with existing trade commitments. It is notable because it effectively enables private parties to raise issues and place items on the negotiating agenda not chosen a priori by government officials.

The TABD and the European Services Forum are widely considered by NGOs to constitute the backbone of the EU’s so-called “Corporate Trade Agenda”. Many characterize the relationship between EU officials and business as incestuous. The situation, according to some NGOs, is so critical that groups like the Corporate Europe Observatory now dedicate all of their resources and energies to revealing how DG Trade

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To date, 24 TBR examination procedures have been initiated. For a list of cases, see [http://ec.europa.eu/trade/issues/respectrules/tbr/cases/cases_list_en.htm](http://ec.europa.eu/trade/issues/respectrules/tbr/cases/cases_list_en.htm)

207 Nikolaos Zaimis. Head of Unit, DG Trade, Unit F2- Dispute Settlement and Trade Barriers Regulation. Interview by author. 4 September 2004.

208 Notably, in early 2005, the European Commission created the Export Help Desk, a system designed to help developing countries access the EU Market. Paolo Garzotti. Acting Head of Unit, DG Trade, Directorate E – Sectoral Trade Questions and Market Access, Bilateral Trade Relations. Interview by author. 5 October 2004. See [http://export-help.cec.eu.int/](http://export-help.cec.eu.int/)


210 Noted signs of ‘incest’ include Pascal Lamy’s participation in the TABD meetings as Member of the Executive Committee - Crédit Lyonnais prior to his role as Trade Commissioner. CEO 2004.
panders to corporate interests. Civil society groups criticize the TABD process as unaccountable, undemocratic and harmful to environment and consumer concerns. Numerous calls for the abolishment of the TABD and the ESF have been forwarded by NGOs to Commission officials.211

Commission officials respond to such criticisms by emphasizing that TABD and ESF influence is not fait accompli and the impact often appears larger than it actually is since they share a joint free trade agenda.212 Moreover, according to a senior DG Trade official, these relationships are defensible because industry is the intended beneficiary of more open markets,

The traders are not the trade unions [or the NGOs]. Consultation with the ESF [and the TABD] is fairly transparent and you need to liaise with European companies because it means jobs for European employees. As long as they don’t have a monopoly of contact with the Commission there isn’t a problem”.213

No matter how it is perceived, the creation of forums like the TABD and the ESF mark an institutional innovation that created entirely new and private access points through which industry can interact with policymakers without interference from other

211 See for example CEO 2004.

212 According to one Commission official, “TABD is a true dialogue. There is ample proof of recommendations, a track record of replies that accurately responds to recommendations and an implementation record … but sometimes implementation is not feasible…. Also, we see a notable convergence of agendas both between government to government and government to business. We are really speaking about the same issues and the commitment is there. Commitment to dialogue but not necessarily to the results. That needs to be looked at case by case. We have never said to the TABD, make your recommendations and we’ll implement them. We’ll always reply and hopefully there will be common ground. We are always keen to move forward, taking into account business views…[but the] true purpose is to get rid of barriers. We are not starting from radically different positions.” Senior Commission Official, DG Enterprise, Unit A2: External Aspects of Enterprise Policy. Interview by Author. 31 May 2006.

213 Sabine Weyand. DG Trade, Member of Pascal Lamy’s Cabinet, Responsible for Relations with European Parliament; Social Partners and NGOs; Transport; Energy; Sustainable Development; Employment and Social Affairs; Environment; European and Social Committee (ESC) until November 2004. Interview by Author. 2 June 2005.
stakeholders including CSOs. Unlike more traditional self-organized industrial lobbies like UNICE, the TABD and the ESF were created at the behest of government. They are forums where the status of industry is elevated from the standard “ad hoc advisory groups convened to elicit private-sector opinion on specific instances of policymaking” to institutionalized interlocutors endowed with the right to “generate [their] own coordinated agenda for policy change” and who enjoy a relatively autonomous right of initiative to set the agenda.214

IV. Conclusion

In this chapter, I mapped the external trade policymaking environment within which a growing chorus of NGOs are demanding a voice. In so doing, I outlined the “two-tier delegation of authority” system that characterizes policymaking in this area and discussed several challenges to the EU’s retention of exclusive competency since the conclusion of Uruguay Round of Multilateral Trade Negotiations. I then traced key developments in EU-level political opportunity structures designed to increase the involvement of a broad base of Civil Society Organizations including business forums, trade unions, farmers’ associations, consumer groups and NGOs, in external trade policymaking across each of the major EU institutions. I demonstrated that the European Commission has been especially zealous in its efforts to improve participatory and access conditions for CSOs since 1995. Notable disparities between the inclusion of economic and non-economic actors remain and in some cases have widened as a result of newly created, exclusive consultative arrangements between industry associations and/or trade unions on one hand and EU Commission officials on the other. Despite inconsistencies in the number of

214 Sherman and Eliasson 2006, 475.
access points and the frequency of contact between economic and non-economic actors, there have clearly been significant aggregate improvements in access and participatory conditions for a wide range of CSOs in the EU’s external trade policymaking process since 1995.

I have argued that a robust democratic imperative appears to underscore these dramatic efforts to make trade policymaking more open, particularly for non-governmental entities. These efforts respond in dramatic ways to demands for better quality trade governance and more inclusive, responsive channels of participation for all actors with a vested interest in the outcome of international trade negotiations. Moreover, the changes outlined in this chapter certainly mark a significant and robust effort by EU policymakers to acknowledge the social, environmental and cultural impacts of international trade rules and the growing range of actors affected by them.

This analysis serves as a baseline from which we can begin to look at how these new access points and consultative mechanisms work in practice. In particular, it prompts the following questions: Do changes in political opportunity structure work to give a voice to a broader range of non-economic actors? Do these changes work to empower NGOs? Do the increased involvement and opportunities for participation actually result in more democratic or qualitatively enhanced external trade policymaking by virtue of the divergence of interests included in consultations? Can we expect proposals that emerge from these consultative arrangements to produce external trade policies aimed at reducing disparities between the north and south and correcting widespread injustices resulting from previous Rounds of Multilateral Trade Negotiations? Will more just, equitable and fair external trade policies result from the increased
participation of NGOs in the EU’s external trade policymaking process? These are all questions that will be answered in the case studies to follow in Chapters 5 and 6.
Chapter Four:  

Entrenching Intellectual Property Rights and Services in the International Trade Regime - Expanding the Legal/Liberal Episteme

I. Introduction

In this chapter, I provide a detailed historical analysis of the evolution of the Agreement on Trade Related Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Services (GATS) in the World Trade Organization. I pay particular attention to the role of the European Union in this context. Although negotiations on intellectual property rights (IPR) during the Uruguay Round were characterized by considerable political wrangling, by 1995 WTO members agreed to codify, legalize and link IPR to the international trade regime. Similarly, after periods of brinkmanship and compromise, WTO members agreed to shift services from traditional, national regulatory regimes to market-based rules embodied in the international trade regime. In both cases, WTO members firmly entrenched services and intellectual property rights inside the legal/liberal episteme defined at length in Chapter 2. By shifting services and intellectual property rights under the auspices of the WTO, policymakers defined what policy options would be conceivable in subsequent negotiations. This analysis is especially important because it identifies the legal and ideational constraints under which EU policymakers are negotiating new international trade deals. This chapter also highlights the key fears of global civil society that developed in response to the entrenchment of services and IP protection in the international trade regime. This discussion centers on several key focal points of concern for NGOs, each of which features prominently in EU-level debates over the EC’s position in ongoing TRIPS and GATS negotiations. Essentially, the purpose of
this chapter is to frame the context and constraints within which NGOs are demanding a
voice in the EU’s external trade policymaking process.

II. Shifting IP Protection into the International Trade Regime

A. Uruguay Round negotiations

The 1994 Agreement on Trade-Related Intellectual Property Rights (TRIPS) ushered in
fundamental normative and substantive changes in the global intellectual property rights
(IPR) regime. The TRIPS Council superseded the World Intellectual Property
Organization (WIPO) as the global IPR administrator.¹ The WIPO is a specialized
agency of the United Nations designed to promote the development and harmonization of
IPR rules among its members.² It works to develop laws and administers 16 international
treaties but lacks the necessary enforcement mechanisms to ensure members’ compliance
with those IPR rules.³ Critics also charge that the WIPO too closely identifies with
developing countries who, from the perspective of IP-based industry, “abet the theft of
intellectual property.”⁴ As a result, prior to the TRIPS Agreement businesses in a wide
range of sectors were facing substantial losses due to inadequate IP protection abroad.
According to Sell and Prakash, U.S. industry lost between $43 billion and $61 billion in
1986 alone.⁵

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¹ Braithwaite and Drahos (2000) give particular attention to the significance of ‘forum-shifting’ between international institutions.
² For an overview of the purpose and key activities of WIPO, see http://www.wipo.int/about-wipo/en/core_tasks.html
³ Details of the treaties administered by the WIPO are available at http://www.wipo.int/treaties/en/
⁴ Sell and Prakash 2003, 158.
⁵ Sell and Prakash 2004, 154.
Controversy over the appropriate scope and forum for IP protection has a long history.\(^6\) However, in the early 1980s, IP-based industry forged a powerful private sector coalition aimed at securing more stringent IP protection at both the national and the international levels. In the United States, the IP-based industry\(^7\) successfully linked its strategic interests to the broader policy challenges plaguing the US government; this lobby was able to tap into the United States’ obsession with competitiveness and its abysmal trade deficit.\(^8\) For the very first time, intellectual property rights were recognized as a “trade” issue.\(^9\) The push towards heightened IPR protection and enforcement culminated in 1988 with revisions to the US Trade Act, which effectively enabled the United States Trade Representative (USTR), by invoking Section 301 of the Act, to act unilaterally against any country that failed to provide adequate protection to US-based industry.\(^10\)

Looking beyond the US to the Uruguay Round of Multilateral Trade negotiations, the Intellectual Property Committee (IPC)\(^11\), Union of Industrial and Employers’

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\(^6\) For a sense of this controversy see Sell and May 2006; Roffe 2000; David 1993.

\(^7\) In the US, the main lobbies are the International Intellectual Property Alliance (IIPA) which was formed in 1984 and represents over 1500 copyright-based companies and the Pharmaceutical Research and Manufacturers of America (PhRMA) which represents major patent holders in the US. Notably, the IIPA was opposed to a multilateral solution to lax IPR protection in developing countries and instead favoured bilateral solutions such as the mechanisms provided for in Section 301 of the US Trade Act.

\(^8\) Sell and Prakash 2004, 156.

\(^9\) The Reagan Administration pursued a trade policy aimed at restoring US international competitiveness by restructuring and in many cases establishing intellectual property right systems in developing countries. These priorities are reflected in the so-called “Young Report” as well as the “President’s Trade Policy Action Plan (TPAP)” of 1985.

\(^10\) Sell and Prakash 2004, 156.

\(^11\) This US based umbrella organization is comprised of 15 CEOs from American MNCs. For further information about this organization see [http://www.ieeeusa.org/volunteers/committees/ipc/index.html](http://www.ieeeusa.org/volunteers/committees/ipc/index.html)
Confederations of Europe (UNICE)\textsuperscript{12} and Keidanren\textsuperscript{13} joined forces shortly before its launch in September 1986 to develop a transnational private sector consensus on IPR protection. Pharmaceutical and computer industries in particular favoured a multilateral approach to securing more stringent IP protection and industry leaders in these areas played a decisive role in each of the organizations in the US, Europe and Japan respectively. These organizations considered it necessary to establish IPR protection standards within an international forum that had the capacity to ensure compliance. Under the leadership of the IPC, these organizations formed the “Cooperation among European, Japanese and United States Business Communities”, or Private Trilateral Meeting. They worked to encourage their respective governments to conclude an agreement on IP protection vis à vis the Uruguay Round Agenda and to develop a consensus on appropriate standards for protection. Though consensus was not easily attained\textsuperscript{14}, the trilateral coalition produced a 100-page \textit{Basic Framework of GATT Provisions on Intellectual Property} in the summer of 1988 calling for:

1) A code of minimum standards for copyrights, patents, trademarks, and appellation of origin issues;

2) An enforcement mechanism;

3) A dispute settlement mechanism.\textsuperscript{15}

\textsuperscript{12} In January 2007, UNICE changed its name to BusinessEurope, the Confederation of European Business. The new website is available at: \url{http://www.businesseurope.eu/Content/Default.asp}

\textsuperscript{13} In May 2002, Keidanren, Japan Federation of Economic Organizations, merged with Nikkeiren, Japan Federation of Employers’ Associations to form Nippon Keidanren. For details about this organization see \url{http://www.keidanren.or.jp/}

\textsuperscript{14} Initially, there was even controversy between the IPC and the USTR over the appropriate scope of intellectual property protection during GATT negotiations. The latter sought the broadest range of product coverage possible while the former sought to limit negotiations to areas in which the Trilateral coalition could easily reach consensus.

\textsuperscript{15} Sell and Prakash 2004, 159.
It is widely agreed that the final TRIPS Agreement reflects the core priorities articulated in the *Framework*.

In this respect, the WTO Secretariat also played an instrumental role in the run up to the TRIPS Agreement. Although it is conventionally understood not to play a policymaking role, the Secretariat was instrumental in the final outcome of IP negotiations during the Uruguay Round of Multilateral Trade Negotiations by determining that talks would not conclude in the absence of a completed and unanimously agreed-to text. In 1991, the Secretariat distributed the so-called “Dunkel Draft” text which mirrored the IP industry’s *Framework* and, according to Frederick Abbott, “provided an almost completed blueprint for the final texts adopted at Marrakesh.”16

Intergovernmental negotiations on IP during the Uruguay Round were complex and fraught with controversy. For instance, developing countries were staunchly opposed to the inclusion of an IP code in the GATT. India and Brazil in particular expressed serious misgivings about extending patent protection to inventions related to public health and nutrition.17 In 1990, the Chair of the TRIPS Negotiating Group had distributed a draft text which included alternative A and B drafts supported by developed and developing countries respectively.18 However, in the end, developing countries were promised a range of incentives if they agreed to a deal on IP protection. For instance, developing countries were convinced that providing greater IP protection would result in

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16 Abbott 2002a, 477.

17 Singh 2006, 61-63. This view was clearly expressed by the Indian delegation in 1989. See GATT Secretariat 1989 at para. 79.1.

18 Abbott 2002a, 477.
increased foreign direct investment and facilitate technology transfer.\textsuperscript{19} IP protection was also linked to progress on other areas of particular concern to developing countries such as agriculture and textiles. Finally, in the hope of limiting the US’ aggressive, unilateral use of Section 301 USTR, developing countries assented to moving IPRs from the WIPO to the trade regime. The distance between the US, Japanese and European mandates was also initially quite wide.\textsuperscript{20} However, by October 1987 Europe, the US and the Trilateral coalition positions were essentially in concurrence.

The political process leading up to the conclusion of the TRIPS Agreement is not the focus of this study.\textsuperscript{21} Nonetheless, it is instructive to at least highlight the aggressive and decisive role played by IP-based industry during this period. The transnational coalition of IPR-based industry was the key interlocutor pushing to shift IPR protection to the trade arena and to legalize dispute settlement. NGOs and other members of civil society were virtually absent at this stage of the IPR policy debate.\textsuperscript{22}

The TRIPS Agreement incorporates all of the rules contained in the treaties once administered by the WIPO, including the Paris Convention for the Protection of

\textsuperscript{19} Maskus 1999.

\textsuperscript{20} For instance, the scope of IP protection was an initial point of concern. The Japanese and Europeans found the omission of design from the US list problematic. The US was looking for inclusion of trade secrets from the Europeans and the Japanese list. The omission of geographical indicators from both the Japanese and US lists was particularly problematic for the Europeans. In fact, the EU only gave its assent to the expansive IP-agenda during the Uruguay Round once geographical indicators were included in the agenda in mid-1988. For the US negotiating mandate see United States Framework 1987. For the European negotiating mandate see GATT Secretariat 1988.

\textsuperscript{21} See Sell 2003 for an extensive and insightful explanation of the adoption of the TRIPS Accord and the establishment of a new global IP regime. For additional analyses of the political process leading up to the TRIPS including the political wrangling between developed countries see: Sell 1995; Matthews 2002; Drahos 1995; Gervais 1998.

\textsuperscript{22} Though some NGOs did mobilize during the 1980s against the price of prescription drugs the debate was largely limited to domestic health policy debate in the US. See Sell and Prakash 204, 161.
Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works but broadens the scope of IPR protection in important ways.\textsuperscript{23} Most-Favoured Nation and National Treatment became the basic principles underpinning the IPR-regime. At bottom, the Agreement aims to ensure that IP protection works to encourage innovation and the transfer of technology. It provides a universal blueprint that sets minimum standards of protection and enforcement for each of the following: industrial property (patents, trademarks, geographic indicators of source, industrial designs) and copyright (literary and artistic works). Most relevant for this study are the provisions related to patent protection. All WTO signatories are required to provide 20 year minimum patent protection “for any [new] inventions, whether products or processes, in all fields of technology without discrimination.”\textsuperscript{24} The logic behind this provision is that the research and development required for new inventions are costly but cheap for generic competitors to reproduce. Granting temporary, exclusive marketing rights to the originator of a new invention allows them to charge higher prices to recoup the costs of R&D and thereby provides an incentive for new research and technological progress. This has been coined a “low-volume, high margin” strategy since it severely restricts the sale of patented goods to poor countries.

Finally, where WIPO members were free to deny patent protection at their discretion, all WTO members are required to maintain the same level of IP protection regardless of their level of development.\textsuperscript{25} They are required to implement minimum

\textsuperscript{23} Notably, the TRIPS Agreement has been commonly referred to as a Berne and Paris-Plus Agreement.

\textsuperscript{24} Article 27.1 TRIPS Agreement

\textsuperscript{25} For an overview of the implications of a “one-size fits all” approach to intellectual property rules for developing countries see Fink and Maskus 2005; Barton et al. 2002.
levels of protection for IP within their national legislation and bring their national patent regimes into line with their TRIPS obligations. Countries were, however, granted grace periods for implementing their TRIPS obligations according to their respective levels of development.\textsuperscript{26} The TRIPS Agreement also introduced new measures governing how IP rules should be enforced. The shift from WIPO to TRIPS introduced the possibility of inflicting retaliatory commercial measures. Since 1995, countries can impose punitive trade sanctions in any field of trade (not just IP) on violators of the Agreement. For the first time, stringent intellectual property norms were codified, legalized and linked to the international trade regime.\textsuperscript{27}

\textbf{B. Global Civil Society Backlash Against the Impact of TRIPS on Access to Medicines}

No issue is more controversial than the potential impact of the TRIPS Agreement on the production and exchange of affordable, essential medicines. Within five years of the introduction of the TRIPS Agreement, this issue became the focal point of a massive worldwide Access Campaign led by NGO AIDS activists and public health advocates. Two aspects of this debate are especially troubling. On one hand, critics take issue with the practice of charging high prices for drugs for diseases that primarily affect people in the global south and who cannot afford treatment. On the other hand, pressure is being

\textsuperscript{26} TRIPS obligations must be implemented in developed countries by 1 January 2006, developing and transition economies by 1 January 2000, and least developed countries by 2006. Developing and transition economies were granted an additional five years to comply with TRIPS obligations that required the extension of patent protection to new areas such as pharmaceutical products. Moreover, as I will discuss later in the chapter, the Doha Ministerial Declaration extended the period for implementing pharmaceutical patent protection by 10 years, until 2016 for Least Developed Countries and in November 2005 they obtained a seven-year extension for other products (until 2013). See WTO 2005a.

\textsuperscript{27} For an overview of the TRIPS Agreement and Substantive Standards of IPR Protection see http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm For further discussion of the TRIPS Agreement see Sell 2003; Correa 2006; Cottier 2005; Matthews 2002.
placed on developing country governments to restrict the local manufacture of generic versions of life saving drugs, even when the measures are TRIPS-compliant.

As soon as the TRIPS Agreement came into force, the US, EU and their Pharma\textsuperscript{28} industries began cracking down on developing countries for *perceived* IPR violations.\textsuperscript{29} In general, the Pharma industry was concerned that any leniency or exception made to IPR enforcement would lead to a downward erosion of IP rights, leaving them unable to recover the costs of research or earn a profit on broad categories of drugs. These worries led to a series of cases against developing countries, such as South Africa and Brazil\textsuperscript{30}, designed to force them to uphold stringent IPR protection, even if it prevented them from addressing public health needs.

The infamous South African case is perhaps the most egregious example of the archetypal Goliath denying access to essential medicines to the world’s poorest people suffering an acute AIDS epidemic. By 1997, the AIDS crisis in Africa had reached epidemic proportions; over 4.5 million people in South Africa had contracted the HIV virus alone and many of them lacked access to affordable treatment.\textsuperscript{31}

\textsuperscript{28} This is a common reference to major research-based pharmaceutical enterprises operating on a global scale. It should be distinguished from PhRMA, a US-based pharmaceutical industry lobby organization.

\textsuperscript{29} Efforts by the United States and the European Union to subordinate public health objectives to IPR protection between 1995 and 2001 are well-documented. See for example, Sell and Prakash 2004; Oxfam 2001a; Drahos 2004; Haakonsson and Richey 2007. For a closer look at the South African case see Bombach 2001.

\textsuperscript{30} The United States took action against Brazil at the WTO’s DSB beginning in June 2000 (WTO 2000a). The Brazilian AIDS programme provides universal access to ARVs. The US took issue with Article 68 of the ‘local working requirement’ of Brazilian patent law arguing that it is in violation of TRIPS Article 27.1 and Article 28.1. Brazil requires that patent holders produce products in Brazil. Failure to do so results in the issuing of a compulsory license. Article 68 is widely viewed as TRIPS compliant and as the key factor ensuring the success of the AIDS programme. Under intense international pressure, the US dropped the case on 25 June 2001. See WTO 2001d. For an in-depth analysis of the case see Shanker 2002.

\textsuperscript{31} ‘t Hoen 2002.
African government passed the Medicines and Related Substances Control Amendment Act, in an effort improve access to affordable HIV/AIDS drugs by effectively allowing the government to overrule national patents.\textsuperscript{32} In particular, Section 15C and C(b) of the Act provides the Minister of Health with the authority to issue compulsory licenses and allow parallel imports respectively.

Granting a compulsory license is a TRIPS-compliant option available to governments to improve access to life saving drugs. Compulsory licenses are issued by governments and allow local, generic companies to produce a product for a limited time without the patent holder’s permission. According to the TRIPS Agreement, they should be granted, “….in situations of national emergency or other circumstances of extreme urgency” (Art. 31, b) but must be limited to the purpose for which it was authorized (Art. 31, c) and “any such use shall be authorised predominantly for the supply of the domestic market of the Member authorising such use” (Art. 31, f).

Parallel importation is also a TRIPS-compliant mechanism that permits the importation of a drug manufactured elsewhere and sold at a lower cost than is available in the domestic market without the permission of a patent holder. Article VI of the TRIPS Agreement permits Member States to adopt a principle of international exhaustion of patent rights; the principle specifies that a patent holder’s ability to earn profits on a patented product is exhausted after the first point of sale.\textsuperscript{33} Therefore, provided Member States explicitly adopt the principle in their national legislation, patent-holder interests are not compromised if one country chooses to sell low cost patented goods to another.

\textsuperscript{32} For further details and analysis of this case see Barnard 2002.

\textsuperscript{33} For further elaboration of the ‘exhaustion principle’ as it pertains to patented products see Stack 1998.
Article 31(h) of the TRIPS Agreement provides "the right holder of a patent shall be paid adequate remuneration in the circumstances of each case [such as compulsory licensing or parallel importing], taking into account the economic value of the authorization."

Finally, Article 8 of the TRIPS Agreement indicates that as a general principle the agreement should not infringe on a WTO member state’s right to protect public health.

Despite the seemingly apparent presence of flexibilities in the TRIPS Agreement to allow governments to take measures to protect public health, 39 multinational pharmaceutical companies launched a case against the South African government beginning in February 1998. They argued that the Amendment Act violated both the South African constitution and the TRIPS Agreement.34 Notably, South Africa had until 2005 to bring its national patent legislation in line with its TRIPS obligations. Moreover, according to Ellen ‘t Hoen, “the most contentious section of the Amendment Act was based on a draft legal text produced by the WIPO Committee of Experts, a fact that made it difficult for the drug companies to maintain the position that the Amendment Act violated South Africa’s obligations under international law.”35

Despite the weak legal positioning of the MNCs in this case, they initially received tremendous support from their national governments. In 1998, the USTR took measures to force South Africa to repeal the Act; by invoking Section 301 of the Trade Act and, by placing South Africa on its “Watch List”, the USTR effectively withheld trade benefits and threatened trade sanctions if South Africa failed to repeal the Amendment Act. The European Union followed suit when Sir Leon Brittan, Vice-

34 Pharmaceutical Manufacturers’ Association of South Africa v President of the Republic of South Africa. Case No 4183/98, filed Feb 18, 1998.

35 ‘t Hoen 2002, 44.
President of the European Commission sent a letter to Thabo Mbeki, Vice-President of South Africa containing a veiled threat, “Section 15c of the [medicines] law in question would appear to be at variance with South Africa’s obligations under the TRIPS and its implementation would negatively affect the interest of the European pharmaceutical industry.”

The heavy handed tactics by Pharma and the aggressive stance taken by the US and EU in light of the raging AIDS crisis in Africa catalyzed a coalition of AIDS activists, public health advocates and developing countries into action. Leading NGOs, including ACT UP, Médecins Sans Frontières (MSF), Health Action International (HAI), OXFAM and the Consumer Project on Technology (CPTECH) launched a massive campaign aimed at ensuring that the TRIPS Agreement did not interfere with poor peoples’ access to affordable and essential medicines. According to Keck and Sikkink, advocacy networks organize most effectively around, “issues involving bodily harm to vulnerable individuals, especially when there is a short and clear causal chain (or story) assigning responsibility”. The NGO-led Campaign sought to establish clear links between stringent IPR enforcement and the HIV/AIDS crisis. In particular, they advanced the following concerns:

1. Increased patent protection leads to higher drug prices. The number of new essential drugs under patent protection will increase, but the drugs will remain out of reach to people in developing countries because of high prices. As a result, the access gap between developed and developing countries will widen.

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37 CPTECH is now known as Knowledge Ecology International. See [www.keionline.org](http://www.keionline.org)

38 Keck and Sikkink 1998, 27.

39 Sell and Prakash (2004) provide one of the most comprehensive overviews of the activities of the Access Campaign in the run up to the Doha Declaration.
2. Enforcement of WTO rules will have a negative effect on local manufacturing capacity and will remove a source of generic, innovative, quality drugs.

3. It is unlikely that TRIPS will encourage adequate R&D in developing countries for diseases such as malaria and tuberculosis, because poor countries often do not provide sufficient profit potential to motivate R&D investment by the pharmaceutical industry.\footnote{This suggests the benefits of a “low margin, high profit” strategy will not trickle down to developing countries. \textit{'t} Hoen 2002, 42.}

The Amsterdam Statement, signed by over 350 participants, also serves as a guide for public health advocates including the MSF-led “Access Campaign”, Oxfam’s “Cut the Cost” Campaign, The South African Treatment Action Campaign, Act Up Paris, and Health Gap Coalition in the United States\footnote{‘\textit{'t} Hoen 2002, 46-47. ‘Access Campaign’ in the remainder of the chapter refers to the general movement of NGOs, health advocates and AIDS activists and not to the MSF-led Access Campaign, unless otherwise specified.}: In the developing world, a lucrative or “viable” market for lifesaving drugs simply does not exist. But what clearly does exist is need. The market has failed both to provide equitably priced medicines and to ensure research and development for infectious diseases. This lack of affordable medicines and research and development for neglected diseases is causing unavoidable human suffering. Market forces alone will not address this need: political action is demanded.\footnote{MSF et al. 1999.}

They also issued an open letter to WTO members calling for states to: Make public health their highest priority in implementing TRIPS obligations; explore the extension of grace periods for developing countries; and encourage developed countries to invoke actively the public health and public interest considerations in TRIPS Articles 7 and 8.\footnote{Sell and Prakash 2004. 163.}
The Access Campaign worked to disseminate information about the link between TRIPS and the AIDS crisis and they provided research that effectively undermined the logic behind Pharma’s “low volume, high margin” R&D strategy; they argued that charging high prices for medicines will not result in greater R&D for disease treatments that primarily afflict poor people.\textsuperscript{44} The NGO-led Access Campaign held massive demonstrations designed to publicly demonize Pharma and US and EU officials; they were typically characterized in the media as greedy profiteers charging exorbitant prices for AIDS medicines and killing poor Africans. In terms of the South African case, the Access Campaign held numerous demonstrations calling for Pharma to drop the case. ACT UP linked the issue to Al Gore’s presidential campaign and accused him of supporting the killing of babies in Africa. Within a week, the Clinton administration withdrew its objection to the Amendment Act and both the EU and US backed away from stringent IPR enforcement in South Africa in late 1999.\textsuperscript{45} By the time the case went to court in May 2000, the NGO-led Campaign effectively turned the episode into a public relations disaster for Pharma and they subsequently withdrew the matter from court. It became apparent that any attempt to block access to affordable, essential medicines would endure a media firestorm.

Although the South African case was eventually withdrawn and the US and EU backed away from their aggressive stance towards countries affected by the AIDS crisis, this case highlights broader ambiguities regarding the conditions under which Member

\textsuperscript{44} Abbott 2002a. For example, the Campaign effectively debunked the claim that stringent IPR enforcement = greater resources for R&D when it revealed that public funding was responsible for the R&D for an important HIV/AIDS treatment, Taxol, marketed by Bristol-Meyers Squibb. Sell and Prakash 2004, 164.

\textsuperscript{45} Sell and Prakash 2004, 165.
State governments could provide affordable medicines for populations in emergency situations and remain TRIPS compliant. First, developing countries were uncertain about the consequences of invoking these TRIPS flexibilities; they feared retaliation in the form of reduced development aid or market access if they used measures to protect public health that infringed on the rights of powerful patent holders. Second, it appeared that developed countries and Pharma were pressuring developing countries to implement patent legislation that either went beyond their TRIPS obligations or do not account for transition periods. Third, there was some controversy over the precise definition of “national emergency”. The pharmaceutical industry argued that since “the spread of the HIV virus has been known since the 1980s… this was not an emergency, but a failure of the government to prevent a predictable outcome. Private pharmaceutical companies should not therefore be forced to ‘pay’ for a governance failure”. Finally, Article 31(f) specified that compulsory licenses could only be issued “predominantly for the supply of the domestic market of the Member authorizing such use”. Since most developing countries lack pharmaceutical manufacturing capabilities or have small domestic markets, only a handful of countries such as Thailand, India and Brazil were able to make use of this provision. The absence of domestic pharmaceutical manufacturing capabilities is the

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46 The Clinton Administration issued an Executive Order on Access to HIV/AIDS Pharmaceuticals and Medical Technologies in May 2000, explicitly endorsing the use of compulsory licenses to increase access to HIV/AIDS treatments in Sub-Saharan Africa. See Office of the Press Secretary 2000. DG Trade also dropped its objections to the use of compulsory licensing and, in February 2001, the EU launched the Programme for Action to Confront HIV/AIDS, Malaria and Tuberculosis. See European Communities 2001b.

47 Haakonsson and Richey 2007, 75.
single most significant obstacle to access to affordable medicines in the Global South today.\textsuperscript{48}

By early 2001, it was clear that the TRIPS Agreement and its related flexibilities required clarification. The issues at stake were too critical to wait for a dispute to go before an Appellate Body. Developing countries also required assurances that they would not face the threat of legal or political challenges if they used the provisions contained in the TRIPS Agreement.\textsuperscript{49} In light of these concerns, the TRIPS Council convened a special session on access to medicines in June 2001. This meeting, according Abbott “was a concrete starting point of the process that ultimately yielded the Doha Declaration”.\textsuperscript{50}

Chapter 5 begins with a detailed examination of the role of NGOs in shaping the EU’s position in the run up to the Doha Declaration. The outcome of this monumental event would shape the debate and consultations on TRIPS and Access to Medicines between EU officials and NGOs through 2008.

\textbf{III. Shifting Services into the International Trade Regime}

\textit{A. Negotiations: Uruguay Round}

Negotiated during the Uruguay Round of Multilateral Trade Negotiations, the General Agreement on Trade in Services (GATS) was concluded in 1994 and entered into force in

\textsuperscript{48} For more details regarding the obstacles faced by developing countries see Abbott 2002a, 484.

\textsuperscript{49} The “African Group” made a request to the TRIPS Council in April 2001 to clarify the interpretation and/or application of certain provisions of the TRIPS Agreement.

\textsuperscript{50} Abbott 2002a, 481. Indeed, the developing country group paper, the ‘lead paper’ of the meeting, stated that “We propose that Members issue a special declaration on the TRIPS Agreement and access to medicines at the Ministerial Conference in Qatar, affirming that nothing in the TRIPS Agreement should prevent Members from taking measures to protect public health.” The Developing country group consisted of the Africa Group, Barbados, Bolivia, Brazil, Dominican Republic, Ecuador, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, Philippines, Peru, Sri Lanka, Thailand and Venezuela. See Council for TRIPS 2001b.
1995. The GATS Agreement contains the first set of multilateral rules governing the liberalization of international trade in services. As was the case with intellectual property rights, the notion of including services in the Uruguay Round of Multilateral Trade negotiations was the result of an initiative launched by the United States at the behest of the US-based services industry.  However, unlike the previous case, its final form reflects in many respects the negotiating strength of developing country and developing country-EC coalitions.

According to Drake and Nicolaides, the concept of “trade in services” first appeared in a report on international competitiveness commissioned by the OECD. This group of economists was the first to acknowledge the growing proportion of services-related cross-border transactions and to consider that conventional “trade concepts” such as protectionism could be applied to transactions in services. Conceived in this way, services were touted by US trade officials, industry analysts, academics and corporate lobbyists alike as a panacea for international competitiveness and further liberalization of the global economy.

In the late 1970s and early 1980s, new protectionism was on the horizon and US-based multinational firms launched a “consciousness raising” campaign and international coalition-building exercise designed to refocus the international agenda on the importance of trade in services. The US government formed the Interagency Task Force on Services and Multilateral Trade Negotiations. Both the Department of Commerce and

51 The process leading up to inclusion of services on the multilateral trade agenda has a long and complex history. For an overview see Drake and Nicolaides 1992; Winham 1989; Lazar 1990; Singh 2006.

52 Drake and Nicolaides 1992, 45-46.

53 For a detailed discussion of the importance of services to the US economy during this period see Broadman 1994.
the USTR had created offices for services which raised the issue during the Tokyo Round of Multilateral Trade Negotiations, 1973-1979. However, at the time, “only the US was convinced of the trade character of services”.54 Developed countries only began to reevaluate their skepticism when the OECD Trade Committee agreed to conduct an appraisal of global services transactions and regulations across member states.

The United States’ Coalition of Services Industries and the Liberalization of Trade in Services Committee in Britain were formed in 1982 and, together with other business lobbies such as the International Chamber of Commerce, immediately became staunch advocates of a new round of GATT negotiations that would place services on the agenda. According to Drake and Nicolaides, “by the mid-1980s there was a large and still expanding multinational ‘trade in services mafia’”.55 The US aggressively pushed the services issue at the behest of its services lobby at the Ministerial Meeting in Geneva in 1982. Fearing the power of the American services industry and reluctant to liberalize their own services industries, the Europeans advocated a “go slow approach”.

Developing countries were staunchly opposed to any inclusion of services in the GATT Agreement because they believed that such an agreement could undermine their ability to pursue national policy objectives and would constrain their regulatory powers.56

Although the services issue was pushed back to the meeting of the Contracting Parties in 1984, it was agreed that that members could present studies on barriers to trade in services to the GATT on a voluntary basis. Developed countries began gathering

54 Drake and Nicolaides 1992, 51.

55 Drake and Nicolaides 1992, 60.

56 Singh 2006.
information from their respective services industries, asking them to identify barriers to trade in services in third country markets. The so-called “Jaramillo Group” formed in 1983 was also instrumental in educating developed countries on the strategic value of services liberalization. GATT delegates met informally to discuss services-related issues and barriers to services in various countries under the leadership of Felipe Jaramillo, Colombia’s ambassador to GATT and an authority on international trade policy. By 1984, several developed countries including the United States had submitted reports and “these assessments indicated that services liberalization might well invigorate a sluggish world economy, offset declining competitiveness and protectionism in goods markets, and yield gains for countries other than the United States.”

By 1984-1985, developed countries were onside to launch multilateral negotiations on services. What remained was the contentious task of convincing developing countries that they too had something to gain from marrying trade and services.

North-South wrangling over the inclusion of services on the GATT agenda was intense and the developing country coalition on services led by Brazil and India initially proved to be a much more difficult nut to crack than developing country opposition to intellectual property rights. However, deadlock was eventually broken at Punta del Este in 1986 where members set the agenda for the Uruguay Round of Multilateral Trade Negotiations and agreed to place services negotiations on a legally separate yet parallel

57 Drake and Nicolaides 1992, 51.

58 Singh 2006 provides a detailed overview of efforts to bring developing countries onside between 1984 and 1986.
track. As a result of this procedural distinction, the Group of Negotiations on Services (GNS) headed by Felipe Jaramillo was created.\(^{59}\)

Although, the negotiations would involve the GATT Secretariat and be part of the “Single Undertaking”, this solution was designed to ensure no cross-issue linkages between traditional GATT issues and services. In the end, members agreed to consider shifting services from traditional, national regulatory regimes to market-based rules embodied in the international trade regime. Indeed, the overarching purpose of negotiations on services was “to establish a multilateral framework of principles and rules for trade in services with a view to expand such trade under conditions of transparency and progressive liberalization, and as a means of promoting the economic growth of all trading partners and the development of developing countries.”\(^{60}\) As such, these negotiations constituted the first step towards entrenching services in the legal/liberal episteme, defined at length in Chapter 2.

During the Uruguay Round, the services negotiations were arduous and fraught with controversy. Indeed, the negotiations involved significant and surprising changes in members’ national interests and negotiating positions between 1986 and 1993. While this is not the place to recount the details of these negotiations, two points are essential to understanding the outcome.\(^{61}\) First, despite early reservations, developing countries

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\(^{59}\) The Group of Negotiation of Goods was also created and the Uruguay Round as a whole was directed by the Trade Negotiations Committee (TNC). Both groups were headed by Arthur Dunkel and Peter Sutherland (after 1993) respectively.

\(^{60}\) Punta del Este Declaration Part II. Available at [http://www.sice.oas.org/trade/Punta_e.asp](http://www.sice.oas.org/trade/Punta_e.asp)

\(^{61}\) The discussion here is brief since there is an extensive literature on the evolution of negotiating positions during the Uruguay Round. This paragraph draws considerably from Singh 2006. See also Croome 1999; Drake and Nicolaides 1992; Winham 2002; Feketekuty 1988; Messerlin and Sauvant 1990; Stewart 1993, 1999. For particular emphasis on developing country negotiating positions also see Raghavan 2002; Winham 1998b; Hoekman 2001.
became proponents of the evolving services agreement and sought to shape it in their own interests. This shift is largely due to the growing presence of private actors and the importance of services in developing economies particularly as they abandoned import-substitution programs and sought to implement market-oriented policies in line with IMF and World Bank obligations. According to Sylvia Ostry, “many developing countries began to see reform of key service sectors such as telecommunications as essential building blocks in the soft infrastructure underpinning growth and the GATS as a means to furthering domestic reform.”\(^{62}\) In terms of coverage, developing countries sought protection for their national industries by attempting to restrict the mode of supply that dealt with commercial presence or foreign direct investment, but became staunch advocates of liberalizing what was later coined “mode 4” or movement of natural persons since this would encourage the movement of labour supplies from developing to developed countries.

However, despite early ambitions for an expansive services agreement, developed countries adopted a much more cautious and at times protectionist stance towards services liberalization during the Uruguay Round. The United States in particular faced growing opposition within factions of its services industry towards the end of the 1980s. Maritime, telecommunications and finance industries were especially skeptical of opening up US markets to foreign competitors and the United States Coalition of Service industries declared that it would not support an agreement born of the GNS framework. At issue was whether the Most Favoured Nation (MFN) principle, as enshrined in GATT Article I, should constitute a general obligation which applied across the board or

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\(^{62}\) Ostry 2000.
whether it should be negotiated on a country by country, sector by sector basis as National Treatment and Market Access would be. The United States argued that since it already had the most open services market in the world, a general MFN obligation would incline its trade partners to free ride. According to the USTR, by signing on to such an agreement, the United States would effectively “lock in” its open market commitments and relinquish leverage to open foreign markets.\(^{63}\) The EC and developing countries refused to endorse this position and by 1991 the United States agreed to back away from this episode of brinkmanship provided that derogation from MFN obligations in some sectors would be permitted. In addition to placing services negotiations on a separate track, this concession was considered a major victory for both developing countries and members of the European Union in the services negotiations during the Uruguay Round.

The GATS Agreement\(^{64}\) is a comprehensive legal framework of rules and disciplines that consists of three main elements: general rules and principles, commitments in specific sectors, and annexes and attachments dealing with rules for specific sectors.\(^{65}\) According to Article 1, the GATS Agreement covers all internationally traded services\(^{66}\) except those provided in the exercise of government authority “neither

\(^{63}\) Drake and Nicolaides 1992, 88; Croome 1999, 271-272.

\(^{64}\) For a detailed overview of the GATS Agreement see Panizzon, Pohl and Sauve 2008; WTO 2005d; Matoo, Stern and Zanini 2007; Krajewski 2003.

\(^{65}\) These items outline outstanding procedural and implementation issues. These include Annexes on MFN exemptions, movement of natural persons, air transport services, financial services, maritime transport services, and basic telecommunications. Attachments include a series of Ministerial Declarations concerning the implementation of the GATS including but not limited to Decisions on Institutional Arrangements, Dispute Settlement Procedures, Services Trade and the Environment, Movement of Natural Persons.

\(^{66}\) Services sectors include: business services; communication services including postal services, courier services, telecommunication services, audiovisual services; construction and related engineering services; distribution services including postal and courier services; educational services; environmental services including sewage services, refuse disposal services, sanitation and similar services; financial services;
on a commercial basis, or in competition with one or more suppliers"67 and all services related to the exercise of traffic rights.68 It also reflects the complex nature of international transactions in services by defining four ways or “modes” of supplying services: cross-border supply (mode 1), consumption abroad (mode 2), commercial presence (mode 3), and temporary movement of natural persons (mode 4).

Although the initiative to shift services into the international trade regime originated in the United States, the final GATS Agreement reflected an EU/Developing country preference for a “soft” framework agreement. Accordingly, the GATS Agreement contains few generally binding obligations.69 However, the most significant, generally binding obligation is the MFN principle (GATS Article II) which applies to all members and all service sectors.70 Many of the other provisions contained in the GATS Agreement, such as the provisions on domestic regulation (Article VI) or subsidies (Article XV), are loosely defined. Their applicability would therefore be subject to discretionary interpretation in the event of a dispute.

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67 GATS Article 1c.

68 GATS Annex on Air Transport Services. Although a services sectoral classification list (WTO 1991) was compiled, no services except those mentioned are excluded a priori from negotiations.

69 Others include transparency whereby “the GATS Agreement also requires that all members “publish all measures of general application and establish national enquiry points mandated to respond to other Member's information requests”, the establishment of administrative review and appeals procedures, and disciplines on the operation of monopolies and exclusive suppliers.

70 Members were allowed ‘one-off” sectoral exemptions; derogation from the MFN obligation was permitted for specified, sectoral measures under Article II – Exemptions, so long as these were scheduled before the GATS Agreement entered into force on 1 January 1995. In principle, MFN exemptions are subject to review and should expire within 10 years. New exemptions can only be granted to new Members at the time of accession or, in the case of current Members, by way of a waiver under Article IX:3 of the WTO Agreement.
Other provisions contained in the GATS Agreement are not broadly applicable. The EC and developing countries preferred a bottom-up or positive list approach and most disciplines in the GATS Agreement are negotiated in this way. Specific commitments are listed in “schedules” and are negotiated bilaterally (request-offer) on a sector by sector basis. Each WTO member decides which sectors to liberalize and to what extent. Moreover, National Treatment (GATS Article XVII) is a specific obligation that only applies to sectors listed in Members’ schedules. The GATS Market Access (Article XVI) obligation is also a specific commitment that disallows six kinds of market access restrictions. Members may also make “horizontal commitments”: market access and national treatment commitments that apply across all sectors and usually pertain to a particular mode of supply. However, WTO members are also free to schedule market access, national treatment, and horizontal limitations in negative lists. For example, a country may choose to open its market to foreign banks but may limit the total number of operators (market access limitation). In addition, the government may allow domestic firms to set up more branches than foreign firms (national treatment limitation). Finally, a government may restrict the number of service workers who may enter the country via Mode 4, regardless of the sector in which they plan to work. However, scheduling restrictions requires considerable foresight since once commitments and limitations are scheduled they become legally “bound” like tariffs under the GATT Agreement.

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71 Preeg 1995, 104.

72 For more information on the technical aspects of scheduling commitments see http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm#Introduction

73 See GATS Article XVI para. 2.

74 Under certain circumstances, WTO members may introduce measures that are in contravention of their MFN obligation or specific NT and Market Access commitments or even withdraw their commitments. For
Commitments are made through bilateral request-offer negotiations. Country A requests market access in a particular sector from Country B. Country B responds with an offer of market opening usually with specific limitations. While bargaining is conducted on a bilateral basis and according to the requests and offers submitted by the two parties, the results are multilateralized by way of the MFN principle. The extent of liberalization commitments made during the Uruguay Round of Multilateral Trade negotiations was quite modest.\(^\text{75}\) Although 96 WTO members made commitments in services, Hoekman estimates that developed countries scheduled 45\% of their service sectors while low and middle income countries scheduled 12\%.\(^\text{76}\) Extensive market access and national treatment limitations means that only a fraction of service commitments are without exceptions – 25\% in developed countries and 7\% in developing countries – and are concentrated in modes 1 (50\%), 2 (30\%) and 3 (20\%).\(^\text{77}\) Also, the majority of commitments have been taken in the least sensitive sectors such as tourism and business services rather than education or health. Across the board, the commitments taken do not present many new business opportunities. Instead, the commitments made

\(^{75}\) For a detailed overview of all the services commitments made by WTO members as of December 2002 see Hartrige, Kaul, and Odarda 2003. Also see Altinger and Enders 1996. Tables displaying commitments across modes, across sectors and by member are available in Chandra 2002.

\(^{76}\) Hoekman qtd in Chandra 2002, 7-8.

\(^{77}\) Chandra 2002, 8.
during the Uruguay Round maintain the status quo and serve for the most part to bind or *legalize* already existing/autonomous market openings.\(^78\) This is no small feat since binding adds predictability to the business environment in these countries. However, it was clear by the end of the Round that much work was still needed to fulfill the objectives declared at Punta del Este.

**B. Negotiations: GATS 2000**

The GATS Agreement has a “built-in” mandate to further liberalize international trade in services. Article XIX GATS requires members to launch successive rounds of services negotiations with a view to achieving progressively higher levels of liberalization. A new round of negotiations was to begin no later than 5 years from the date of entry into force of the GATS Agreement. Hence, the current round of multilateral services negotiations has been dubbed “GATS 2000” negotiations.

Developing countries actively took part in services talks regarding the objectives, scope and method of further negotiations.\(^79\) In 1999, a coalition of 24 developing countries that included Argentina, Brazil and India, formed to devise a set of negotiating guidelines and procedures that eventually formed the basis for the current negotiations.\(^80\)

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\(^78\) Chandra 2002. Several interview participants, including senior level Commission officials who are directly involved in ongoing services negotiations, concurred with this characterization of the progress made during the Uruguay Round of Multilateral Trade Negotiations.

\(^79\) Mattoo 2000.

\(^80\) The proposed guidelines and procedures submitted by the group of 24 and supported by CARICOM and the African Group (in total constituted a 70 member coalition), were initially resisted by developed countries. The WTO secretariat produced a revised draft in February 2001 more in line with the preferences of developed countries but this was roundly rejected by the developing world. At issue was the inclusion of language that reflected the special needs of developing countries. In particular, developing countries wanted explicit acknowledgement in the guidelines that additional measures to increase the involvement of developing countries in services negotiations would be taken. They wanted clear commitments on flexibility for developing countries in liberalization and scheduling commitments. The final text adopted by the Special Session of the Council for Trade in Services reflected these demands. See WTO 2001f.
Notably, the guidelines reiterated the GATS promise to extend flexibility to developing countries in terms of “opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access” in view of their national policy objectives and levels of development.\(^{81}\) It also mandates that special attention be given to sectors and modes of supply such as mode 4 that are of particular export interest to developing economies.

Once the Guidelines and Procedures were agreed to in March 2001, services negotiations were incorporated into the “Single Undertaking” of the Doha Development Agenda. According to this mandate, WTO members should use the “request-offer” approach in bilateral, multilateral or plurilateral negotiations. The timetable devised at Doha required WTO members to submit initial bilateral requests for third country market access or specific commitments by 30 June, 2002 and initial offers by 31 March 2003. Progress made in bilateral negotiations was dismal and in December 2005 at the Hong Kong Ministerial, a group of countries\(^{82}\) embarked on a plurilateral process of negotiations. Notably, though the EC pursued a soft line position in the Uruguay Round negotiations, it is now the most ambitious player aiming to expand and deepen GATS commitments.

\textit{C. Global Civil Society Backlash Against the Impact of GATS on Public Services and Democracy}

\(^{81}\) WTO 2001f.

\(^{82}\) The key ‘demandeurs’ in the plurilateral requests were Australia, Canada, EC, Japan, New Zealand, Norway, Switzerland and the US. The key ‘requestees’ were Argentina, Brazil, Chile, China, Colombia, Egypt, India, Indonesia Malaysia, Mexico, Philippines, Singapore, South Africa and Thailand.
The launch of the new round of GATS negotiations occurred alongside brewing concern over the implications of the GATS Agreement for national autonomy, democracy and the ability of governments to regulate in the public interest, particularly in the developing countries. Beginning in 2000, a high profile, global campaign against the so-called “GATSAttack” was launched by NGOs such as the World Development Movement, Third World Network, Trade Observatory and GATSWatch, Canadian Center for Policy Alternatives, ATTAC, Friends of the Earth, Public Citizen Trade Watch, World Economy, Ecology and Development (WEED), and the Alliance for Democracy. These organizations sought to educate the public and policymakers in the Global South alike about GATS coverage of public services, GATS flexibilities, governments’ right to regulate and the policy impacts of GATS rules.

Chief among the criticisms leveled against the GATS is a concern that the GATS Agreement constitutes a regulatory straightjacket for governments, regardless of bottom-up scheduling of commitments. NGOs cite formidable practical obstacles to scheduling market access, national treatment and horizontal limitations. Many developing countries in particular lack the administrative capacity, technical know-how or expertise to foresee a need for future policy flexibility in particular sectors or modes of supply and there are few options available if a country wishes to add protection or policy flexibility at a later

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NGOs are also concerned that Article VI GATS on Domestic Regulation\textsuperscript{85} will serve to restrict government measures that affect international trade, regardless of whether they are discriminatory.\textsuperscript{86} Essentially, this article requires that where WTO members have scheduled commitments and where limitations have not been listed, they do not make their regulatory regime more restrictive in the future. In the current work programme, WTO members are discussing the possibility of introducing a “necessity test” to complement national treatment and market access commitments.\textsuperscript{87} In the event of a dispute, the defendant would be required to prove that its regulation was no more burdensome than necessary to achieve the quality of a service and that licensing procedures do not in themselves restrict the supply of the service. Finally, NGOs take issue with the GATS built-in agenda contained in Article XIX, noting that developing countries in particular are under intense pressure to cede policy flexibility in successive Rounds of Multilateral Trade Negotiations and this may conflict with their levels of development and have disastrous results for the world’s poorest people. In tandem, NGOs believed that these features of the GATS Agreement will restructure the role of government and undermine democracy in WTO members.

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\textsuperscript{84} The average number of people working in a developing country’s WTO mission in Geneva is 3.51 compared to 7.38 for developed countries. It is also estimated that 20 developed and developing countries have no permanent WTO mission in Geneva. Mehta and Madsen 2005, 161.

\textsuperscript{85} This article provides for disciplines on qualification requirements and procedures, technical standards and licensing requirements to ensure the quality of the service. WTO members must ensure that these regulations do not constitute unnecessary obstacles to international trade. Sub-paragraph (b) of Article VI:4 further specifies that such disciplines shall aim to ensure that regulatory measures are “not more burdensome than necessary”.

\textsuperscript{86} Sinclair and Grieshaber-Otto 2002, 63. For a detailed analysis of the impact of the GATS on domestic regulations in particular sectors as well as discussion on the current work programme, see Matoo and Sauve 2003; Krajewski 2003a. For the most recent developments in this debate see Gould 2008.

\textsuperscript{87} Necessity tests for goods are found in the TBT and SPS Agreements.
The Stop the GATSAttack Campaign also claims the GATS Agreement threatens access to basic public services. Most NGOs acknowledge that the GATS Agreement does not require governments to privatize their public services. However, they express concern that GATS commitments make it very difficult if not impossible for governments to reverse failed privatization projects and entrench rights for corporate service providers. Moreover, there is concern that developing countries will face considerable pressure in bilateral negotiations or via other institutions such as the World Bank and IMF to privatize basic services. As mentioned above, services provided in the exercise of governmental authority, defined as “services provided neither on a commercial basis nor in competition with one or more service suppliers” are exempt from coverage under the GATS. Social security and immigration services fit this definition. However, NGOs note that public services are often provided in partnership with private actors and/or with private funding. The introduction of commercial elements into public service delivery opens a window for coverage and hence pressure to liberalize under the GATS.89

Finally, monopolies (eg postal services, water distribution) and exclusive service supplier arrangements (eg post secondary education, health care services) in a sector listed in a country’s schedule must be inscribed as specific exceptions. NGOs involved in this campaign claim this requirement threatens governments’ ability or willingness to designate new monopolies or exclusive service provider arrangements in committed

88 Power differentials are more pronounced in bilateral negotiations than they are in multilateral negotiations because developing countries are unable to make effective use of coalitions to resist pressure. Developed countries also often employ a ‘divide and conquer’ strategy; they communicate directly with ministers in national capitals in an effort to confuse them about what their negotiators are doing in Geneva.

89 For further discussion on the impact of the GATS on public services see Adlung 2006; Krajewski 2003b. For a look at the impact of the GATS on particular sectors see Grieshaber-Otto and Sanger 2002; Blouin, Drager and Smith 2005.
sectors since they will be required to negotiate compensation with other members who may lose market share as a result.\textsuperscript{90} Monopoly or exclusive service providers may also become the subject of trade disputes if other members sense that they are operating outside the scope of their monopoly rights or abusing their monopoly position in sectors that are covered by the government’s GATS commitments.\textsuperscript{91} At bottom, NGOs argue that a blanket exception for public services should be explicitly carved out of the GATS Agreement, regardless of whether those services are provided in partnership with private actors or private funds.

At the heart of this campaign is the belief that opening up basic services such as education, health, or sanitation to foreign competition constitutes a full frontal attack on basic human rights and serves only to buttress the structural power of multinational corporations. The livelihood and rights of people in developing countries are considered especially at risk. Liberalizing water services for human use in particular is considered tantamount to the commodification of life-giving resources. Accordingly, efforts by the European Union to liberalize trade in water services for human use embodies all the vices underscored by the Stop the GATSAttack Campaign and serves as a magnifying glass for why a moratorium on GATS is seen by NGOs as the only solution.\textsuperscript{92}

\textbf{IV. Conclusion}

The shift from GATT to the WTO served to entrench a legal/liberal episteme in the international trade regime. As discussed at length in Chapter 2, this hybrid episteme is

\textsuperscript{90} GATS Article VIII.3

\textsuperscript{91} GATS Article VIII.2

\textsuperscript{92} See this letter signed by over 500 civil society activists calling for a moratorium on the GATS 2000 negotiations: \url{http://www.gatswatch.org/StopGATS.html}
comprised of shared, intersubjective or taken for granted causal and evaluative assumptions about how the world works. It consists of “widely held accepted norms, consensual scientific knowledge, ideological beliefs deeply accepted by the collective, and so on.” Since epistemes are the lenses through which people view the world, the legal/liberal episteme defines, for WTO members, which actions and policy options are conceivable and which are unimaginable. At the core of the liberal dimension of the episteme is the belief that free trade and open markets are an instrument for development and economic growth. The legal dimension of the episteme is the rule of law counterpart to these free market principles. Legal constraints are necessary to increase the legitimacy of the newly created WTO and to insulate trade policy and trade negotiations from political or regulatory interference with the free functioning of the market.

In this chapter, I have undertaken a detailed historical analysis of the evolution of the GATS and TRIPS in the WTO and the role of the EU in this context. I argued that by situating services and IPR inside the legal/liberal episteme, WTO members defined, perhaps unconsciously, the “limits of the possible” in subsequent GATS and TRIPS trade negotiations. The substantive disciplines contained in the WTO Agreements delineate the appropriate trajectory of new international trade rules. As such, they work to constrain the range of policy options considered appropriate by policymakers in the EU. These ideational and legal constraints inevitably impact and structure dialogue and consultation between NGOs and policymakers in the EU. Chapters 5 and 6 will look closely at the patterns of empowerment that have resulted from shifting IPR and services under the auspices of the WTO.

93 Adler and Bernstein 2004, 12.
The legal/liberal episteme has also become a focal point for resistance and for growing demands for a voice in policymaking. By expanding the scope of the rules to include services and IPR, WTO members engendered a massive backlash from global civil society. NGOs in particular now view themselves as part of the broader governing arrangement because international trade rules have major impacts that affect entire communities. Since their primary purpose is to give otherwise marginalized people a voice and to represent the interests of the oppressed or disadvantaged, many NGOs have responded in significant and dramatic ways to the social, environmental and cultural impacts of new trade rules. This chapter identified a number of core concerns that have arisen in response to the inclusion of services and IPR in international trade rules. As I will demonstrate in Chapters 5 and 6, these concerns colour NGO efforts to influence the EU’s external trade negotiating agenda.
Chapter Five:
Assessing the Role of NGOs in the EC’s TRIPS: Access to Medicines Negotiations

I. Introduction

Following the conclusion of the Uruguay Round of Multilateral Trade negotiations in 1994 and the subsequent entry into force of the Agreement on Trade-Related Intellectual Property Rights (TRIPS) in 1995, global civil society waged a sustained campaign aimed at ensuring the primacy of public health over intellectual property rights and characterized by demands for less stringent IPR enforcement and access to affordable medicines for all. The global Access to Medicines movement is heralded by scholars and activists alike as evidence of NGOs’ ability to influence international public policy. Rather than focus on the international dimension of this campaign, as much of the existing literature on the subject has done, this chapter traces the role of NGOs in the formulation of the European Communities’ (EC) position on trade related intellectual property rights and access to medicines. In line with the overarching objective of the study, this chapter asks whether new opportunities for access and participation for NGOs working in this area improved the post-national procedural and substantive legitimacy of external trade policymaking in Europe.

As I established in Chapter 3, since the conclusion of the Uruguay Round of Multilateral Trade Negotiations, CSOs, including NGOs, have experienced sustained, aggregate improvements in participatory and access conditions in the EU’s external trade policymaking process. Against the backdrop of these burgeoning new opportunities, NGOs working on the TRIPS: Access to Medicines issue became key interlocutors in Europe beginning in early 2001. They became actively and directly engaged in policy
discussions with EU technocrats in the run up to the Doha Declaration in November 2001. Given the international renown of the Access Campaign and the deeply institutionalized relationship of NGOs with EU policymakers, this case should constitute an “Easy Test” for the Cosmopolitan explanation.

According to this explanation, NGOs should be empowered in the policymaking process as a direct consequence of new, more inclusive channels of participation and access. As a result of their increasing involvement in formal channels of policymaking, we should observe enhanced public education activities and public awareness campaigns, public debate and deliberations about substantive policy issues, growing empowerment and involvement of otherwise marginalized people, more transparent decision-making, and greater public accountability. Moreover, we should observe clear causal links between the activities of NGOs and policy outputs. In this case, by virtue of NGO involvement in the external trade policymaking process, EU policymakers should pursue policies that ensure greater access to medicines, reduce disparities in access to medicines between the north and south, and which place public health concerns over IPR protection.

The following analysis proceeds to trace the role of NGOs and the development of the EC’s position on TRIPS: Access to Medicines over three stages since the conclusion of the Uruguay Round of Multilateral Trade Negotiations. First, I examine the development of the EC’s position leading up to the Doha Declaration and the role played by NGOs in educating both the public and EU-level policymakers about the links between stringent IPR protection and the AIDS crisis in Africa. This stage of decision-making was characterized by highly politicized debates about the appropriate circumstances under which to invoke mechanisms such as compulsory licenses and
parallel importation to battle public health crises. In Section 2, I examine efforts to solve the so-called “Paragraph 6” problem left over from the Doha Declaration. Two key policy developments are of particular relevance here, namely the August 30 Decision and the Protocol of TRIPS Amendment Concerning Article 31bis. During this stage, policy discussions centered on the highly technical matter of deciding how to ensure countries with no domestic manufacturing capacity could secure adequate access to affordable medicines. Finally, I examine the process leading up to the European Parliament’s ratification of the TRIPS Amendment. At this stage, politically charged debates over the complicated and bureaucratic nature of the proposed TRIPS Amendment characterized policy discussions.

In this chapter, I argue that despite clear improvements in procedural legitimacy, early optimism regarding the power of NGOs to bring about substantive, normative changes in the international IPR regime was premature. The evidence, particularly following the Doha Declaration in 2001, suggests that EU policymakers acquiesced to certain NGO demands by making incremental (at least as far as least developed countries were concerned) changes in least vital areas or by clarifying already existing rules in the international IPR regime to maintain a forward momentum in WTO trade negotiations. Once the pressure from NGOs lessened and the issues became more technical, EU policymakers shifted back to their preferred set of outcomes on IPR. Experts and technocrats, not NGOs, were empowered in the external trade policymaking process to maintain and reinforce the status quo. As the issue became more complex and technical by virtue of the so-called Paragraph 6 problem, experts and technocrats gained greater functional authority to find a solution that ‘fit’ inside and, indeed, reproduces the

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1 ‘bis’ refers to an addition to an existing Article. In this case, it refers to an addition to TRIPS Article 31.
legal/liberal episteme. Given these outcomes, it is clear that the Epistemic explanation provides the most plausible account of external trade policymaking in Europe.

II. Formulating the Doha Declaration: NGOs bring the Access Campaign to the EU

As discussed in Chapter 4, the EU’s initial position regarding international IPR protection was quite stringent. In the run up to the TRIPS Agreement, IP-based industry, represented by the umbrella organization UNICE, was the EU’s key partner. However, beginning in 1998, the Access to Medicines Campaign spread to Europe. Through a multi-pronged strategy, the campaign sought to compel EU decision-makers to initiate a Ministerial Declaration that would clarify TRIPS provisions on public health and guarantee governments’ rights to put public health concerns above IPR protection.

In Europe and elsewhere, NGOs launched a massive media blitz designed to generate public awareness about the link between IPR enforcement and public health. They issued countless press releases and held numerous demonstrations to publicize grievances against EU policymakers and to inform the public about the EU’s practice of cracking down on poor Africans dying of HIV/AIDS as in the case of South Africa. By late 1999, EU policymakers realized that they would ignore the Access Campaign at their peril. Indeed, it became clear that progress in the context of a new round of Multilateral Trade Negotiations could not proceed until the issue was addressed. In partial response and as described in detail in Chapter 3, EU policymakers created access points and opened up forums for consultation with CSOs working on a range of issues including public health. These new mechanisms for consultation constituted an explicit attempt to legitimize the international trade regime, to make the prevailing legal/liberal episteme

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more sustainable and to deflect public scrutiny away from the substantive impact of new rules.

First, members of the Access Campaign were invited to participate in a series of structured Civil Society Dialogues. In part, this initiative was designed to improve transparency and public accountability of EU decision-making, especially as it pertained to the impact of TRIPS enforcement on public health. In this context, EU Commission officials met to discuss this issue together with a wide range of industry, NGOs, and health advocates 8 times between April 2000 and November 2001.\(^3\) NGO participants characterize the meetings during this period as constructive opportunities to present various points of view; formal consultations evolved into a workshop format where all participants, industry, NGOs and Commission officials, were raising issues and providing evidence and research to defend different points of view. In this way, CSD meetings on TRIPS and Public Health fostered true dialogue during this period. Although they often disagreed, according to NGOs, actors gathered at the CSD to engage in an informal exchange of ideas or views with the intent to learn, integrate multiple perspectives and to uncover and examine assumptions.\(^4\)

Commission officials, however, recall a less productive atmosphere in the Civil Society Dialogue. According to one senior level Commission official who worked closely on the negotiations leading up to the Doha Declaration, “These structured consultations became a kind of beauty contest to see who was most radical. We found


\(^4\) Seco Gerard. MSF Access Campaign: EU Liaison Officer. Interview by author. 6 February 2006.
out that in fact most were just there to make political statements. They were screaming and shouting and weren’t there to really find a solution.”⁵ Instead, it was only a small number of actors including MSF and Oxfam, who were willing to work within the existing framework of international trade rules to find solutions to the access to medicines problem and thus who made meaningful contributions to the dialogue. In the view of the Commission, professional NGOs with impeccable reputations and good moral standing such as MSF and Oxfam are, “the only ones who have the capacity to contribute real ideas and solutions, even if in the end they weren’t realized.”⁶ Therefore, Commission officials supplemented the input generated during structured, public dialogues with more informal, one-on-one meetings with a select number of NGOs. In fact, Commission officials met with NGOs such as MSF and Oxfam on a weekly basis in the period preceding the Doha Declaration.⁷

In addition to direct consultations, members of the Access Campaign developed and distributed concrete proposals for action to EU policymakers. For example, prior to the June 2001 TRIPS Council Meeting, MSF drafted a list of recommendations for discussion and submitted it to the European Commission.⁸ Members of the Access Campaign also made several submissions and directly lobbied members of the European

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⁶ Ibid.

⁷ “MSF and Oxfam are the only ones with whom there is constructive engagement…One on one meetings with a select number of players is preferable and more useful because it is really the only context in which you move beyond gesturing”. Ibid.

⁸ MSF 2001a.
Parliament.® Although the EP lacked any formal decision-making powers, the
Commission consulted regularly with International Trade (INTA) Committee during this
period. The EP also passed a series of resolutions that reflect the priorities of the Access
Campaign.®

Clearly, NGO activity has not been limited to media campaigns. They have also
been actively involved in formulating policy positions and offering guidance on
substantive issues. The consensus amongst policymakers in the EU is members of the
Access Campaign were instrumental in generating awareness about the public health
implications of the TRIPS Agreement. NGOs provided critical expertise and experience
that EU policymakers would not otherwise have had access to.® In their absence, EU
policymakers claim they would have no idea about the significance of the AIDs crisis in
the developing world or its link to IPR enforcement.®

From this brief overview, it is clear that NGOs became key interlocutors in the
European Union in the period preceding the Doha Declaration. Their work in the media
was instrumental in generating public debate and disseminating information about the
link between IPR protection and the AIDS crisis in Africa. While the Pharma industry
continued to enjoy its status as “social partner” through its membership in UNICE, its
views were counterbalanced by the participation of NGOs in the external trade

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® See for example MSF 2001b.
® See for example European Parliament 2001b. For more recent resolutions along these lines see European
® Sabine Weyand. DG Trade, Member of Pascal Lamy’s Cabinet, Responsible for Relations with European
Parliament; Social Partners and NGOs; Transport; Energy; Sustainable Development; Employment and
Social Affairs; Environment; European and Social Committee (ESC) until November 2004. Interview by
Author. 2 June 2005.
® Lanoszka 2003, 192.
policymaking process. NGOs launched a sustained effort to reorient the EU’s approach to IPR enforcement in developing countries. In this way, they worked to give a voice to developing countries and the world’s poorest people whose interests had otherwise been marginalized in TRIPS negotiations. They enjoyed dramatically enhanced access and participatory conditions and their involvement improved the procedural legitimacy of external trade policymaking in the EU. By providing education and generating awareness about the issue, NGOs played a decisive role in shaping and informing the debate over the impact of the TRIPS Agreement on Access to Medicines.

The EU’s position on TRIPS and public health shifted significantly between 1999 and 2001 and parallels, in many respects, the concerns of the Access Campaign. By dropping its objection to the use of compulsory licensing, the EU distanced itself from the South African case and endorsed a broad, US commitment made at the Seattle Ministerial Meeting to adjust external trade policy to support access to HIV/AIDS drugs in Africa. In February 2001, the EU made a further and more explicit commitment to alter its external trade and development policies to improve access to essential medicines in developing countries. The Programme for Action to Confront HIV/AIDS, Malaria and Tuberculosis commits the EU to the following objectives: to increase the impact of existing interventions, make key pharmaceuticals more affordable, and support research and development of specific global public goods to confront these diseases. The EU also became an advocate for a global tiered pricing system for pharmaceuticals.13

13 European Communities 2001b.

14 The Programme For Action states, “The European Community will work towards the introduction of tiered pricing as the norm for the poorest developing countries, while seeking to prevent re-importation to the EU market.” See European Communities 2001b Section 3.2.1. For further details on steps taken by the EC to avoid trade diversion, the practice of diverting discounted products intended for poor countries back into high priced markets, see European Communities 2003.
At the international level, EU efforts ensured that the public health implications of IPR protection would figure prominently on the international trade agenda. The submission by the EC to the TRIPS Council in June 2001, signaled a change in the EU’s approach to IPR protection that reflects the goals of the Access Campaign.\textsuperscript{15} In particular, the EU explicitly acknowledged the freedom of all WTO members to decide the circumstances under which to grant compulsory licenses and expressed willingness to negotiate a solution to Article 31(f). It emphasized that Articles 7 (“Objectives”) and 8 (“Principles”) of the TRIPS Agreement already allow the right of all members to take measures to protect public health. The EU did maintain an industry-oriented, hard-line approach to Article 30 exceptions and data protection. However, the significance of this would not be immediately clear. During a special informal meeting of the TRIPS Council on 25 July 2001, the idea of crafting a specific Doha Declaration was launched. The EU played the role of “honest broker”\textsuperscript{16}, acting as a mediator between developing countries on one hand and the US and like-minded countries\textsuperscript{17} on the other.\textsuperscript{18} Overall, the EU supported an interpretation of TRIPS in a manner that supports public health interests and sought to encourage a compromise solution between North and South. In fact, Pascal Lamy, DG Trade Commissioner at the time, is credited with providing

\textsuperscript{15} Council for TRIPS 2001a.

\textsuperscript{16} Abbott (2002, 486) notes that the EU backtracked temporarily from its ‘pro-health’ positioning in the pre-Doha talks when it submitted a non-paper draft declaration that reflected the US/like-minded group position. The Commission delegation noted that the paper had not been approved by member states. It subsequently withdrew the paper and repositioned itself in the middle ground of TRIPS: Access to medicines negotiations.

\textsuperscript{17} Like-minded countries included Australia, Canada, Switzerland, Japan.

\textsuperscript{18} For a thorough overview of intergovernmental negotiations leading up to the Doha Declaration see Abbott 2002b.
decisive leadership in getting the Doha Declaration on the TRIPS Agreement and Public Health passed by the WTO Ministerial Council.

The Doha Declaration on the TRIPS Agreement and Public Health, adopted by the WTO Ministerial Conference on 14 November 2001, is widely cited as a victory for the Access campaign. This document explicitly recognizes the gravity of the public health problems afflicting developing and least developed countries and acknowledges that stringent IPR protection may have a negative impact on access to affordable medicines. The essence of the Declaration is contained in Article 4 of the Declaration:

We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.

This paragraph affirms that provisions in the TRIPS Agreement should be interpreted in light of the principles and objectives of the Agreement contained in Articles 7 and 8 respectively. In the event of a dispute, these articles will be used by panels and the Appellate Body “as primary interpretation tools when determining the TRIPS-compatibility of measures taken by a Member in view of protecting public health”.

\[19\] WTO 2001c.

\[20\] Article 7 sets out the objectives of the TRIPS Agreement, “the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. Article 8 sets out the principles underpinning the Agreement and “recognizes the rights of Members to adopt measures for public health and other public interest reasons and to prevent the abuse of intellectual property rights, provided that such measures are consistent with the provisions of the TRIPS Agreement.” WTO 2001c.

The Declaration (Para. 5b) clarifies that all WTO member states have the right to grant compulsory licenses under any conditions they deem appropriate. Members also have the right to determine what constitutes a national emergency or other circumstances of extreme urgency (Para. 5c). This principle is in stark contrast to the United States’ preferred outcome which would have established an exhaustive list of “qualifying” diseases. Furthermore, the Declaration reconfirms Members’ rights to establish their own regime for exhaustion of intellectual property rights thereby leaving the door open for parallel importation without challenge (Para. 5d). Finally, Paragraph 7 encourages developed countries to transfer technology to least-developed country members and reiterates the right of least-developed countries to opt for an extension of the transitional period of the TRIPS Agreement until 2016. What the Doha Declaration leaves unresolved is the problem created by TRIPS Article 31(f) for countries without domestic manufacturing capacity or insufficient market demand. Instead, Paragraph 6 of the Doha Declaration recognizes this problem and commits the TRIPS Council to finding “an expeditious solution to this problem and to report to the General Council before the end of 2002.”

If the analysis were to stop here, as much of the existing literature that celebrates the achievements of the NGO-led Access Campaign does, we could draw very optimistic conclusions about the ability of NGOs to influence EU policymakers’ interests and to affect policy outcomes by establishing and strengthening global norms to the point that

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22 Council for TRIPS 2001c.

23 For further discussion on the accomplishments contained in the Doha Declaration see Abbott 2002; Correa 2002.
even great powers cannot ignore them. There are certainly clear correlations between the demands made by members of the Access Campaign and the policy line pursued by EU policymakers in Doha. In the immediate aftermath, the outcomes achieved in the Doha Declaration were celebrated by activists and policymakers alike as going great distances to redress persistent inequalities in international trade rules, ensuring individual members’ rights to protect public health and building fairness into the global IPR regime. From this account, it would appear that NGOs were instrumental in bringing about more substantively legitimate external trade policies in Europe. If so, then the Cosmopolitan explanation succeeds, at least in this “easy test”, in accounting for the role of NGOs in the EU’s external trade policymaking process. However, the extent to which the EU’s position on public health norms actually underwent substantive and normative change is questionable. In fact, it appears the early successes attributed to the Access Campaign were exaggerated.

With the exception of the extension of the transitory period for least developed countries, the Doha Declaration served to clarify already existing flexibilities contained in the TRIPS Agreement. Moreover, the issue of access to medicines was a deal breaker at the Ministerial Conference in Qatar. Developing countries had linked it to a range of issues including textiles, investment, and agriculture. According to Haochen

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24 See in particular Sell and Prakash (2004, 167) who claim: The NGO network presented a normative frame and proposed policy solutions that the business network opposed. In the end, with its successful strategies of mobilizing a transnational coalition, framing policy problems, disseminating information, grafting its agenda as a solution to policy problems, and exploiting political opportunities….the NGO network has clearly won some substantive victories and brought about a normative change in the IPR debate.


26 Notably, most African countries have already brought national patent legislation in line with the TRIPS Agreement.
Sun, “[WTO] members came to understand that no broad negotiating mandates such as
investment and competition would emerge from the conference in the absence of a
meaningful result on medicines.” Rather than constituting a major normative or
substantive change in the global IPR regime, the Doha Declaration was merely a political
compromise designed to quiet developing countries and NGOs so progress could be made
in other, arguably more crucial, areas of multilateral trade negotiations. A closer look at
Paragraph 6 of the Doha Declaration and subsequent developments since a solution was
reached, reveal that early optimism regarding the significance of the Doha Declaration on
one hand, and the EU’s “shift” in position on the other were overstated. In many
respects, the EU has fallen back to its hard-line market-oriented approach to IPR
protection and this calls into question the extent to which public health norms
disseminated by the Access Campaign actually took hold.

III. August 30th Agreement and the Protocol of TRIPS Amendment
Concerning Article 31bis: EU Technocrats Build Deliberate Limitations
and Bureaucratic Complications into the Solution

Between November 2002 and December 2005, the task of solving the Paragraph 6
problem shifted the TRIPS and Public Health matter from a political issue to a highly
technical one. As a consequence and despite newly created mechanisms for access and
participation for CSOs, policy discussions in the EU “pulled away” from the deliberative
or a broadly participatory process. Functional power pooled in the hands of European
technocrats working in DG Trade and policy outcomes did not reflect the preferences of
NGOs. Instead, European technocrats were the architects of a highly complex solution, the so-called August 30th Solution, fraught with bureaucratic red-tape. The European

27 Quoted in Drezner 2005, 23. Also see De Jonquieres 2001.
technocrats crafted a solution to Paragraph 6 that they never intended to function in practice. Instead, it is hoped that the threat of its use and indeed threat of competition from generic firms will compel patent holders to sell drugs at lower costs. The effectiveness of this solution therefore depends on the market and competition between firms working to shift patent holder strategies from a “high cost, low margin” approach to a “low-cost, high margin” approach. European technocrats were staunch advocates of the expeditious legalization of the solution, however imperfect, and on 6 December 2005 the General Council accepted it as a permanent amendment to the TRIPS Agreement. The EC subsequently passed a Regulation\textsuperscript{28} on 17 May 2006 implementing and giving “direct effect” to WTO General Council Decision of 30 August 2003. Ultimately, the work of EU technocrats is grounded in the belief that market forces will provide equitably priced medicines and ensure research and development for infectious diseases in developing countries – a position that is diametrically opposed to the demands of NGOs working as part of the Access Campaign in Europe.

The importance of solving the Paragraph 6 problem was acute since the supply of low-cost, generic medicines would dry up as developing countries brought their patent legislation in line with their TRIPS obligations on 1 January 2005.\textsuperscript{29} Only a few developing countries have pharmaceutical manufacturing capacity but prior to the end of the patent system moratorium for countries like India, developing countries were free to import generic copies of life saving drugs such as first line antiretroviral treatments

\textsuperscript{28} European Communities 2006.

\textsuperscript{29} Ismail 2003.
In fact by 2005, 70% of the HIV/AIDS treatments provided by MSF were imported from generic firms in India. All new products produced after the 2005 deadline would be subject to full patent protection but generic versions of products produced between 1995 and 2005 would still be available provided the generic producer pays royalties to the patent holder.

Over time, patients become resistant to first-line ARVs and need to shift to 2nd or 3rd line patented treatments. As a result, MSF estimates that the cost of treating HIV/AIDS patients in developing countries such as Guatemala or Kenya will increase 10-fold. Developing countries that lack domestic manufacturing capacity are unable to make use of compulsory licenses to gain access to affordable medicines; while countries are permitted to issue compulsory licenses under any conditions they are prohibited under Article 31(f) from producing products primarily for export: “any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use”. In the absence of an adequate solution to Paragraph 6 that could open up access to affordable generic medicines for developing countries lacking manufacturing capacity, Seco Gerard of MSF makes the following forecast: “We are almost right back where we started. Colleagues of mine were in Seattle and our message was “our patients are dying”. Well again we are nearing the same scenario. In a few

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30 The HIV/AIDS crisis serves as a magnifying glass for the wider problem of access to medicines.

31 MSF 2005b.

32 Haakonsson and Richey 2007, 79. It is estimated that between 4200 and 12000 patent applications had accumulated in India’s “Mailbox” between 1995 and 2005.

33 Seco Gerard. Access Campaign EU Liaison Officer. Médecins Sans Frontières (MSF). Interview by author. 9 February 2006. In response to the shortage of transparent and reliable information on pharmaceutical products on the international market, MSF has published a series of Pricing Guides for ARVs. These guides are designed to help developing countries make informed decisions when buying ARVs. See MSF 2005a, 2006; Unicef et al. 2005.
months time, in a few years time, we will be back at the WTO saying our patients are dying again.\textsuperscript{34}

Prior to the adoption of the Doha Declaration, developing countries were already acutely aware of the problem caused by Article 31(f).\textsuperscript{35} They proposed using TRIPS Article 30 as a basis for a solution to the problem. This solution would allow Members to “give effect” to compulsory licenses issued by other members, and to export pursuant to those licenses. This solution required the development of an authoritative interpretation that would allow Members to “use the Article 30 exception provision to authorize production for export "to address public health needs in importing Members".\textsuperscript{36} However, the EU and the United States roundly rejected this proposal and sought to resolve the issue at a later date. Unfortunately, momentum and political will declined significantly after Doha and the TRIPS Council was unable to find a “simple and expeditious solution to this problem…before the end of 2002.”\textsuperscript{37}

By July 2002, the TRIPS Council had received a number of communications on a solution to the Paragraph 6 problem.\textsuperscript{38} The four main proposed solutions indicated that a consensus would be difficult to reach. First, developing countries maintained their preference for a solution under Article 30 that would provide for a specific exception for

\begin{itemize}
\item \textsuperscript{34} Seco Gerard. Access Campaign EU Liaison Officer. Médecins Sans Frontières (MSF). Interview by author. 9 February 2006.
\item \textsuperscript{35} Council on TRIPS 2001d.
\item \textsuperscript{36} Abbott and Reichman 2007, 6.
\item \textsuperscript{37} WTO 2001c.
\item \textsuperscript{38} These communications were by the African Group (Council on TRIPS 2002c), the EC and their Member States (Council on TRIPS 2002a, b), United Arab Emirates (Council on TRIPS 2002d), Brazil, on behalf of Bolivia, Brazil, Cuba, China, the Dominican Republic, Ecuador, India, Indonesia, Pakistan, Peru, Sri Lanka, Thailand and Venezuela (Council on TRIPS 2002e), and the US (Council on TRIPS 2002f, g).
\end{itemize}
exports by means of an authoritative interpretation. Since this solution would result in a broad and general exception in WTO Members’ patent laws, it was widely viewed as the most “administratively simple, workable and economically viable.”

The Access Campaign and the World Health Organization were also staunch advocates of this proposal. In its statement to the TRIPS Council on 17 September 2002, the WHO established its position thus:

> the people of a country which does not have the capacity for domestic production of a needed product should be no less protected by compulsory licensing provisions (or indeed other TRIPS safeguards), nor should they face any greater procedural hurdles, compared to people who happen to live in countries capable of producing the product….Among the solutions being proposed, the limited exception under Article 30 is the most consistent with this public health principle. This solution will give WTO Members expeditious authorization, as requested by the Doha Declaration, to permit third parties to make, sell and export patented medicines and other health technologies to address public health needs.

NGOs also preferred this solution because the patent holder would receive remuneration in the country where the pharmaceutical product is consumed thereby avoiding double compensation. It also permits the export of products to countries that have not filed or granted patents. It encourages exports from the widest number of countries and, perhaps most significantly, this solution does not place the power to determine the appropriate conditions for granting a compulsory license in the hands of the exporting country.

In June 2002, the Africa Group proposed a second option, a moratorium whereby WTO members would agree not to bring disputes against countries that export some

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39 t’ Hoen 2003, 59. For the same reason, Pharma vigorously opposed this solution.

40 See for instance ‘Joint Statement’ 2002a, b; Oxfam 2002.

41 Qtd in t’ hoen 2002, 59.

42 These points were conveyed in a letter to the TRIPS Council by six leading members of the Access Campaign. See MSF et al. 2002.
medicines to countries in need.\textsuperscript{43} The United States expressed its preference for a temporary moratorium a month later.\textsuperscript{44} However, any solution, according to the United States, should be limited to epidemics explicitly referenced in the Doha Declaration: HIV/AIDS, Malaria, Tuberculosis.\textsuperscript{45} The possibility of “waiving” certain WTO Members from specific obligations under the TRIPS and thereby making exports to select countries “non-judiciable”, was also suggested by the United States’ as an interim solution until consensus on Paragraph 6 could be attained.\textsuperscript{46} Nonetheless, both the waiver and moratorium options are temporary solutions that suffer from an inherent lack of legal stability and predictability—key values underpinning the international trade regime—and were therefore viewed as unsustainable.\textsuperscript{47}

A third option involved carving out an exception to Article 31 of the TRIPS Agreement through an amendment. The African Group and its partners suggested that an amendment should simply delete the paragraph in Article 31(f) that limits the production of products “predominantly for the domestic market.” Others proposed the introduction of a limited exception that would apply only under certain circumstances “for exports of

\begin{itemize}
\item \textsuperscript{43} Council on TRIPS 2002c.
\item \textsuperscript{44} Council on TRIPS 2002g.
\item \textsuperscript{45} Ismail 2003, 399. Notably, the United States acted upon its offer to grant moratoriums to developing countries following the TRIPS Council’s inability to find a solution to Paragraph 6 in December 2002. USTR Press Release 2002.
\item \textsuperscript{46} Bourgeois and Burns 2002; Vandoren and van Eekhaute 2003. A waiver could be granted under WTO Article IX.3-4 which states: In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph.
\item \textsuperscript{47} Matthews 2004, 85.
\end{itemize}
products needed to combat serious public health problems and produced under compulsory licences.” Such an amendment would be subject to three conditions:

a. The need to provide safeguards against exports to countries which do not face serious public health problems;

b. The need to provide safeguards against re-exportation from the country of destination, especially to rich countries, to avoid creating “black markets” for the products concerned; and

c. The need to make the system transparent, in order to allow other Members to be informed if a Member makes use of this mechanism.49

In the event of an amendment to Article 31(f), compulsory licenses would be granted on a case by case basis. Therefore, this is a much more restrictive solution than the one proposed under Article 30. This solution would provide the basis for the Decision of the General Council of the WTO on August 30 2003.50

Initially, the EU resumed its role as honest-broker in international negotiations. In its communications to the TRIPS Council in March 2002, the EU presented both the Articles 30 and 31 solutions as viable options.51 In the meantime, the EU struggled internally to forge a common position. Due to pressure from its sizeable pharmaceutical industry, Germany maintained a position most in line with the United States while many other Members sought a much broader solution under Article 30. The UK Commission

50 WTO 2003a.
51 Council on TRIPS 2002b.
on Intellectual Property Rights also implicitly endorsed this solution by emphasizing the importance of economies of scale for generic producers.\textsuperscript{52}

There was also considerable political wrangling between different institutional arms of the EU. DG Internal Market and the patents working group of the Council of Ministers both sought restrictive solutions that would not lower intellectual property protection standards. By contrast, DG Development and the European Parliament stood squarely behind a solution based in TRIPS Article 30.\textsuperscript{53} In fact, on 23 October 2002, the European Parliament passed Amendment 196 to the EU Directive 2001/83/EC relating to medicinal products for human use officially endorsing an Article 30-based solution. Article 10 para 4 states:

Manufacturing shall be allowed if the medicinal product is intended for export to a third country that has issued a compulsory licence for that product, or where a patent is not in force and if there is a request to that effect of the competent public health authorities of that third country.

This amendment is widely considered by NGOs to contain an “ideal solution” or blueprint for solving the Paragraph 6 problem but it has since been rejected.

By June 2002, the EC and its Member States had already positioned themselves squarely behind an Article 31 amendment and were preoccupied with clarifying modalities.\textsuperscript{54} Despite considerable intergovernmental wrangling over a range of issues including the scope of diseases covered by the amendment, whether the exception should be limited to least-developed countries, which countries qualify as exporters of low-cost

\begin{itemize}
\item \textsuperscript{52} UK Commission on Intellectual Property Rights 2002, Chap. 2-Health, 44-48.
\item \textsuperscript{53} Desk officer working on international aspects of intellectual property rights, in particular in regards to access to health. DG Trade, Unit H2: New Technologies, Intellectual Property and Public Procurement. Interview by author. 15 February 2006.
\item \textsuperscript{54} Council for TRIPS 2002c
\end{itemize}
essential medicines, and the need for additional safeguards, the Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS and Public Health was adopted on 30 August 2003.55

Momentum for meeting with CSOs endured throughout 2002 and 2003. The Civil Society Dialogue met 3 times in 2002 and 4 times in 2003. In each instance, the lead commission participant was the Head of the Unit working on IP, Paul Vandoren. However, by early 2003 the quality of discussion, especially as it pertained to a Paragraph 6 solution, declined significantly. As the policy debate centered on issues that required a good deal of legal and technical know-how, discussions were “pulled back” from the burgeoning participatory process. Even DG Trade’s most avid and trusted NGO partners were effectively relegated to the status of “passive receivers” of information.

According to actors on both sides of the debate, Civil Society Dialogues became one-sided “de-briefing sessions” where Commission officials inform members of civil society about their activities at the TRIPS Council and their position/work on modalities for implementing a solution under Article 31(f).56 The floor was open for participants to ask one or two questions, but unlike the pre-Doha Declaration period, there was no longer any opportunity for meaningful debate.57 NGOs report that the sessions ended before

55 For a detailed overview of the intergovernmental negotiations leading up to the August 30 Decision and a close examination of US efforts to block an expeditious and efficient solution to the paragraph 6 problem see Baker 2003, Section 2.3; Matthews 2004; Abbott 2005. Matthews (2002) also conducts a thorough comparison of US and EU negotiating strategies during this period.


they could advance their own point of view on the issues.\textsuperscript{58} The intensity and quality of input were reportedly diminished during one-on-one meetings between MSF, Oxfam and Commission officials. Moreover, NGO activism began to stagnate during this period. As the issues became more complex, and dialogue less likely, NGOs had difficulty maintaining interest amongst their membership.\textsuperscript{59}

By contrast, both the research-based and generic pharmaceutical industries in Europe stepped up their efforts to find an optimal solution to the Paragraph 6 problem. The research-based industry worked to ensure the implementation and enforcement of the TRIPS Agreement. In addition to attending CSD sessions, individual companies and the European Federation of Pharmaceutical Industries and Associations (EFPIA) targeted Commission officials working on IP in DG Market and the patents working group of the Council of Ministers.\textsuperscript{60} Their primary concern was to ensure adequate measures were implemented in the EU to prevent the re-importation of cheaply priced medicines from developing countries. The EFPIA was also staunchly opposed to a Paragraph 6 solution based in Article 30. The Pharma considers this option to be far beyond the scope of the Doha Declaration and also beyond the charge given to WTO members to help poorest countries access affordable medicines. Indeed, according to Pharma, it is a proposal that threatens to undermine the TRIPS Agreement and stunt progress on research and development for new drugs, particularly for diseases afflicting the world’s poorest

\textsuperscript{58} Seco Gerard. MSF Access Campaign: EU Liaison Officer. Interview by author. 6 February 2006; Louis Belanger. OXFAM International: EU Advocacy and Media Officer. Interview by author. 8 February 2006.

\textsuperscript{59} Seco Gerard. MSF Access Campaign: EU Liaison Officer. Interview by author. 6 February 2006.

\textsuperscript{60} Dür and De Bièvre 2007, 95.
people. Therefore, EFPIA and indeed the wider international research-based pharmaceutical industry, lobbied aggressively on the issue.

As an alternative, they preferred a legally binding solution in the form of an amendment under Article 31(f). However, Pharma sought to restrict disease scope and limit the range of countries eligible to import under the amendment to least developed and low-income countries. This limitation would effectively disallow use by countries with the manufacturing capacity but insufficient market size to produce pharmaceutical products. The Pharma also wanted the burden of proof to fall on importing countries; a developing country could be challenged at any time through an expedited review process before a WTO expert panel on whether it lacks manufacturing capacity in the pharmaceutical sector. Finally, the EFPIA worked to shift attention away from the link between TRIPS and access to medicines by encouraging the EU to pursue a comprehensive strategy to address the HIV/AIDS pandemic and other major diseases ravaging the least-developed countries. As a result, efforts to ensure access to affordable medicines increased in other international venues including the World Health Organization, the World Bank, and the United Nations AIDS Programme.

The position of the international generic industry resembled in many respects the priorities of the Access Campaign. In mid 2002, the European Generics Association


62 In earlier submissions, the Pharma also sought to limit the applicability of the amendment to HIV/AIDS, tuberculosis and malaria, and excluding ‘other epidemics’.

63 Dür and De Bièvre 2007, 95.
The EGA also advocated for the adoption of the European Parliament’s Amendment 196. Indeed, according to EGA Director Greg Perry, “An interpretation of the 'general exemption Article' is the only practical way forward as it would eliminate the need to both amend TRIPS and to create a complicated system of export licenses as would be envisaged under an amendment to Article 31 (compulsory license Article). The EGA regrets that at present the EU appears to prefer amending Article 31.” Moreover, the EGA argued such a solution would facilitate the creation of economies of scale and a degree of competition between generic producers. Together these elements would ensure that prices are as low as possible. Alongside measures under the TRIPS Agreement to increase the availability of affordable medicines, the EGA encouraged EU Member States to provide financial incentives such as tax relief and research grants for Pharma involved in R&D for HIV/AIDS, Malaria, Tuberculosis and other tropical diseases. Notably, while the European Generic Medicines Association was also an avid participant in CSDs with Commission officials, no significant coalition building occurred between the EGM and the Access Campaign.

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64 EGA 2002a.

65 EGA 2002b.
A. August 30 Decision

The August 30 Decision\textsuperscript{66} was an interim solution in the form of a waiver of Article 31(f) agreed to before the Cancun Ministerial Meeting in September 2003.\textsuperscript{67} It effectively allows the import of generic pharmaceuticals under compulsory license on a case by case basis, provided certain conditions are met. Despite attempts by the international research-based pharmaceutical industry and the United States\textsuperscript{68}, the Decision does not limit the scope of diseases\textsuperscript{69} nor does it restrict usage to least-developed or Sub-Saharan African countries.\textsuperscript{70} The Decision requires that importing countries (excluding least-developed countries\textsuperscript{71}) notify the TRIPS Council website of their general intent to make use of the system. Countries may also make a declaration of their intention not to use the system or to use it in a limited way.\textsuperscript{72} The importing member must also provide the names of the pharmaceutical products and the quantities it expects to import, and confirm that it has insufficient or no manufacturing capacity in the

\textsuperscript{66} Previously referred to as the “Motto Text”.

\textsuperscript{67} For a detailed description and analysis of the different aspects of the decision see Baker 2003.

\textsuperscript{68} Ismail 2003, 398; Elliot and Denny 2002. At one point, in an effort to break deadlock, the European Union also recommended limited disease scope to a list ‘approved’ by the WHO.

\textsuperscript{69} This move would have been inherently discriminatory since developed countries with manufacturing capacity do not face disease limitation on the grant of compulsory licenses.

\textsuperscript{70} According to Paragraph 1(a) of the Decision, pharmaceutical product“means any patented product, or product manufactured through a patented process, of the pharmaceutical sector needed to address the public health problems as recognized in paragraph 1 of the [Doha] Declaration.” WTO 2003a. According to Abbott and Reichman 2007, this includes active ingredients, vaccines and diagnostic kits required for treatment of any disease. Paragraph 1 of the Doha Declaration does not limit the Declaration’s applicability to specific diseases or medicines.

\textsuperscript{71} Least-developed countries are exempt from this requirement since they are assumed to lack the manufacturing capacity to produce pharmaceuticals and are thus already eligible to use the system.

\textsuperscript{72} Most OECD countries and all EU Member States including newly acceded countries have made such a declaration. This decision has been the subject of debate in light of the Avian flu virus. Abbott and Reichman 2006. See also the debate in the Civil Society Dialogue on 27 October, 2005 on this issue: http://trade-info.cec.eu.int/civilsoc/meetdetails.cfm?meet=11125
sector to produce the product in question.\textsuperscript{73} If the drug is patented in the importing country, it must grant a compulsory license in accordance with Article 31 TRIPS.\textsuperscript{74}

Exporting WTO members must also issue a compulsory license but it must only be for the amount necessary to meet the needs of the importing Member as indicated in its notification to the TRIPS Council.\textsuperscript{75} All of the product produced under the compulsory license must be exported to that member and be clearly identified as having been produced under this system through special labeling or markings, provided that such distinction is feasible and does not have a significant impact on price.\textsuperscript{76} The exporting member must post quantities, destinations and distinguishing features of each product prior to shipment for export on a website and notify the TRIPS Council of its location.\textsuperscript{77} The TRIPS Council must also be notified by the exporting member when a compulsory license is issued, “the name and address of the patent holder, the product(s) for which the license has been granted, the quantity(ies) for which it has been granted, the country(ies) to which the product(s) is (are) to be supplied and the duration of the license”.\textsuperscript{78} Finally, the Decision requires that adequate remuneration be paid to the patent holder in the

\textsuperscript{73} WTO 2003a, Para. 2(a)(ii) and Annex: Assessment of Manufacturing Capacities in the Pharmaceutical Sector.

\textsuperscript{74} Least Developed Countries are exempt from this requirement because they need not apply patent or data protection for pharmaceuticals until 2016. Least developed countries that had already introduced patent regimes, largely as a result of colonial administration of their legal systems, have the right to dis-apply existing patent protection for this period. Notably, TRIPS Article 31(b) contains a “fast-track” provision that states compulsory licenses issued for public non-commercial use and/or national emergency or circumstances of extreme urgency do not require notification or prior negotiations with the patent holder. Abbott and Reichman 2007, 13. Also see Vandoren and Van Eeckhaute 2003.

\textsuperscript{75} Notably and despite Canada’s claim to the contrary, TRIPS Article 31(b) or the “fast-track” option also applies to exporting members. Abbott and Reichman 2007, 13.

\textsuperscript{76} WTO 2003a, Article 2(b)(ii).

\textsuperscript{77} WTO 2003a, Article 2(b)(iii).

\textsuperscript{78} WTO 2003a, Article 2(c).
exporting country. This provision ensures that remuneration required under TRIPS Article 31(h) is not paid twice.

The August 30th Decision also places more general obligations on all WTO members. First, members must take reasonable measures to prevent trade diversion and re-importation of products produced and exported under this system. In other words, products sold under this system cannot be treated as “lawful parallel imports”. Members of regional trade agreements where at least half of the current membership is comprised of least- developed countries can effectively “share” products exported under this system. According to Abbott and Reichman, “this provision permits pharmaceutical products imported into one Member of the group under a compulsory license to be re-exported to other Members of the group without additional export licensing.” The Decision reiterated WTO members’ commitment under TRIPS Article 66.2 to promote capacity building and technology transfer in the pharmaceutical sector. Paragraph 9 also confirms that the Decision does not preclude WTO members from making use of the rights, obligations and flexibilities contained in the TRIPS Agreement. Perhaps most significantly, this provision provides that “if production and export by third parties of products under patent are deemed permissible under Article 30, which deals

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79 “Taking into account the economic value to the importing Member of the use that has been authorised in the exporting member” WTO 2003a, Article 3.

80 WTO 2003a, Article 4.

81 Abbott and Reichman 2007, 15.

82 This provision is effectively restricted to Sub-Saharan Africa.

83 Abbott and Reichman 2007, 15.

84 WTO 2003a, Article 7.
with exceptions rather than compulsory licensing, this possibility has not been foreclosed by the [decision].”

Finally, the Decision was accompanied by the reading of the “General Council Chairperson’s Statement”. It includes an extra statement of purpose intended to provide assurances to the United States in particular that the Decision would not be abused and products would not be diverted to third-country markets. The statement provides for ad hoc reviews of determinations of insufficient manufacturing capacity. It also lists the

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85 Abbott and Reichman 2007, 16.
86 Abbott and Reichman 2007, 16.
87 WTO 2003b. The “statement” was necessary in order to obtain agreement from the United States who had blocked adoption of a draft text of the Decision because it sought to restrict the solution to countries in Sub-Saharan African and because it sought a definitive list of diseases for which the amendment could be invoked. According to one EU Commission official, the reading of the statement allowed the United States to ‘save face’ in light of demands by its Pharma industry. Notably, the ‘statement’ was distributed to developing countries only one day before a decision would be taken. For further discussion on the practical significance of the Chairperson’s statement see Baker 2003; Abbott and Reichman 2006, 17-18;
88 “Members recognize that the system established should be used in good faith to protect public health and, without prejudice to paragraph 6 of the Decision, not be an instrument to pursue industrial or commercial objectives.” WTO 2003b.
89 “Therefore, all reasonable measures should be taken to prevent such diversion in accordance with the relevant paragraphs of the Decision. In this regard, the provisions of paragraph 2(b)(ii) apply not only to formulated pharmaceuticals produced and supplied under the system but also to active ingredients produced and supplied under the system and to finished products produced using such active ingredients.” WTO 2003b.
90 This provision could amount to an extended role for the TRIPS Council in policing the system. See in particular item three in the Chairperson’s statement which begins “To promote transparency and avoid controversy, notifications under paragraph 2(a)(ii) of the Decision would include information on how the Member in question had established, in accordance with the Annex, that it has insufficient or no manufacturing capacities in the pharmaceutical sector…. Any Member may bring any matter related to the interpretation or implementation of the Decision, including issues related to diversion, to the TRIPS Council for expeditious review, with a view to taking appropriate action. If any Member has concerns that the terms of the Decision have not been fully complied with, the Member may also utilise the good offices of the Director General or Chair of the TRIPS Council, with a view to finding a mutually acceptable solution.” WTO 2003b.
47 WTO members who had made statements of either complete or partial non-use of the Decision as importers.  

Members of the Access Campaign immediately issued widespread and unequivocal denunciations of the August 30 Decision. It is viewed as a flawed deal that is likely to make the access to essential medicines situation in developing countries far worse. The system entails onerous administrative costs for developing countries with limited resources and it is considered too complicated to work in practice. According to members of the Access Campaign, lobbying EU technocrats, the burden of proof on developing countries to establish that they lack sufficient manufacturing capacity and the possibility of review by the TRIPS Council will compromise their willingness to make use of the system. This provision raises the specter of costly legal battles and/or trade retaliation in other areas for countries who apply to use the system. The precise meaning of “insufficient capacity” is unclear and therefore subject to dispute. NGOs believe any solution to Paragraph 6 must include situations where it is economically inefficient to

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91 These include Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxemburg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom and the United States. The ten countries awaiting accession to the EU agreed to use the system as importers only in cases of national or other extreme cases or urgency. Once they joined the EU they would opt-out completely. These are: the Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia. Finally, fourteen high income developing countries agreed to use the system only in cases of national emergency: Hong Kong, China, Israel, Korea, Kuwait, Macao China, Mexico, Qatar, Singapore, Turkey, the United Arab Emirates, the Separate Customs Territory of Taiwan, Penghu Kinmen and Matsu. WTO 2003b.

92 Cptech has posted press releases, letters and position papers from various actors on this issue during the 2002-2005 period. See http://www.cptech.org/ip/wto/p6/

93 Louis Belanger. OXFAM International: EU Advocacy and Media Officer. 8 February, 2006.

94 For a detailed assessment of the administrative aspects of the Decision see Baker 2003; Abbott and Reichman 2007; Matthews 2004. To date, only Rwanda has notified the TRIPS Council of its intent to use the system by importing 260, 000 packs of ‘Apo-TriAvir’, a combination HIV/AIDS drug from Canada. Notably, Apotex, the generic firm that won the tender to manufacture and export the drug to Rwanda, says it will never participate in such an arrangement again because the procedure was so cumbersome and consumed so many company resources. For further details see ICTSD 2007a; Gandhi 2008.
produce a particular product; that is, where meaningful economies of scale are lacking. However, in the absence of an expansive definition of “insufficient capacity” it remains unclear whether this situation qualifies. NGOs also take issue with the fact that potential importers under this system are entirely dependent upon government decisions in exporting countries.95

According to the Access campaign, an energetic market in developing countries for generic medicines is essential to combat AIDS and other public health problems. However, the Decision also makes it difficult for generic producers to establish viable economies of scale that will drive the price of essential medicines down. There is concern that in the absence of competition, Indian and Brazilian generic industries can be predatory in the pricing practices.96 The system does not allow for international tendering and the requirement for double licensing (in both the importing and exporting countries) adds an unnecessary layer of bureaucracy and uncertainty for generic producers. Because they may only produce products for export on a case-by-case, license by license basis, prospective generic producers will be deterred from building up capacity for export on “speculation”. Moreover, the Chairperson’s statement, if upheld or used as a basis for legal interpretation of the Decision, works to restrict generic producers’ right to make a profit.97 If generic producers may only produce products for export on humanitarian grounds, they will be deterred from participating in the system. NGOs are also concerned that the requirement for distinctive labeling to prevent trade diversion and


97 “The Decision should be used in good faith to protect public health and … not as an instrument to pursue industrial or commercial policy objectives.” WTO 2003b.
the payment of remuneration in wealthy OECD countries\textsuperscript{98} will drive generic prices upwards.

The generic industry has echoed many of these concerns. In particular, the European Generics Association considers the system so constraining and legally risky it will not be able to make use of it. In a comment on the European Commission’s initiative to introduce a Regulation implementing the August 30 Decision, the EGA stated, “the procedures are complicated, the terms under which new procedures must operate are very restrictive, and the various measures proposed are ambiguous.”\textsuperscript{99} The comment went on to doubt the extent to which the Decision could function in practice to improve access to medicines in other countries.

The Decision also failed to meet the expectations of the international research-based industry. It was especially frustrated by the decision not to include limits on the scope of diseases but was appeased by the Chairperson’s statement and the declarations of non-use by a wide range of countries.

Once the EU had explicitly endorsed a solution based in Article 31(f), there was no possibility of compromise with NGOs working with the Access Campaign who denounced the Decision wholesale. In part, this explains the decline in the quality of dialogue between late 2002 and August 2003. The diminishing quality of consultations between EU technocrats and NGOs in this period is also due to a fundamental disagreement over the appropriate solution to high prices for essential medicines in developing countries. As discussed at some length above, the Access Campaign

\textsuperscript{98} According to Baker (2003, 25) the entire issue of calculating remuneration in exporting countries is a Pandora’s box.

\textsuperscript{99} EGA 2005, 2.
attributes the high price of medicines to stringent IPR protection and therefore looked for greater flexibility in IPR enforcement vis-à-vis TRIPS Article 30. Commission officials cite a range of other problems including the failure of public policy, lack of health infrastructure and distribution channels and do not view compulsory licenses as a viable or sustainable solution to the access problem in developing countries. Instead, the European Commission favours voluntary (market-based) mechanisms.

EU technocrats forged the August 30 decision with the intent to maintain IPR protection and to provide legal certainty for the pharmaceutical industry – two qualities that were lacking in an Article 30 solution. EU Commission officials were the architects of many of the most cumbersome and bureaucratic elements of the August 30 decision. They built deliberate limitations and complications into the system. Although the reading of the Chairperson’s statement was meant to appease the United States and allow them to sign on to a solution while saving face in light of Pharma demands, it effectively wraps an already complicated solution in even more red tape. European technocrats do not expect an Article 31 solution to the Paragraph 6 problem to function in practice. The “threat” of compulsory licenses arising from an amendment to Article 31 should lead to spontaneous price reductions as patent holders issue voluntary licenses and/or sign on to a voluntary global tiered pricing scheme; both options are considered to be more “sustainable” solutions to high priced medicines. Therefore, all NGO arguments regarding the cumbersome and complicated nature of the solution are moot from the point of view of the Commission.¹⁰⁰ Once a decision had been made to support an

¹⁰⁰ Desk officer working on international aspects of intellectual property rights, in particular in regard to access to health. DG Trade, Unit H2: New Technologies, Intellectual Property and Public Procurement. Interview by author. 15 February 2006; Desk officer working on international aspects of intellectual
Article 31 solution to the Paragraph 6 problem, Commission officials shifted attention to highly technical matters including the precise form or limits on compulsory licensing, tiered pricing\(^\text{101}\) and related “safeguards against the diversion of low-priced pharmaceuticals …and price erosion in the markets of developed countries.”\(^\text{102}\)

**B. Protocol of TRIPS Amendment Concerning Article 31bis**

After August 2003, policy discussions focused on finding a permanent solution to the Paragraph 6 problem and the issue became even more complex and technical.\(^\text{103}\) As a result, additional functional power pooled in the hands of EU technocrats who sought to make use of their carefully crafted August 30 Decision as an authoritative basis for a new and permanent rule on compulsory licensing in countries with no manufacturing capacity. The quality of engagement between EU technocrats and NGOs working with the Access Campaign degenerated further. Where they once served as key interlocutors to the

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\(^{101}\) From the point of view of research-based Pharma, tiered pricing is preferable over compulsory licenses as a solution to the price of high medicines in developing countries – mainly because it is a voluntary system. If accompanied by market segmentation between developed and developing countries, then tiered pricing represents the ideal solution from the point of view of Pharma. Members of the Access Campaign such as Oxfam are also supporters of tiered pricing provided it does not introduce any conditionality to compulsory licensing or link the two in any way. See Oxfam Response to EC Working Document on Tiered Pricing: [http://www.oxfam.org.uk/resources/policy/health/downloads/tiered.pdf](http://www.oxfam.org.uk/resources/policy/health/downloads/tiered.pdf)

\(^{102}\) In May 2003, the EC introduced a Regulation to avoid trade diversion into the European Union of certain key medicines purchased under tiered pricing system. The Regulation focuses primarily on Malaria, Tuberculosis and HIV/AIDS. See European Communities 2003. To date only treatment for HIV/AIDS has been included. Notably in 2006 no new products were registered. Three annual reports containing detailed information on volumes and destination countries of tiered priced medicines covered by the Regulation are available at [http://trade-info.cec.eu.int/cgi-bin/antitradediversion/annual_reports.pl?action=reports](http://trade-info.cec.eu.int/cgi-bin/antitradediversion/annual_reports.pl?action=reports)

\(^{103}\) Paragraph 11 of the Decision states that “(t)his Decision, including the waivers granted in it, shall terminate for each Member on the date on which an amendment to the TRIPS Agreement replacing its provisions takes effect for that Member. The TRIPS Council shall initiate by the end of 2003 work on the preparation of such an amendment with a view to its adoption within six months, on the understanding that the amendment will be based, where appropriate, on this Decision and on the further understanding that it will not be part of the negotiations referred to in paragraph 45 of the Doha Ministerial Declaration.” WTO 2003.
Access to Medicines debate in the EU’s external trade policymaking process, NGOs were effectively sidelined at the implementation and policymaking stage. Their participation was once celebrated and considered vital to making progress on the issue. However, in the post-30 August 2003 policymaking environment, EU technocrats questioned whether public health advocates and NGOs even qualify as stakeholders.  

Only two formal Civil Society Dialogues were held between September 2003 and December 2005. In prior years, the head of DG Unit H2: New Technologies, Intellectual Property and Public Procurement was the lead participant in dialogues with civil society. Following the August 30 Decision, low-level administrators from DG Trade Unit H2 attended the meetings in a “de-briefing” capacity. Regular informal contact was maintained with MSF but it is reported that these sessions were frustrating and unproductive in the absence of any possibility of compromise.

NGOs report difficulty in maintaining momentum and interest in their campaign. They were at a distinct disadvantage in the policymaking process because of the highly technical nature of policy discussions. It was difficult to develop sufficient technical and legal expertise amongst membership to engage in substantive policy debates. Therefore, members of the Access Campaign focused their efforts on more general public

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104 According to one EU Commission official working directly on the Access to Medicines issue, “Stakeholders are really those with clear economic interests – member states, our trading partners, industry and trade unions. NGOs should be called public advocacy groups. They have intellectual and political concerns, not economic concerns…their involvement, their advocacy causes problems because they are not really representative. [Including them], is this not a somewhat elitist approach pushed by people without a mandate?” Desk officer working on international aspects of intellectual property rights, including access to medicines and copyrights. DG Trade, Unit H2: New Technologies, Intellectual Property and Public Procurement. Interview by author. 15 February 2006.

105 See http://trade-info.cec.eu.int/civilsoc/meetlist.cfm?pastyear=2005

106 Seco Gerard. MSF Access Campaign: EU Liaison Officer. Interview by author. 6 February 2006.
statements and position papers calling for developing countries to resist EU and US pressure to translate the August 30 Decision into a permanent TRIPS Amendment.  

NGOs also targeted Members of the European Parliament calling on them to encourage research and development for neglected diseases and to address US-initiated Free Trade Agreements that require signatories to implement and enforce more stringent IPR protection than is required by the TRIPS Agreement.

In intergovernmental negotiations, a legal debate ensued over how or indeed whether to incorporate the August 30 Decision into the TRIPS Agreement. In two separate filings with the TRIPS Council, the European Union and the United States took the position that it was just a technical matter of incorporating the Decision into the TRIPS Agreement. The United States, in partnership with Japan and Switzerland, went farther by insisting that the Chairperson’s Statement should be made part of a permanent solution. Indeed, the inclusion of the Chairperson’s statement and demands to elevate

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107 The message conveyed is well represented by the following NGO Joint Statement: The [August 30] procedures have been criticized by generic industry experts and activists alike for being too burdensome and unworkable in practice. However, the US and the EU are pressuring developing countries to accept that flawed August 30 agreement be locked in as a permanent amendment to the TRIPS Agreement - despite the fact that the mechanism has not been used since its introduction more than 2 years ago and its workability is uncertain…. the current 30 August 2003 mechanism needs to be tested and shown to work, before it is turned into a permanent feature of the TRIPS agreement. If the mechanism proves ineffective in achieving its stated goal – enhanced access to affordable medicines for countries with insufficient or no domestic manufacturing capacity – then WTO members should return to the drawing board and agree to a mechanism that is more effective. Joint Statement by NGOs on TRIPS and Public Health available at http://www.cptech.org/ip/wto/p6/ngos12032005.html


111 “To preserve the consensus, the principles included in the [Chairperson’s] Statement must be preserved. The Statement made the consensus solution possible by addressing and resolving questions concerning aspects of the Decision that were unclear or were not addressed. It thus is an essential part of the solution, and provides value for all WTO Members. If elements of the consensus are eliminated, it will be difficult or impossible to transform the solution into an amendment.” Council for TRIPS 2005a.
its legal status by an explicit written reference to it in the text of the Amendment became a focal point for negotiations during 2005. The research-based pharmaceutical industry in particular, insisted that this be part of a permanent solution to the paragraph 6 problem.

However, the African Group, strongly supported by NGOs, were reluctant to make permanent a solution that was, in their view complicated, untested in practice, and reached under duress prior to the Cancun Ministerial Meeting. The African Group took the view that negotiations on finding a permanent and satisfactory solution would continue during the amendment process. In a 2004 proposal for amending Article 31 of the TRIPS Agreement, they proposed dropping many of the safeguards and procedural requirements of the Decision including those concerning notification and trade diversion and adding a second sub-paragraph on when Article 31(f) did not apply. The Africa Group also took the position that the Chairperson’s statement would be an unnecessary addition to the amendment since it had fulfilled its purpose by creating conditions for consensus prior to the Cancun Ministerial Meeting. Despite the strong stance taken by the African Group, many other developing countries were suffering from negotiation fatigue and were less hopeful that better terms could be achieved in the

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113 Paragraph 11 of the Decision states that an amendment will be based on the Decision “where appropriate”. WTO 2003. The Africa Group interpreted this provision to mean that negotiations would work to address developing country concerns over the more cumbersome aspects of the August 30 Decision and be on-going during the amendment process with the aim to find an optimal, permanent solution.


115 The Decision reached on 30 August, 2003 did not include a reference to the Chairperson’s Statement. However, it was later added as a footnote. The African Group argued that this was done without the consent or consensus of WTO members. See Rwanda’s statement to the Council for TRIPS on behalf of the African Group, Council for TRIPS 2005b, para. 12.
amendment process. Thus a split emerged between developing countries over how to proceed with the amendment process.

Despite hopes for a more efficient solution and against the backdrop of resistance from members of the Access Campaign, WTO members agreed to translate the August 30 Decision into the TRIPS Agreement by adding a formal amendment, “Article 31bis”\textsuperscript{116}.

To the disappointment of Pharma, the US eventually backed down on the matter of the Chairperson’s Statement under pressure from the European Union and developing countries. WTO members settled on the reading of the Chairperson’s Statement in the General Council at the moment of adoption of the amendment. Nonetheless, it is possible that the Statement will serve as the sole supplementary means for interpreting the Amendment should a dispute arise.\textsuperscript{117} Although it remains unclear why the African Group would have agreed to a suboptimal solution, there was little hope of securing achievements in other areas at Hong Kong. On one hand, it is speculated that developing country negotiators were eager to bring something substantive back to their national capitals. On the other hand, developed countries may have been trying to demonstrate their commitment to the “development” agenda at Hong Kong and thereby deflect attention away from the lack of progress on issues that tend to be of greatest interest to developing countries, namely Non-agricultural Market Access (NAMA) and Agriculture negotiations.\textsuperscript{118} In any case, the outcome and thus the policy line adopted by EU negotiating officials at Hong Kong did not reflect the demands and priorities of public

\textsuperscript{116} WTO 2005b.

\textsuperscript{117} ICTSD 2005; Abbott and Reichman 2007, 17.

\textsuperscript{118} ICTSD 2005.
health advocates and NGOs. Since the interests of the European based pharmaceutical industry were contradictory, the EC’s position represents a middle road between the strategic demands of patent holders and the generic industry.

Reactions to the Amendment varied widely. For instance, it was initially celebrated at the WTO as a great success. However, NGOs and public health advocates widely denounced the move. According to Ellen ’t Hoen, Director of Policy Advocacy for the MSF Access Campaign, members of the WTO are “ignoring the day-to-day reality of drug production and procurement”.\(^{119}\) Furthermore, “it seems that the WTO has decided to sacrifice access to medicines before the Hong Kong meeting, settling for inadequate measures simply to get it off the agenda”.\(^{120}\)

The amendment does not take effect or become enforceable until at least two-thirds of WTO membership ratify it. In the meantime, countries will continue to rely on the August 30 Decision. Since the substantive aspects of the decisions are identical, this distinction has little significance in practice. Nonetheless, in the absence of concrete evidence that the system will work to effectively meet global needs for affordable generic medicines, NGOs and public health advocates encourage WTO members not to ratify the

\(^{119}\) ICTSD 2005.

\(^{120}\) MSF 2005
The original deadline for ratification was December 2007 but this has been extended to the end of 2009.

IV. Ratification of TRIPS Amendment by European Parliament: Concessions, Compromise and Co-optation in the IPR Regime

Before taking steps to ratify the amendment, the EU sought to create a legal basis in the EU for granting compulsory licenses for export. On 17 May 2006 the European Parliament and the Council adopted Regulation No 816/2006 on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems. This regulation effectively brings the EU Member States’ patent regimes into line with the August 30 Decision.

Regulation No 816/2006 was a temporary compromise reached after several months of dialogue among the European Commission, the Council and the European

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121 31 NGOs issued a public statement urging governments to test the mechanism before turning it into permanent law. This group includes national groups, such as Kenya AIDS Intervention Prevention Project Group (KAIPPG), Assessor de comunicação Associação Brasileira Interdisciplinar de AIDS (ABIA) and the Ugandan Treatment Access Campaign, as well as international NGOs such as MSF, Oxfam and ActionAid. For the statement see http://www.cptech.org/ip/wto/p6/ngos12032005.html

122 The deadline was extended in October, 2007 when only 11 countries had ratified the amendment. These include Australia, the U.S., India, Israel, Japan, Norway, the Philippines, Korea, El Salvador, Singapore and Switzerland. The Amendment was endorsed by the European Parliament on 24 October, 2007 and on 19 November, 2007 the EC notified the WTO that the amendment had been ratified in all EU Member States. Finally, China’s top legislature, the Standing Committee of the National People’s Congress approved the amendment on 28 October, 2007. This brings the number of ratifications to 39 out of 151.

123 European Communities 2006.

124 On 14 May, 2004 Canada passed Bill C-9 which has been criticized by NGOs for including a restrictive list of medicines, it does not automatically include medicines pre-qualified by WHO (including Fixed-Dose Combination antiretrovirals), it imposes hurdles on NGOs in the field attempting to procure Canadian generics, and it includes language against production that is “commercial” in nature. As of December 2007, India (2005, Insertion of new section 92A to the Indian Patent Law), Norway (Section 49 of Norway’s Patents Act was Amended by the Act of 19 December 2003 No. 127, Section 49), China (In November, 2005, China passed State Intellectual Property Office Order 37), Korea (Amended Patent Act on 31 May, 2005), and Switzerland are the only other countries who have brought their patent legislation into line with the August 30 Decision allowing pharmaceutical companies to produce generic versions of patented medicines to supply countries that make use of compulsory licenses.
Parliament. Although the final Regulation marks a significant improvement over the Commission’s original proposal, it fell dramatically short of the ambitions of the European Parliament. A compromise was possible on 27 April 2006 only because the European Parliament was assured that the regulation “would represent only a temporary solution and that the European Parliament would be consulted again [under the co-decision procedure] once a permanent amendment was adopted.” Notably, the European Parliament must assent to the TRIPS Amendment before each of the EU Member States can ratify it. Therefore, the issue of whether to accept the Amendment to the TRIPS Agreement in the European Union became a highly contentious political matter.

Although the quality of engagement with Commission officials had been in decline since 2002, the role of members of the Access Campaign is evident at this stage of policy development/implementation. According to members of the European Parliament’s Committee on International Trade (INTA), direct lobbying by NGOs, in addition to the Access media campaign can be credited with educating MEPs and stimulating debate over the practical limitations of the August 30 Decision. The message conveyed by members of the Access Campaign, that patents are being used to keep essential medicines out of the hands of the poor and there has been no significant increase into research aimed at finding cures for neglected diseases, has clearly resonated with MEPs.

INTA in particular wanted more substantive commitments on technology transfer, capacity building, and the remuneration of the right holder. It also noted the complicated nature of the August 30 Decision and sought a more simplified and accelerated system. European Parliament 2007b.

Concerns over the complicated and bureaucratic nature of the August 30 Decision led Members of the European Parliament to withhold support and delay ratification of the Amendment throughout much of 2007. In the absence of some proof that the August 30 Decision would work in practice, MEPs sought to improve their understanding of the impact of the TRIPS Agreement and evolving legal framework on access to medicines in developing countries by commissioning a study by Professors Frederick Abbott and Jerome Reichman.  

Following the publication of this study, the European Parliament passed a resolution on 12 July 2007 indicating that it would block the TRIPS Amendment if EU member states do not put measures in place to ease access to affordable medicines in developing countries. The resolution reflects the message conveyed by the Access Campaign by explicitly acknowledging, among other things, the negative impact of stringent IPR protection arising from the TRIPS Agreement on pharmaceutical prices and stresses that a TRIPS Amendment “represents only part of the solution to the problem of access to medicines and public health”. The Resolution also claims the amendment pays insufficient attention to issues of technology transfer and capacity building, is unnecessarily burdensome for developing countries, and may be impossible to use effectively. To a significant extent, this resolution also reflected the conclusions and recommendations thought necessary to ensure that the amendment would promote access to medicines in poor countries contained in Abbott and Reichman’s study.

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127 Abbott and Reichman 2007. The Committee on Legal Affairs also prepared an opinion on the amendment which compounded the doubts about the system’s effectiveness raised by NGOs. Notably, it was the Committee’s opinion that “the compulsory licensing provisions do not improve the prospects for cheaper drugs for poor countries as much as can be justified in humanitarian terms”. See European Parliament 2007c.

Key amongst the demands contained in the resolution is an explicit commitment by the European Commission and EU Member States not to oppose developing country governments that choose to take advantage of flexibilities in the TRIPS Agreement in order to produce or import generic copies of patented drugs for public health purposes. There were also calls for improved financial support for research and development of neglected diseases, transfer of technology and capacity building for production of pharmaceuticals in developing countries themselves. The European Parliament asked the Council to provide assistance to developing countries to make effective use of the flexibilities contained in the TRIPS Agreement including compulsory licensing and parallel importation. The hands of the European Commission should be tied from pursuing so-called TRIPS-Plus provisions in the framework of Economic Partnership Agreements (EPAs) or bilateral free trade agreements with developing countries. The Commission should be mandated to play a more active role in the World Health Organization’s Intergovernmental Working Group on Public Health, Innovation and Intellectual Property (IGWG). Perhaps most significantly, the Resolution asks the European Commission and EU member states to provide explicit political support for governments that wish to make use of Article 30 of the TRIPS Agreement.

The Portuguese Presidency responded to the Resolution in a letter in August expressing the view that existing EU programmes to support research and development and build capacity are sufficient to meet the access to medicines challenge in developing countries. Moreover, the letter cited the Doha Declaration as adequate proof that the

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129 TRIPS-Plus refers to more stringent IPR commitments than are required by the TRIPS Agreement. These include data exclusivity, patent extensions, and limitations of grounds for compulsory licenses.

system provides public-health related flexibilities and no further clarification is required. Regarding the TRIPS Amendment, Manuel Lobo Antunes, Portugal’s secretary of state for European Affairs stated that “the Council believes that this amendment is the best solution at the moment to attempt to solve the specific issue of facilitating exports to poor developing countries that do not have the production capacity for generic drugs”.131 Individual EU member states responded informally by making promises of monetary and political support for developing countries. On 17 July and again on 12 September 2007 the EP’s Committee on International Trade (INTA) delayed its vote on the TRIPS Amendment citing an “inadequate response” from EU Member States and the EU Portugese Presidency to its requests in the resolution voted in plenary session on 12 July 2007. In doing so, the EP sent a clear signal that it would not endorse the Amendment if EU Member States failed to provide adequate assurances that they would take steps to promote access to medicines for all.

A face-off between the European Parliament on one hand and the European Commission and the European Council and Member States on the other ensued until mid-October. On 17 October 2007 Parliament, Council and Commission representatives met informally to try to respond to the MEPs' requests. On Monday 22 October 2007 the European Presidency offered a solution with a last-minute statement read in the plenary session by Manuel Lobo Antunes. The statement was designed to make the Amendment politically palatable to MEPs and members of the Access Campaign without significantly altering the status quo. The Council reaffirmed the flexibilities contained in the TRIPS Agreement and further endorsed by the Doha Declaration but the reading of the statement

131 Quoted in ICSTD 2007b.
falls short of the joint declaration between the EP and the Council demanded by MEPs. In the statement, the Council recognized that the Amendment “represents just a part of the solution to the problem of access to medicines and public health….We look favourably upon initiatives encouraging the transfer of technology, research, capacity strengthening, regional supply systems and help with registration, in order to facilitate and increase the production of pharmaceutical products by the developing countries themselves.” The Council promised that Commission officials would not seek to negotiate TRIPS-plus provisions with ACP countries or poor developing and least-developed countries in the future. EU member states are free to choose to authorize exceptions under TRIPS Article 30 without interference from the European Commission. Finally, “poor developing countries” are free to make use of the existing TRIPS flexibilities to produce or export generic products for public health purposes without fear of interference or opposition from the European Commission. On 24 October 2007, the European Parliament voted overwhelmingly in favour of accepting the amendment.132

The statement goes some distance in meeting the demands outlined in the EP’s July Resolution and MEP reactions133 have been, on balance, quite positive. Widely viewed as a step in the right direction, this statement has been celebrated as a major political victory for the European Parliament. However, there are signs that this

132 European Parliament 2007d.

133 Gianluca Susta MEP, said: We won this battle proving that it is crucial for the European Parliament to be united. However, the real struggle for access to medicines against HIV/AIDS is still not over. Bureaucracy and reluctance from most developed countries are often a major impediment. I am sure there will be other occasions when we have to return to this and reaffirm our stance”. Susta’s statement is available at http://www.gianlucasusta.it/index.php?id=20,120,0,0,1,0 For other reactions by MEPs in EP Plenary on 24 October, 2007 see: http://www.europarl.europa.eu/eplive/public/default_en.htm?language=EN
statement is a case of political posturing designed to push the amendment through without undermining the status quo. Indeed, a closer examination of the issues reveals that the reading of this statement constitutes little more than an attempt to co-opt MEPs and their NGO interlocutors and does not respond to their substantive concerns in a meaningful way. Notably, once the amendment takes legal effect, the EP has no legal recourse to ensure the Council or the Commission uphold their end of the bargain. However, the EC Regulation implementing the Amendment will be reviewed three years after entry into force.

There are five key issues of concern surrounding the reading of the statement. First, the language of “poor” developing countries in the statement is troubling since it could open the door to challenges against countries classified by the World Bank as “low-middle-income economies” or “upper-middle-income economies” such as Thailand and South Africa respectively. Such a challenge would interfere with these countries’ access to affordable medicines, an outcome that is inconsistent with the demands of the MEPs and the Access Campaign.

Second, although the European Commission has repeatedly denied any intent to negotiate TRIPS-plus provisions in free trade agreements, it stands idly by while the United States aggressivelaly and unilaterally inserts more stringent IPR protection rules in FTAs than are required by the TRIPS Agreement. Critics charge that this serves to dismantle the multilateral trade regime and undermine the Doha Declaration. Therefore, the European Commission has a responsibility to wield its political power at the TRIPS Council to stop the practice. Others argue the European Commission’s tacit acceptance of the practice allows the European Union to piggy-back or free ride on US-obtained
agreements by virtue of the MFN rule enshrined in the TRIPS Agreement. In any case, the reading of the statement does little to respond to these concerns.

There is also evidence that the European Commission intends to backtrack on the commitment not to interfere with countries’ use of TRIPS flexibilities to obtain generic pharmaceutical products. Thailand’s TRIPS-compliant attempt to procure generic copies of two HIV/AIDS drugs and one heart disease treatment by issuing compulsory licenses was a major focal point for debate during the summer in 2007. The European Commission publicly questioned the use of compulsory licenses for this purpose and Trade Commissioner Mandelson sent a letter to the Thai government indicating that “other means should be explored to increase access to essential medicines among the Thai people before resorting to such exceptional measures.” 134 According to NGOs, this statement and others made since constitute a veiled threat against the Thai government. It appears that the European Commission intends to maintain this hard-line approach to Thailand’s use of compulsory licenses, emphasizing it should only take such measures as a last resort, despite the commitments in the Council’s statement in October 2007 and the EP Resolution of 12 July 2007 which asks the Commission to encourage “developing countries to use all means available to them under the TRIPS Agreement, such as compulsory licenses and the mechanism provided by Article 30 thereof.” 135

Fourth, explicit acknowledgment of the right of EU Member States to make use of exceptions in their national patent laws to export generic drugs under Article 30 has been welcomed in all circles. However, this option is not without risks. In particular, industry


pressure at the Member State level might inhibit some governments from proceeding under Article 30, despite the statements made in EP plenary. Moreover, EU Member State practice is likely to vary considerably throughout the EU.\footnote{Abbott and Reichman 2007, 54.}

Finally, there is the matter of the Substantive Patent Law Treaty (SPLT) which will have the effect of harmonizing patents in developing countries. If a “deep harmonization of world patent law” takes place it will serve to erode TRIPS flexibilities including all pro-competitive options such as issuing compulsory licenses.\footnote{Abbott and Reichan 2007, 31.} As a consequence of these six outstanding issues, the reactions of NGOs to the ratification of the amendment in the EU have been tempered.

V. Conclusion

This chapter traced the evolution of the EC’s position on TRIPS and Access to Medicines across three stages and studied the role of NGOs therein. First, in the run-up to the Doha Declaration in 2001, EU policymakers responded positively to demands by NGOs for improved transparency and public accountability, opportunities for access and participation in the external trade policymaking process. These measures can be understood as part of a wider effort to legitimize the prevailing legal/liberal episteme and make it more sustainable by deflecting criticisms over the quality of decision-making. There is no doubt that NGOs, by virtue of their formal inclusion in policy discussions, worked to improve the procedural legitimacy of external trade policymaking in Europe.

Since NGOs working in the Access Campaign were willing to work within the WTO framework to find a solution to the access to medicines problem and because they had such specialized, on-the-ground knowledge of the issue, they were invited to serve as key
interlocutors in the policymaking process in the period preceding the Doha Declaration. By giving them a formal voice in policymaking, EU policymakers facilitated the role played by NGOs in disseminating information and generating public awareness about the links between stringent IPR enforcement and access to medicines. Through their role in both the Civil Society Dialogue and in informal meetings, NGOs were instrumental in educating policymakers about the ways in which the TRIPS rules were exacerbating the AIDS crisis in Africa. Through their media campaign and more formal public deliberations with EU policymakers, NGOs also generated and publicized debate over the issue. Through these channels, NGOs gave a voice to the world’s poorest people who are unable to access affordable medicines as a result of stringent IPR rules and lobbied for more equitable allocation of burdens in the international trade regime. Finally, by holding policymakers to account for their positions in international trade negotiations on TRIPS and Access to Medicines both within CSD meetings and in the media, decision-making during this period became more transparent and EU policymakers took greater public responsibility for their actions.

In terms of policy outcomes, the Doha Declaration was staunchly supported by EU policymakers and reflected, in many respects, the demand of NGOs working on the TRIPS: Access to Medicines issue. If the analysis were to stop here, we could preliminarily conclude that the Cosmopolitan account goes some distance in accounting for the role of NGOs in the EU’s external trade policymaking process. Indeed, most analyses of the Access Campaign and many NGOs working on the issue did not fully comprehend the significance of the Paragraph 6 problem. Rather than mark a fundamental reorientation of the international IPR regime, the Doha Declaration was a political compromise designed to
highlight already existing flexibilities in the system and to further ongoing WTO negotiations in other areas. As a consequence, activists and scholars alike prematurely celebrated the triumph of public health norms over stringent IPR protection and also the success of NGOs in influencing policy outcomes.

During the second stage of policy development, it became clear that the EC’s position on TRIPS and Access to Medicines had not undergone a major substantive or normative change as a result of NGO involvement in the external trade policymaking process. Between November 2002 and December 2005, the task of solving the Paragraph 6 problem in the TRIPS: Access to Medicines issue became a highlight technical, rather than political issue. EU experts and technocrats retreated from broadly participatory processes. Robust policy debates in formal consultative arrangements were replaced with top-down information sessions. Although NGOs continued to educate the public about the implications of the August 30 Decision, disseminate information and lobby on behalf of people in developing countries, most activities occurred outside the context of formal consultative channels at the EU level. Where they had served as key interlocutors in the pre-Doha era, NGOs were now relegated to “informed observer” status in policy debates.

The Cosmopolitan explanation cannot account for why the role of NGOs working on TRIPS: Access to Medicines diminished over time despite burgeoning new, Commission-wide opportunities for participation and access. Instead, the Epistemic explanation provides the most plausible explanation for this pattern of empowerment. As the issue area became more technical, functional authority and decisive power pooled in the hands of technocrats and experts. They were required to develop new rules in a highly complex issue area that required the use of their specialized cause-effect knowledge to find a
market-based solution to the Paragraph 6 problem. EU technocrats and experts were the primary architects of the August 30 Decision. Their policy prescriptions served as the basis for new rules in the international trade regime, in the form of the TRIPS Amendment Concerning Article 31bis, and ultimately served to maintain and reproduce the ideas upon which the legal/liberal episteme is based.

The debate over appropriate solutions to the Paragraph 6 problem revealed deep ideational cleavages between EU technocrats and NGOs working on the TRIPS: Access to Medicines issue. EU technocrats are convinced that market based forces that uphold stringent IPR protection are sufficient to overcome the Paragraph 6 problem, provide equitably priced medicines to countries lacking sufficient manufacturing capacity and ensure research and development for infectious diseases in developing countries. They deliberately crafted a solution that is so fraught with bureaucratic red tape that it will scarcely be used in practice. Instead, EU technocrats expect that the mere threat of its use will compel patent holders to sell drugs at lower costs and shift their marketing strategies from a “low volume, high margin approach” to a “high volume, low margin approach”.

However, NGOs and Members of the European Parliament believe that relaxing IPR rules is key to ensuring equitable access to affordable medicines. This proposal is clearly in conflict with the norms, consensual scientific knowledge, and ideological beliefs that comprise the legal/liberal episteme. During the ratification stage of policy development, EU officials attempted to co-opt and absorb forces within civil society and within the European Parliament who resist or reject the prevailing episteme by making broad, political pronouncements. Although it protects the core features of TRIPS Amendment, the statement made in the EP Plenary by Manuel Lobo Antunes on 22 October 2007
certainly responded to some of the concerns of MEPs and NGOs. However, there are signs such as the widespread use of TRIPS-plus provisions in US negotiated bilateral trade deals and the EU’s response to Thailand’s legitimate use of compulsory licensing to suggest the promises and assurances made by the statement are baseless in practice.

The practical implications of the October 22 2007 EP Plenary remain to be seen over the coming months. It is also not yet clear whether the TRIPS Amendment will have devastating effects for developing countries as NGOs fear. Since the mechanism has only been used once, it is unknown whether it will work to drive patent holder prices down or promote competition between generic producers. What is clear is EU technocrats and experts, not NGOs or industry, were empowered in the EU’s external trade policymaking process following the Doha Declaration in 2001. NGOs did not, by virtue of their formal participation in the process, compel EU policymakers to pursue a policy line on Paragraph 6 or the August 30 Decision that they would not have pursued in their absence. In other words, EU policymakers did not respond to NGO demands by pursuing policies that ensure greater access to medicines, reduce disparities in access to medicines between the north and south, and which prioritize public health concerns over IPR protection. Since this was an “Easy Test” for the Cosmopolitan explanation, we should be skeptical about the extent to which NGOs have the capacity to improve the substantive legitimacy of external trade policymaking.

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Chapter Six:
Assessing the Role of NGOs in the EC’s GATS Environmental Services Negotiations

I. Introduction

This chapter traces the role of NGOs in the formulation of the EC’s requests for third country market access for Environmental-Water Services in the context of GATS 2000 negotiations. The EC requests for water services liberalization in developing and least developed countries sparked outrage and wide-spread condemnation amongst global civil society. At the center of this movement is the fundamental belief that liberalizing water services for human use to foreign competition constitutes an attack on democracy and basic human rights. Unlike NGOs working on the TRIPS: Access to Medicines issue, NGOs involved in the GATS: Water Campaign in Europe reject wholesale the entrenchment of services in the multilateral trade regime. Indeed, in their view, the only viable solution is a full-scale moratorium on GATS negotiations. Given this position, it became clear to all actors early on that neither compromise nor co-optation was possible between NGOs and EU policymakers in this case. Therefore, NGOs operated almost entirely outside the context of newly created mechanisms for access and participation in the EU’s external trade policymaking process to pressure EU policymakers to remove the requests for water services liberalization. In the absence of any formal engagement between NGOs and EU policymakers, Cosmopolitans would expect that NGOs working on the GATS and access to water issue were much less successful in bringing about improvements in both procedural and substantive legitimacy than NGOs working on TRIPS and access to medicines.
The following analysis traces the evolution of the EC’s position on water services liberalization across four stages since the launch of the GATS 2000 negotiations. First, I examine the EC’s attempt to diversify environmental services covered by the GATS to include water for human use including water collection, purification and distribution. This move sparked a massive backlash by NGOs against the EC’s negotiating position in GATS 2000 negotiations. Following the move to re-classify environmental services, the EC’s requests for third country market access underwent three revisions. In 2002, the public learned of the EC’s intent to request water services liberalization from a number of developing and least developed countries, many of whom had recently experienced water privatization disasters. In 2005, the EC revised its requests with the intent to clarify the scope and content of requests, particularly those concerning water services liberalization. Later in 2005, the EC became a party to the plurilateral GATS negotiations launched at the Hong Kong Ministerial meeting. At each stage of policy development, EU technocrats and experts grappled with highly technical and complex issues. I trace the role of NGOs in this process as well as their activities that occurred outside formal channels of consultation to persuade EU technocrats to remove all requests for water services liberalization from its GATS negotiations.

I argue that despite minimal formal consultations between EU external trade policymakers and NGOs, the activities of NGOs brought about clear improvements in procedural legitimacy. Despite their circumvention of new opportunities for access and participation, NGOs working on this issue were instrumental in generating and widening public debate, educating the public, and bringing about more transparent and accountable policymaking. However, they were unable to convince EU policymakers to withdraw
their requests for third country market access. Due to the highly technical nature of trade in services, together with the complex bilateral, request-offer approach to negotiations, EU technocrats and experts were empowered in the external trade policymaking process, relative to all other actors. As actors in a position of power, European technocrats and trade experts were able to insulate the issue in policy debates from public scrutiny and to marginalize and de-legitimize NGOs campaigning against the inclusion of water in the EC’s GATS requests by emphasizing fundamental flaws, hyperbole or misunderstandings in their grievances. By doing so, EU experts and technocrats exercised their functional authority to design a policy line on trade in water for human use that “fit” inside the legal/liberal episteme.

II. NGOs Bring the Stop the GATS Attack to the European Union

The GATS Agreement applies in principle to all services sectors other than those provided in the exercise of governmental authority or in the exercise of traffic rights. That is, no services sector except those explicitly listed above is excluded a priori from GATS negotiations. However, the GATS “services sectoral list”, around which WTO members structure their negotiations, does not explicitly include many elements of the water sector including water delivery or distribution for domestic use. Since 2000, the EC has been working to re-classify what is meant by “environmental services”.

Currently, water-related sub-sectors listed under environmental services include: sewage services, refuse disposal services, sanitation and similar services. The EC proposes to diversify environmental classification\(^1\) and to add water for human use including water delivery or distribution for domestic use.

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\(^1\) The new environmental services sectoral classification list would include: 6A Water for Human Use and Waste Management; 6B Solid/Hazardous Waste Management; 6C Protection of Ambient Air and Climate; 6D Remediation and Clean up of Soil and Water; 6E Noise and Vibration Abatement; 6F Protection of Biodiversity and Landscape; 6G Other Environmental and Ancillary Services. See WTO 2000b.
collection, purification and distribution to this classification. Although there has not yet been an official agreement, the EC is not precluded from negotiating market access for water services for human use in its bilateral negotiations. In 2002, the EC included water and sanitation services in 72 of 109 third country market access requests, 14 of which are directed at opening markets in least developed countries.

In addition to securing better market access conditions for European services exporters in foreign markets, the move to include water for human use in the GATS requests has been packaged by EU Commission officials as part of the effort to promote sustainable development. Moreover, Commission officials make the case that developing countries should make liberalization commitments for water for human use because this sub-sector has been mismanaged by the public sector and by private or public-private, national monopolies. The facts cannot be denied - developing country governments have failed to universalize water services. According to UNICEF, 40% or 2.6 billion of the world’s population lacks access to basic sanitation and an estimated 1.1 billion lack access to safe drinking water.² Involvement of private, foreign multinationals in the distribution of water for human use is widely viewed by EU officials as a solution to meeting the UN Millennium Development Goals and the targets agreed to at the World Summit on Sustainable Development in Johannesburg.³ In particular, their involvement

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³ Senior Trade Official, DG Trade, G1 - Trade in Services and Investment; GATS and Investment. Interview by author. 14 June 2005. For the most recent progress report on the MDGs, see United Nations 2007. For a full list of MDGs see [http://www.huwu.org/millenniumgoals/](http://www.huwu.org/millenniumgoals/)
will help reduce by half the proportion of people without sustainable access to safe drinking water and basic sanitation by 2015.\textsuperscript{4}

The European Union does not explicitly promote privatization. Indeed, according to the European Commission:

1) In conformity with Article 295 of the EC Treaty, the Commission takes a neutral stance on the ownership of any enterprise;
2) Before a decision is taken to reform a state-owned enterprise or public utility, all the reform options must be reviewed and their social, economic and financial consequences assessed;
3) The best option should only be chosen on the basis of an assessment and be transparently implemented with adequate regulatory frameworks and monitoring mechanisms in place.\textsuperscript{5}

Moreover, EU technocrats take the position that where governments have undertaken to involve the private sector (usually in public-private partnerships or PPPs) in the water services sub-sector, foreign, namely European companies should be allowed to bid for contracts. This point is significant since “by the end of 2000, at least 93 countries had partially privatized water or wastewater services and more than 65% were developing countries”.\textsuperscript{6} Allowing foreign companies to bid for concession contracts will assure higher levels of efficiency and investment.\textsuperscript{7} Moreover, European companies such as

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\textsuperscript{4} This position was recently advanced by the Commission in a question answer period in the European Parliament. See http://www.europarl.europa.eu/sides/getDoc.do?type=QT&reference=H-2004-0327&language=BG

\textsuperscript{5} European Commission 2003a. 1

\textsuperscript{6} Mehta and Madsen 2005, 156.

\textsuperscript{7} According Mehta and Madsen (2005) concession contracts are the most common types of privatization arrangements for water which is a natural monopoly. A private company enters into an agreement with the government to have the exclusive right to operate, maintain and carry out investment in the water supply system for a fixed period of time. These arrangements are coined Public-Private Partnerships (PPPs). Often concession contracts are subject to specific service obligations such as Universal Service Obligations.
Veolia, Suez Lyonnaise des Eaux, and Thames, are the world’s largest and most experienced water service providers in the world. According to EU officials, they will operate more efficiently, invest in basic infrastructure, provide better quality water services, and drive down prices paid by consumers thereby working to ensure more equitable access to water supplies and sanitation services.

For NGOs involved in the GATS: Water Campaign, the water case serves as a litmus test for all the concerns and criticisms of the GATS discussed in Chapter 4. They contend that liberalizing water services under the GATS will restrict the regulatory space required by governments to ensure universal, equal and affordable access to water.

Water is conceived as a basic necessity and a human right. As such, water must be explicitly excluded from trade deals and access to water should not be contingent upon one’s ability to pay for the service.

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8 Formerly named Vivendi.

9 Owned by German conglomerate RWE.

10 European service providers dominate the global water market. Vivendi and Suez control 70% of all private water services between them (200 million customers). Thames is the world’s third largest water service provider with 70 million customers. Smaller European water services exporters include: SAUR (French), Anglian Water and United Utilities (both British), Cascal (a joint venture between British engineering firm Biwater and Dutch utilities group Nuon) and Aguas de Barcelona (Spanish, but itself 26% owned by Suez). US construction giant Bechtel remains the only non-European multinational with any significant interest in foreign water services. Hilary 2003, 8.

11 Desk Officer - Policy and negotiations; DG Trade, Unit F1- Coordination of WTO, OECD, Trade Related Assistance; GATT; and 133 Committee. Interview conducted by author. 1 June 2005

12 According to General Comment 15, the UN Committee on Economic, Social and Cultural Rights of the United Nations Economic and Social Council (2002), “The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.” For further discussion on whether water is a fundamental human right see Gleick 1999; WHO 2003; Scanlon, Cassar and Nemes 2004.

13 Hilary 2003.
As discussed at length in Chapter 4, services are situated squarely inside the legal/liberal episteme. GATS rules favour legal security and predictability. They are designed to “lock in” policy choices once they are established. According to members of the GATS: Water Campaign, GATS rules conflict with the need for flexibility to implement adaptive management plans and meet changing public needs. It is argued that concerns regarding profit motives and short-term business cycles are incompatible with the need to ensure equitable access to public goods. Although liberalizing water services and privatization are not synonymous, NGOs contend that making commitments under GATS will, in effect, make it impossible to correct failed privatization experiments. They cite numerous failures in the developing world as evidence of the ills associated with private sector involvement in water supply and sanitation services.\textsuperscript{14} Cochabamba, Bolivia is perhaps the most infamous and widely cited case where the introduction of a 40 year concession contract to Bechtel at the behest of the World Bank was followed by an almost immediate increase in water tariffs up to 200%. Mass demonstrations ensued, the concession was terminated and water supply services were returned to public hands. According to NGOs, the disaster would have been irreversible had the government made commitments to liberalize the water services sub-sector under the GATS.

Following a sustained campaign by trade unions and NGOs and unprecedented public consultations on how the EC should respond in its initial offer to the requests it had received from third countries, the European Union undertook to safeguard education,

\textsuperscript{14} The cases of failed privatization projects are numerous. For an overview see Public Citizen 2003. For an assessment of water privatization in the three African countries of Guinea, Senegal and Cote d’Ivoire see Bayliss 2001. On water privatization in South Africa see McKinley 2005. For a discussion on why privatization failed in Atlanta, Georgia see http://www.cbc.ca/news/features/water/atlanta.html
health, and audiovisual services in both its initial and revised services offers. Although
the EU has offered to open other sub-sectors under environmental services to foreign
providers such as services related to waste water, solid waste, remediation of oil and
water, noise and vibration abatement, protection of biodiversity and landscape, the EU
has safeguarded water for human use. NGOs involved in the GATS: Water Campaign
consider this to be a deeply hypocritical position since the EU is asking developing
countries to liberalize a range of basic services including water for human use and
sanitation services.

Finally, critics charge that the EU is promoting privatization of water services
through parallel aid initiatives such as the EU Water Initiative (EUWI), the ACP-EU
Water Facility, and Private Sector Enabling Environment Facility (PSEEF). The EU’s

15 For the full text of the initial offer see European Commission 2003b. For a summary of the initial offer
see European Commission 2003c. The full text and summary of the revised offer is available in European
Commission 2005a, 2005h respectively.

16 European Commission 2005a.

17 However, this statement should be qualified since, according to the European Commission (2005i), “no
requests are being made on health services or audiovisual services to any country, and only the US will
receive a request on higher education services but strictly limited to privately-funded education services.”

18 For summaries of the EC’s Initial Requests and Revised Request for third country market access, see
European Commission 2002b, 2005i respectively.

19 [http://www.euwi.net/](http://www.euwi.net/)


21 The facility is promoted under the ACP Business Climate Facility (BizClim) and is “about improving
legislation, institutional set up and financial measures (the rules of the game) relating to the enabling
environment of the private sector in ACP countries or regions and to the reform of SOEs - and to do so by
focusing on possible support to ACP governments or regional institutions.” See
[http://acpbusinessclimate.org/about_us_page_1.html](http://acpbusinessclimate.org/about_us_page_1.html)
involvement in the World Bank’s Public-Private Infrastructure Advisory Facility (PPIAF) since 2004 has also become focal points for criticism.\textsuperscript{22}

In sum, these concerns are at the core of the GATS: Water Campaign in Europe. Since 2001, NGOs have been lobbying the EU and its member states to exclude water for human use from trade deals, withdraw its support for private sector involvement in the water services sector and, instead, pursue “not-for-profit public-public or public-collective partnerships”.\textsuperscript{23}

III. Launch of GATS 2000 Negotiations to Leak of the EC’s Draft Requests for Third Country Market Access

The key objective of EU technocrats in the context of GATS 2000 negotiations is to pursue the gradual liberalization of global trade in services in order to achieve real and meaningful market access opportunities for European service providers for their exports.\textsuperscript{24} As discussed at length above, “properly regulated” services liberalization is considered a win-win scenario for development and growth for developed and developing countries alike. By contrast, NGOs working on the GATS: Water Campaign reject this premise wholesale. They are unwilling or unable to develop substantive recommendations or solutions that could work within the parameters of the EC’s GATS 2000 mandate. A fundamental disagreement over basic economic principles defines the

\begin{itemize}
\item \textsuperscript{22} See, for example, CEO 2007; WDM 2006. Also see the Open Letter (2006) from Civil Society Organizations to Development and Humanitarian Aid Commissioner Louis Michel asking the Commission to withdraw support for the PPIAF. For the Commissioner’s response, see Louis Michel 2006.
\item \textsuperscript{23} For further details, see Belanya et al. 2005.
\item \textsuperscript{24} According to the European Commission (2005i), “These requests DO seek to reduce restrictions and expand market access opportunities for European services companies and thus through increased competition bring lower prices and more choice to consumers and business in third country markets with a resulting increase in efficiency across the whole economy.”
\end{itemize}
adversarial and largely unconstructive consultative relationship between EU technocrats and NGOs between 2000 and 2005 and accounts for why these NGOs sit on the margins of the external trade policymaking process in Europe.

Moreover, as discussed above, services negotiations are complex and highly technical. It is the position of EU officials that substantive details concerning the EC’s offensive interests must be kept from public scrutiny; to do otherwise would substantially weaken the EC’s negotiating position in bilateral trade negotiations. Therefore, during the GATS 2000 negotiations, the EC’s requests for third country market access were devised behind closed doors. Despite burgeoning consultative and participatory mechanisms for a wide range of civil society, there was minimal public dialogue on the substance of third country market access requests in general or on water in particular.

Between 2000 and 2002, EU-level public debates on services liberalization took place in a series of Civil Society Dialogue meetings of the Services “Thematic Group” organized by DG Trade. During 2000, the group met four times and the meetings were well attended by wide range of CSOs.

It became very clear by the second meeting that the potential impact of GATS on environmental services and sustainable development was the major concerns, especially amongst NGOs. DG Trade officials focused almost exclusively on this topic during the third meeting in an attempt to elucidate the EU’s position on the importance of ensuring developing countries’ effective participation in international services negotiations. They also presented the EC’s proposal for the

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25 Desk Officer - Policy and negotiations; DG Trade, Unit F1- Coordination of WTO, OECD, Trade Related Assistance; GATT; and 133 Committee. Interview conducted by author. 1 June 2005.

reclassification of environmental services and received feedback from CSOs.\textsuperscript{27} Criticism at this point was largely limited to concerns that liberalization of trade in environmental services would undermine Multilateral Environmental Agreements.

In the run up to the Doha Ministerial Meeting, regular services thematic meetings were suspended in favour of a series of more general Civil Society briefings on the proposed agenda and sustainable development. Regular services meetings resumed in 2002.

In early 2002, the Canadian *Polaris Institute* covertly obtained the EC’s draft requests for third country market access and made them available to small number of Anti-GATS NGOs, including the World Development Movement (WDM) and the Corporate Europe Observatory (CEO), for a global internet exposé. With the intent to derail services negotiations and undermine “secret trade diplomacy”, the Polaris Institute and CEO published the 29 draft requests on their websites on 16 April 2002.\textsuperscript{28} The full text of the 109 final requests was subsequently leaked on 24 February 2003.\textsuperscript{29} It was hoped that, like the release of the draft text of the Multilateral Agreement on Investment (MAI), publication of the draft requests would trigger the breakdown of GATS 2000 negotiations.\textsuperscript{30}

\begin{itemize}
\item \textsuperscript{27} Prior to this date, the proposed re-classification was not subject to any significant public or parliamentary scrutiny before it became adopted as EU policy. WDM 2003, 22.
\item \textsuperscript{28} \url{http://www.gatswatch.org/leakannounce.html}
\item \textsuperscript{29} The full text of the 109 requests for third country market access is available at \url{http://www.gatswatch.org/requests-offers.html#outgoing}
\item \textsuperscript{30} Notably, the Polaris Institute was responsible for obtaining and distributing the draft text of the MAI.
\end{itemize}
While the potential impact of GATS on water distribution services was on the radar of some NGOs between 2000 and 2002, it did not become a focal point for the Stop the GATSAttack Campaign in Europe until after the EC’s requests were leaked. During the earlier period, the campaign was focused more generally on educating the public about the ills associated with services liberalization under the GATS described above. From the outset, the campaign adopted a multi-pronged strategy involving grassroots mobilization, public demonstrations and rallies, petitions, and reports on the potential, negative impact of services liberalization on public services, environment and democracy. The belief that the GATS “is the wrong treaty, in the wrong place, at the wrong time” underscored protests against services liberalization and came to define the campaign against the EC’s requests for market access for water.

The international media erupted in a furor over the EC’s requests for third country market access. It was widely reported that the EU was demanding that essential services be traded for concessions in other areas being negotiated during the Doha Round. For instance, after receiving copies of the 29 draft requests, the UK’s Guardian reported that “The European Union is demanding full-scale privatization of public monopolies across the world as its price for dismantling the Common Agricultural Policy


32 For a sense of Stop the GATSAttack activities see http://www.wdm.org.uk/campaigns/past/gats/index.htm

33 See for example WDM 2001, 2002; Woodroffe and Joy 2002.

34 FOE 2001.

35 For a sense of the media coverage following the leak of 29 draft requests and the leak of 109 final requests respectively see http://www.gatswatch.org/ECleaknews.html and http://www.gatswatch.org/offreq-news.html
in the new round of global trade talks." Similarly, the requests only served to confirm the gravest fears of NGOs involved in the Stop the GATSAttack Campaign over the EC’s “hidden agenda” to dismantle the public sector in developing countries. In the immediate aftermath of the leak, NGOs coined the requests a “privatizers’ hitlist” and condemned the EU for “preparing to trample all over sustainable development objectives in the naked pursuit of the interests of European multinational service corporations”. Following the leak of the full text of the requests, WDM reported “now we can see that the EU is aiming for a global takeover of essential services and the financial infrastructure of developing countries for the benefit of EU corporations”. Most egregious, according to NGOs, was the EC’s requests for water services liberalization commitments from 72 WTO members including Bolivia and South Africa. The requests were taken as evidence of the EU’s agenda to dismantle public water delivery in developing and least developed countries regardless of the devastating record of private sector involvement in many of the targeted countries.

EU officials tried to downplay the significance of the leak. They worked through the media to cast the NGO reaction as hyperbole and to counter fundamental ‘misunderstandings’ being circulated by NGOs about the nature and content of the GATS negotiations. In an official reaction, the European Commission issued a public statement

36 Vidal, Denny and Elliot 2002.
38 Ainger 2002.
39 http://www.gatswatch.org/ECleaknews.html
that characterized the leak as “unfortunate” and “irresponsible”; the drafts, it said, are a work in progress and do not reflect the official EU position since consultations with EU Member States were not yet complete.\textsuperscript{41} Although the response to the requests had generated “wild accusations”, the European Commission hoped that critics would see that the draft requests were consistent with publicly stated trade liberalization objectives and do not ask any countries to privatize or deregulate their public and essential services. Any claim that the GATS negotiations undermine the provision of public services were characterized as “completely wrong”.\textsuperscript{42}

Moreover, the Commission acknowledged that liberalization is not a panacea for development or economic growth; the document highlighted the importance of strong institutional and regulatory frameworks to accompany liberalization including scope to ensure universal services obligation in the provision of essential services. Indeed, failure to “implement appropriate institutional and regulatory framework[s] to ensure competition or protection for the poor” accounts for the failed privatization attempts routinely cited by NGOs in their critique of GATS.\textsuperscript{43} Finally, the Commission outlined its efforts to provide technical assistance and capacity building to ensure developing countries fully participate in negotiations.

NGOs responded swiftly and definitively by denouncing this statement as blur.\textsuperscript{44} According to NGO analyses, the content of the leaked requests is inconsistent with the

\footnotesize{\textsuperscript{41} Full text of the European Commission’s official reaction is available at http://www.gatswatch.org/ECleaknews.html}

\footnotesize{\textsuperscript{42} Ibid.}

\footnotesize{\textsuperscript{43} Ibid.}

\footnotesize{\textsuperscript{44} NGOs including the CEO, WDM, and FOE International issued a reply to the European Commission’s response to the leaked draft requests. See FOE et al 2002.}
EU’s espoused commitment to sustainable development and contradict the GATS’ defense offered in the European Commission’s public response to the leaks.\(^{45}\) In particular, NGOs maintain that although GATS does not force privatization, liberalization commitments under the GATS are “inconsistent with retaining public monopolies”.\(^{46}\) Since the EC is making requests in countries where essential services are provided in some capacity by the state, the EC’s requests are viewed as a backdoor to privatization of services such as water delivery and energy services.\(^ {47}\) Moreover, NGOs take issue with the fact that the EC’s requests target countries where successful, alternative non-market based service delivery systems are in place.\(^ {48}\) If developing countries such as Brazil and Bolivia agree to EC requests, the further expansion of locally based service water delivery alternatives will be threatened.\(^ {49}\)

The EC’s requests target some of the world’s poorest countries. According to NGOs, the European Commission’s response is inconsistent with the political reality of the bilateral negotiating environment. GATS cannot accurately be described as a flexible agreement in light of the political pressure placed on developing countries to progressively liberalize. Moreover, NGOs argue the EC’s requests to remove National Treatment (NT) and Market Access (MA) limitations listed in countries’ schedules during the Uruguay Round is evidence that GATS negotiations will have the effect of

\(^{45}\) The World Development Movement (2003) produced one of the most comprehensive analyses of the EC’s GATS requests of developing countries following the leak of requests.

\(^{46}\) Friends of the Earth 2002.

\(^{47}\) NGOs especially take issue with requests directed at countries such as Honduras, Tunisia and Botswana with recognized ‘good’ public sector water companies. WDM 2003, 28-29.

\(^{48}\) World Development Movement (2005) has produced a survey of public water sector successes and private water sector failures.

\(^{49}\) World Development Movement 2003, 22-27.
limiting countries’ right to regulate in the public interest. Developing countries are especially at risk since they lack the “level of foresight and technical capacity” to anticipate the long term consequences. Scheduling GATS commitments will inevitably threaten democratic policymaking since the commitments are effectively irreversible. Moreover, despite the purported value of appropriate regulatory and institutional frameworks, the EC’s requests target sectors such as water, transport and energy in countries where these frameworks are absent. Finally, NGOs argue technical assistance and capacity building efforts must be disassociated from the ideological view that “liberalization benefits the world’s poor and the environment” and must not be driven by the EU’s negotiating agenda.  

These points of debate would play out over and over again over the next three years. According to representatives on both sides of the debate, it became apparent by early 2002 that EU technocrats and NGOs involved in the Stop the GATS Attack Campaign would never see eye to eye on the issue of services liberalization.

IV. Release of the EC’s Initial Requests for Third Country Market Access to Revised Requests

Demands for greater transparency and public input into the EU’s external trade policymaking process accompanied NGO criticisms of the EC’s requests for market access. On 7 May 2002 more than 90 NGOs sent an open letter to Pascal Lamy and Members of Committee 133 calling for greater public disclosure of the details pertaining to requests and offers in the GATS 2000 negotiations. A deadline of 30 May 2002 was

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50 The World Development Movement (2003) produced a comprehensive analysis of the EC’s GATS requests of developing countries following the leak of the full requests.

51 Friends of the Earth et al. 2002.
set for European Commission officials to make public the full details of all incoming and outgoing requests. The letter also demands a more integral consultative role for the European Parliament and a full moratorium on GATS negotiations at least until a “full evaluation and impact assessment of the consequences of the current or proposed GATS obligations” is undertaken in cooperation with civil society. These demands for greater transparency were echoed in a European Parliament Resolution in March 2003.

In an effort to respond to these demands, DG Trade took steps to improve the transparency of the external trade policymaking process and to stimulate public dialogue over GATS 2000 negotiations. However, these measure fell dramatically short of NGO demands and were met with disappointment by all parties involved.

The preparation of GATS requests was placed on the agenda of an ad hoc services session in the CSD on 7 May 2002 in advance of their submission to the WTO on 1 July 2002. Although the topic of the session was publicized beforehand, Friends of the Earth Europe was the only NGO in attendance during this meeting. Again, the sparse attendance by members of the Stop the GATS Attack Campaign was notable during the CSD services meeting on 2 July 2002 where the key topic was again the EC’s requests for third country market access; only representatives from the Corporate Europe Observatory and Friends of the Earth attended this meeting. A summary of the final draft

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52 The Open Letter to Commissioner Lamy and EU Member States is available at http://www.gatswatch.org/070502letter-en.html


54 Incidentally, this was the same day NGOs issued their Open Letter to Pascal Lamy.
of the EC’s requests was posted on DG Trade’s website at the beginning of July but this move was considered much too little too late by NGOs.\textsuperscript{55}

Critical engagement between NGOs and the EU technocrats on the substance of the requests was also virtually absent during these sessions. This lapse was due in part to the poor showing of NGOs and also to high levels of mistrust resulting from the leak of the draft requests in April. Indeed, the 2002 CSD sessions are better characterized as question-answer or clarification periods than “dialogues”.\textsuperscript{56}

According to DG Trade officials, the substance of discussions with NGOs during the CSD services sessions between 2000 and 2002 was limited either to procedural issues or to allaying fears that the EU was pushing privatization onto developing countries vis à vis GATS commitments.\textsuperscript{57} In this respect, the quality of dialogue was again impeded by “fundamental misunderstandings” about the nature of the GATS Agreement.\textsuperscript{58} DG Trade officials also expressed particular frustration over the fact that the most vocal critics of the process and of services liberalization in general failed to attend meetings. Instead, DG Trade received very little direct contact from NGOs working on GATS except in the form of protest letters during this period.\textsuperscript{59}

\textsuperscript{55} European Commission 2002b; European Policy Officer. Coalition of the Flemish North South Movement. Interview by author. 6 June 2005.

\textsuperscript{56} Pascal Kerneis, Director of the European Services Forum. Interview by author. 24 September 2004; Campaigner and Researcher at Corporate European Observatory and GATSwatch. Interview by author. 23 May 2005.

\textsuperscript{57} Senior Trade Official, DG Trade, G1 - Trade in Services and Investment; GATS and Investment. Interview by author. 14 June 2005.

\textsuperscript{58} Ibid.

\textsuperscript{59} “There is also a question of whether groups want to learn. They seem to have fixed understandings and do not hear us when we talk…The claims that we are not available are disingenuous especially when we try to organize events and invite them to attend and then we hear the very next day, after the group has not attended, that we are not sufficiently transparent and we are unavailable for discussion.” Ibid.
Although each of the meetings in 2000 included some contribution by both civil society and EU technocrats on ways to ensure the transparency and quality of policy dialogue, the scheduling of Civil Society Dialogue meetings through 2002 was widely criticized by NGOs as being much too late in the game to offer any feasible opportunity for meaningful NGO input. Indeed, by the end of 2002, it seemed to NGOs that DG Trade officials were unwilling to voluntarily share information about negotiations in an open and timely manner, even without giving preference to certain interest groups.60 As a result of this perception, EU trade officials were called to account for the details of the draft requests in the media.

Following the leak of the EC’s requests, NGOs launched a more focused and sustained attack against the EC and its requests for market access particularly for water for human use. Key NGOs took the reins including Oxfam, the World Development Movement, Attac, Friends of the Earth International, Save the Children, and a Belgian umbrella organization of development NGOs, the Coalition of the Flemish North-South Movement 11.11.11. These actors consider it highly unlikely that EC officials would issue a moratorium on GATS or withdraw individual requests. Instead, the overarching purpose of the GATS: Water Campaign was to educate the broader public about the ills associated with services liberalization, privatization of water supply and distribution services, and to speak for disadvantaged and exploited people in the developing world. NGOs used water for human use as the focal point to highlight why privatization is bad

60 WEED. Transparency and Negotiating Guidelines: A Comment by the Working Group Trade of the German NGO Forum Environment and Development.
and to show that EU technocrats are beholden to corporate interests.\textsuperscript{61} Between July 2002 and January 2005 the GATS: Water Campaign launched a public education/outreach campaign that operated almost entirely outside the context of newly created avenues for access and participation at the EU level.

In order to raise awareness about the potential impact of GATS negotiations on access to water, NGOs staged numerous public demonstrations in opposition to the EC’s requests. For instance, on 9 February 2003, shortly before the leak of the full and finalized requests on the 25 February, NGOs and trade unions held a massive demonstration in Brussels where 15 000 people convened to protest the EC’s GATS requests. This action was followed up in cities across Europe on 13 March during a “European Day of Action Against GATS”. NGOs staged street theatre events where protestors dressed as black market criminals or “spivs” who were auctioning off public services to others dressed as fat cats.\textsuperscript{62} Similar events took place throughout 2003 and 2004 across Europe and directed at various levels of government – municipal, national, EU-level.

In addition to the countless protest letters sent directly to the officials in the European Commission calling for the removal of water from the EC’s requests, NGOs also used a range of high profile meetings to stage protests against the EU and the privatization of water services more generally. For example, at the 3\textsuperscript{rd} World Water Forum in Kyoto Japan, NGOs made a plea to the Ministerial Conference to “keep water

\textsuperscript{61} Campaigner and Researcher at Corporate European Observatory and GATSwatch. Interview by author. 23 May 2005.

\textsuperscript{62} For an account of the protests in London see \url{http://www.foe.co.uk/resource/press_releases/spivs_sell_off_public_serv0.html}
and water services out of the WTO and all other regional and international trade and investment negotiations and agreements”.

NGOs took the opportunity to present position papers and to speak widely about the risks associated with water privatization. NGOs also launched an “Evian Challenge” in advance of the G8 summit in Evian, France in 2003. Since a key goal of the summit was to devise a global plan to meet the UN’s Millennium Development Goals, NGOs called on key EU member states including Germany and France to withdraw the EC’s water requests and to back away from efforts to reclassify environmental services at the WTO.

Another key feature of the campaign was the dissemination of information through press releases, briefings and information booklets. A number of NGOs produced comprehensive analyses of the risks associated with making water liberalization commitments under GATS. Others highlighted the negative experiences of water privatization in developing countries. The World Development Movement sought to educate national parliamentarians and members of the European Parliament directly through a series of briefings.

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63 The open letter is available at [http://www.waterobservatory.org/library.cfm?refID=33790](http://www.waterobservatory.org/library.cfm?refID=33790)

64 See for instance the presentation by Maude Barlow, Chairperson of the Council of Canadians, outlining NGO concerns regarding water services privatization [http://www.youtube.com/watch?v=pCEgQRmfqUE](http://www.youtube.com/watch?v=pCEgQRmfqUE). Her reaction to the outcome of the World Water Forum is widely shared by NGOs and is available at [http://www.ifg.org/programs/water/mbkyoto03.htm](http://www.ifg.org/programs/water/mbkyoto03.htm)

65 The Open Letter to members of the G8 is available at [http://www.gatswatch.org/docs/evian.pdf](http://www.gatswatch.org/docs/evian.pdf)


68 See for example WDM 2004. All WDM briefings are available at [http://www.wdm.org.uk/resources/briefings/listbydate.htm](http://www.wdm.org.uk/resources/briefings/listbydate.htm)
Unfortunately, the EP never took a firm stance on GATS and water liberalization nor did it respond directly to NGO concerns as it did in the case of TRIPS and access to medicines. Nonetheless, it passed a resolution on 12 March 2003 welcoming the EU decision not to include health, education or audiovisual services in its own services offer. It called on the European Commission to press for an impact assessment of existing GATS commitments in line with GATS Article XIX and in parallel with the Doha Agenda, emphasized the need to approach services liberalization in developing countries with sensitivity given the absence of functioning regulatory frameworks in many countries, and it requested that certain sectors, such as water and sanitation, be granted “special status” since “they have direct and dramatic impact on peoples’ daily lives”. Moreover, in a motion for a resolution on the Porto Alegre World Social Forum, the members of the European Parliament emphasized their support for the maintenance of public services particularly in developing countries, where they constitute a major factor in development. Notably, this reference to GATS was omitted in the final text adopted by the European Parliament.

There was also a distinct grassroots dimension to the GATS: Water Campaign. NGOs campaigned in municipalities and lobbied local officials and national MPs in an effort to get them to exert pressure on their Committee 133 representatives to remove water from the EC’s requests. ATTAC, Coalition of the North-South Movement 11.11.11, and WDM were especially active at the national and municipal levels. Each

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<sup>69</sup> European Parliament 2003a.

<sup>70</sup> European Parliament 2003b.

<sup>71</sup> European Parliament 2003c.
organization orchestrated postcard and letter campaigns, demonstrations and sit-ins whereby national and municipal governments were literally flooded with demands. In a sign of solidarity with the campaign, municipalities across Europe declared themselves “GATS-Free Zones”\textsuperscript{72} and passed municipal motions in opposition to the GATS 2000 negotiations

\textbf{Table 4: GATS Free Zones}

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>GATS FREE ZONES AND OTHER MOTIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>600 local governments have demanded more transparency in the negotiations and a moratorium in the GATS. Some have declared \textit{GATS-free zones}, among these the city of Paris.</td>
</tr>
<tr>
<td>Belgium</td>
<td>171 Flemish communities have signed motions against the GATS and water supply services.</td>
</tr>
<tr>
<td>Switzerland</td>
<td>Geneva and Lausanne are GATS free zones. The governments of 15 cantons and 25 communities have presented different motions regarding GATS.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>26 local governments have signed motions in which they express their concern about the effects of the Agreement</td>
</tr>
<tr>
<td>Austria</td>
<td>280 declarations regarding GATS made by municipalities, including Vienna. These declarations reject greater liberalization of quotas for public services and insist on an immediate moratorium in the negotiations</td>
</tr>
<tr>
<td>Italy</td>
<td>The provinces of Genoa and Ferrara, as well as such communities as Turin have passed motions against the GATS.</td>
</tr>
<tr>
<td>Spain</td>
<td>Declaration against GATS by the Andalusian parliament. City councils in Andalusia, Extremadura and the Basque Country have declared themselves GATS Free Zones.</td>
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</tbody>
</table>

(Source: Verger and Bonal 2006)

Moreover, the Assembly of European Regions, which represents 250 member regions from 33 European countries and 14 interregional organizations, is strongly opposed to any liberalization in the cultural, education, health, social affairs, water supply and

\textsuperscript{72} For more information see \url{http://www.hors-ages.org/agcs/} (in French)
purification services sectors, especially in the context of GATS negotiations. These symbolic moves demonstrated substantial local resistance to the EC’s GATS negotiations and solidarity with the *Stop the GATSA ttack* Campaign more generally.

The bottom line of the campaign was also taken up by parliamentarians in several EU countries. For instance, during the first session of the Scottish Parliament in 2003, 70 Members signed motions calling for more parliamentary and public debate on services liberalization in the context of the GATS 2000 negotiations.\(^{73}\) German parliamentarians went several steps further in the summer of 2003, when the Bundestag asked the German government to demand that the EC withdraw its third country requests for water services liberalization.\(^{74}\) Belgian parliamentarians echoed this call in December 2002 and again in April 2005. Although viewed as a tremendous success in the national context, Belgian calls for the withdrawal of the requests in Committee 133 in December and January 2005 were unsupported by other EU member states and therefore had little chance of success.\(^{75}\)

Finally, working to expose corporate interests as the driving force behind the inclusion of water in the EC’s requests was a cornerstone of the GATS: Water Campaign in the 2003-2005 period. NGOs obtained access to a large volume of correspondence between EU trade officials and the European water industry. Mainly consisting of emails, this correspondence revealed that, in the process of drafting the EC’s initial requests, EU trade officials had routinely met with and aggressively sought input and

\(^{73}\) [http://www.wdmscotland.org.uk/media/news/newsletters/issue19_nov_03.pdf](http://www.wdmscotland.org.uk/media/news/newsletters/issue19_nov_03.pdf)

\(^{74}\) German Bundestag 2003.

\(^{75}\) Deckwirth 2005; European Policy Officer. Coalition of the Flemish North South Movement. Interview by author. 6 June 2005.
advice from EU based water multinationals including Veolia, Suez Lyonnaise des Eaux, and Thames. According to EU officials, the purpose of this dialogue was to help draft requests that best reflect their strategic interests. In particular, in May 2002, EU officials circulated a questionnaire asking companies to identify the key obstacles (regulatory, administrative etc) to new market access in third countries. DG Trade officials followed up several times to reiterate the importance of receiving input from water companies. Members of Committee 133 were often invited during this period to receptions and meetings with water company representatives at the European Services Forum. There is also evidence to suggest that representatives from Thames were invited to attend a seminar organized by the EU at the OECD on Environmental Services to answer developing country questions and reservations about binding market access in this sector.

All this information was acquired by the Corporate Europe Observatory through access to documents requests. In this respect, the EU’s newly created mechanisms to improve public access to documents were directly responsible for improving the transparency of external trade policymaking, even while gross disparities characterized access to policymaking. In May 2001 the European Union implemented Article 255(1) EC through Regulation 1049/2001. This regulation effectively grants “a right of access

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76 Formerly named Vivendi.
77 The text of this correspondence is reproduced in Gould 2003, Appendix A.
78 Gould 2003, Appendix A.
79 Pascal Kerneis, Director of the European Services Forum. Interview by author. 24 September 2004.
80 Qtd in Deckwirth 2006, 4.
81 See European Communities 2001.
to European Parliament, Council and Commission documents” to any Union citizen and to any natural or legal person residing, or having its registered office, in a Member State.\textsuperscript{82} The current level of access to documents is unprecedented.\textsuperscript{83} In the absence of this mechanism, NGOs would never have learned the extent to which EU officials consulted with European-based water companies in the period preceding the deadline for the initial requests. As such, it was the single most valuable innovation at the EU level to the GATS: Water Campaign in this period.

While European-based water companies may have been instrumental in drafting the initial requests (2000-2002), it is far from clear that they were driving the EU’s line on including water in GATS negotiations in the period following the leaked draft requests (July 2002-January 2005). Water companies got cold feet after the initial bad press from NGOs and no longer wanted to be publicly associated with any link between GATS and water service delivery in developing countries.\textsuperscript{84} While there is no question that liberalizing water services would serve their strategic interests, European-based water companies now state publicly that they prefer that individual countries not be requested

\begin{itemize}
  \item access is extended to documents originating with third parties (the Member States, the other institutions, the public)
  \item a document protected by an exception (other than the protection of public interest or of privacy) can still be released where serving the public interest is more important than protecting the document
  \item time limits for replies are reduced to 15 working days
  \item a document register will be made available to the public in the first half of 2002.
\end{itemize}

\textsuperscript{82} Article 255 was first introduced in the Amsterdam Treaty (1997). For further details on Regulation (EC) No 1049/2001, see the Citizen’s Guide available at \url{http://ec.europa.eu/transparency/citguide/index_en.htm}. For background, see \url{http://www.euractiv.com/en/pa/access-documents/article-117440}.

\textsuperscript{83} Regulation (EC) 1049/2001 replaced Decision 94/90 (see European Commission 1994) on public access to Commission documents. Although the new regulation is similar in coverage to Decision 94/90, it introduces a number of new and innovative ways to increase transparency and public access. In particular, according to European Communities 2001,

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\end{itemize}

\textsuperscript{84} Pascal Kerneis. Managing Director of the European Services Forum. Interview by author. 15 June 2005.
to take GATS commitments in this sector. Instead, their expressed preference is to quietly pursue public-private partnerships in developing countries; they prefer to risk legal uncertainty and unpredictability in favour of a low profile and this can only be achieved if water services liberalization is taken off the GATS negotiating table.

The World Water Forum in Kyoto in 2003 was the first international forum where European-based multinational corporations sought to dissociate themselves from the GATS and to highlight some of the problems associated with full scale water privatization. The centerpiece of the World Water Forum was a scheduled report from a panel committee led by Michel Camdessus, former managing director of the IMF, on the use of public funding and aid to facilitate investments in the private sector. However, in a direct challenge to the logic underpinning the report, the CEO of Thames Water claimed it did not support GATS negotiations on water services. Suez complained that it was next to impossible to establish a profitable market in the developing world and Vivendi challenged the World Bank’s projections that subsidizing the privatization of water would lead countries to achieve the Millennium Development Goals of halving the world’s population without water supply.85

Thames Water has been especially vocal about its opposition to the EC’s water requests and has explicitly asked the Commission not to “include water or waste water services in its demands for the forthcoming GATS round” as the company “both will respect and share the concerns raised by civil society organizations.”86

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85 For a discussion of the Suez withdrawal of investments from ‘unprofitable’ developing countries see Hall 2003.

organized by the Institute for Public Policy Research and sponsored by Thames Water in Brussels, “Richard Aylard, head of corporate development and external affairs of RWE/Thames, flatly came out against the EU water requests. All the European water companies present denied they had asked the EU Commission to insert water into the 72 requests.” Indeed, even some NGOs are now convinced that it was EU Commission officials running behind industry on this issue. In any case, despite these diffuse inputs from European based water companies, the EU would continue to aggressively pursue water services liberalization in GATS 2000 negotiations throughout 2005.

V. EC Revised Requests for Third Country Market Access to the Hong Kong Ministerial Conference

Progress in the Doha Round of Multilateral Trade negotiations began to languish after the 2003 WTO Ministerial in Cancun collapsed as the result of an overcrowded agenda and deep divisions over crucial issues such as agriculture. Members were unable to develop a framework agreement that would then guide them through the next phase of more detailed negotiations on specific modalities. In the following months, services negotiations showed no progress. Despite the original deadline of 31 March 2003 only 42 offers covering 57 WTO Members (the EC offered covered 15 EU members) had been submitted by April 2004. The “July Package”, a package of non-binding framework agreements was agreed to on 31 July 2004 and served to revitalize the Round. Annexes

87 Deckwirth 2006.

88 European Policy Officer, Coalition of the Flemish North South Movement. Interview by author. 6 June 2005.

89 Only 15 WTO members had submitted offers by this deadline.

90 WTO 2004.
A, B, and D lay out negotiating modalities for agriculture, NAMA and trade facilitation respectively. Annex C contains recommendations on services raising the profile and offering renewed impetus to the bilateral negotiations. In particular, it reiterates calls on members “who have not done so to submit offers as soon as possible.” Members should strive to ensure “a high quality of offers, particularly in sectors and modes of supply of export interest to developing countries, with special attention to be given to least-developed countries”. The new deadline for approved offers was set for 31 May 2005.

Where the EC’s offensive interests were concerned, EU technocrats pulled even farther away from the deliberative or broadly participatory context following the leak of the EC’s full requests as they worked to reinvigorate GATS negotiations and to revise its requests in advance of the new deadline for offers set by the July Package. On 24 January 2005, the EC submitted revised requests to WTO members and the European Commission released a “Comprehensive Summary” of the revised requests. According to this document, Commission officials took this opportunity to “clarify what kinds of improvements the EC is looking for in the revised offers to be tabled in May 2005.” In a press release on 25 January, the Commission said "The presentation of revised requests by the EU gives an important boost to the DDA by providing focused and targeted information to assist the EU's WTO partners in the preparation of their revised offers for May... We need to ensure that services negotiations match the ambition of other

91 For a more detailed overview of the July Package see ICTSD 2004.

92 European Commission 2005c.

93 European Commission 2005c.
negotiating areas such as agriculture." EU officials also wanted to clarify the content and scope of requests, particularly those concerning water services liberalization directed at developing and least developed countries. Finally, the revised requests were designed to reiterate the EU’s commitment to take into account individual countries’ levels of development. Despite these “development-friendly” goals and the importance attached to transparency in the European Commission, no public consultations on the revisions took place.

In the run up to the Cancun ministerial meeting, three Civil Society Dialogue meetings were dedicated to the ongoing GATS negotiations. The meetings were reasonably well attended by NGOs and were led by Anders Jessen, Acting Head of Unit DG Trade, G1 - Trade in Services. The EC’s services offer preoccupied the agenda on 31 January 2003. Prior to the release of the EC’s services offer in April 2003, DG Trade launched an unprecedented request for public input into how the EC should respond in its initial offer to the requests it had received from third countries. The European Commission received thousands of responses to the consultation document, some included substantive recommendations and others criticized the EU’s handling of GATS consultations and negotiations. Unfortunately, dialogue over the EC’s offensive

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96 European Commission 2002a.

97 See for example the response from the European Bureau of Library, Information and Documentation Associations (EBLIDA) available at [http://www.eblida.org/position/GATS_Response_Jan03.htm](http://www.eblida.org/position/GATS_Response_Jan03.htm)

98 For example see the submission by UNI-Europa, the trade union federation for services and communication at [http://www.union-network.org/uniflashes.nsf/0/bfbc95cc82f1a85c1256cad00397e4e?OpenDocument](http://www.union-network.org/uniflashes.nsf/0/bfbc95cc82f1a85c1256cad00397e4e?OpenDocument).
interests never reached comparable proportions. Instead, civil society received a series of State of Play briefings throughout 2003.

No CSD meetings on services took place between the collapse of the Cancun Ministerial in September 2003 and the July Package in 2004. When the CSD sessions on services resumed on 9 December 2004, participants were informed of the Commission’s intent to revise the third country market access requests. NGOs were reportedly shocked by this announcement since revisions were not required by the WTO and there was no public announcement of a revision of the EU requests in advance of this meeting, nor an invitation for consultation. 99 During this meeting, senior level officials explained the political rational behind the revisions but were vague on the substance of the requests. Dialogue during this meeting was limited to an exchange between Commission officials and NGOs over whether the negotiations are about pushing privatization and whether the EU would maintain neutrality in the public vs private water provision debate. In response to demands for greater transparency, the revisions were presented as a closed door matter, since, according to DG Trade officials “there are limits on what can be disclosed during the negotiation.” 100 As one senior DG Trade official explains:

The EC is a negotiating machinery, not a traditional policymaking machinery….first they have to agree in the Commission which will be difficult enough. Then they will have to agree with the Member States which can be very agonizing. By this time you are very late in the process and by then positions are

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99 European Policy Officer, Coalition of the Flemish North South Movement. Interview by author. 6 June 2005.

100 A summary report of the CSD meeting on 9 December, 2004 is available at http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122354.doc

GATSwatch also orchestrated a protest against GATS consultations, sending a barrage of emails to the European Commission. See http://www.gatswatch.org/consultaction.html
quite consolidated…only thereafter can they consult with Civil Society…Room for incorporating NGOs in this balancing act is obviously very very difficult.\textsuperscript{101}

The next CSD services meeting would not take place again until 13 May 2005, long after the revised requests had been submitted to the WTO. Notably, this would be the last opportunity for public dialogue between DG Trade officials and civil society before the Hong Kong Ministerial Meeting in December 2005.

The EC’s revised requests struck a decidedly more “development-friendly” tone and removed some of the language NGOs found most offensive.\textsuperscript{102} Where water services are concerned, two changes are significant. First, while the EC’s requests are still based on the EC’s proposal for classification of environmental services and cover all environmental sub-sectors including water for human use, the revisions work to clarify and limit their scope. In the initial requests, the EC had asked for open ended market access. The revisions make clear that for modes 1 and 2, the EC is requesting National Treatment and Market Access commitments primarily for advisory or consulting services. Where “other” environmental services are mentioned, the EC is only requesting Market Access and National Treatment for environmental impact assessment and environmental risk analysis, two key activities for sustainable development. For Mode 3, the EC’s revised requests on infrastructure services (water and solid/hazardous waste) draw a distinction “between services supplied directly to business (industrial customers

\textsuperscript{101} Desk Officer - Policy and negotiations; DG Trade, Unit F1- Coordination of WTO, OECD, Trade Related Assistance; GATT; and 133 Committee. Interview conducted by author. 1 June 2005

\textsuperscript{102} For example, the following sentences are removed from the revised requests: 1) “Nevertheless, a number of barriers and obstacles to trade in environmental services remain, and the main objective of the EC for the negotiations is to reduce the barriers which European operators face in third countries' markets”; 2) "The EC is seeking the removal of discrimination of, and restrictions to, European companies wishing to supply environmental services“
notably), where more ambitious commitments are sought, and the traditional public services (notably municipal services), where the request is more focused.”

For services which are not subject to exclusive rights, the EC requests countries to take full Market Access and National Treatment commitments. For services that are subject to exclusive rights (such as concessions) the EC’s requests ask that foreign companies not be discriminated against in the allocation of concessions or in the operation of service. According to Mendelson, the revised requests “simply aim to facilitate the opening up of these services to international operators if and when the responsible public authorities freely choose to do so, for instance through any form of public-private partnership of their choice.”

In essence, this is the same request made in 2002 but it is now couched in assurances that the EC does not seek to dismantle public delivery of essential services or undermine exclusive service provider arrangements.

Second, in an attempt to better take into account the level of development of individual WTO members, the EC reduced the number of requests directed at least developed countries from 3-5 to 2 out of 5 sectors. Essentially, telecommunication, financial services, transport, construction and environmental services were the five sectors that were identified as being key to economic development and greater participation in the world economy on one hand and “sectors in which the EC can offer

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103 European Commission 2005c.

104 qtd in Deckwirth 2006, 8.

105 In particular, the EC’s revised requests reiterate the rights of countries: 1) to apply exclusive rights (for instance through concessions); 2) to choose freely the management arrangements for the service (for instance municipalities managing directly the service - “régie”, public operator, cooperative, concession to a private operator); 3) to choose the mode of attribution of the exclusive rights (open competition or not); 4) to change from one mode of management to another (for instance, at the end of a concession contract, to return to a public or cooperative management mode). European Commission 2005c.
extensive expertise and technological skills whilst at the same time representing its export interests” on the other.106

The revisions of the EC’s requests mark an effort by EU technocrats to make the requests more politically palatable to developing countries and to correct the messages being conveyed by NGOs about the EC’s hidden offensive interests.107 Indeed, EU technocrats were very concerned about the negative backlash that was resulting from the GATS: Water Campaign.108 In particular, they were anxious to provide assurances that NGO concerns about GATS and water privatization are baseless. Numerous interviews with senior level DG trade officials confirm this attitude. These concerns reveal that the campaign had some effect by making EU technocrats more sensitive to wider public concerns. They adjusted their language and tempered their offensive approach accordingly but did not change the substance of the requests in any significant way to meet the demands of NGOs. Moreover, since developing countries are generally thought to be exempt from taking commitments in the GATS 2000 negotiations, NGOs consider the 2 out of 5 benchmarking strategy to be unnecessarily aggressive and evidence of the EC’s continued quest to “prize open fragile financial and public utilities markets in some of the world’s poorest nations.”109

106 European Commission 2005c.


108 An internal email exchange between a desk officers in DG Trade and Director General Peter Carl obtained through an access to documents request reveals that DG trade officials considered the campaign both seriously flawed and to be a serious threat to ongoing negotiations. See text of the email in Deckwirth 2006, 5.

109 Christian Aid 2005.
In the run up to the Hong Kong Ministerial Meeting, 13-18 December 2005 few countries responded to the EC’s requests. Indeed, only 69 countries have submitted initial offers and since 19 May 2005 only 30 Members have submitted revised offers.\textsuperscript{110}

In order to overcome the abysmal progress in services negotiations, WTO members agreed to pursue plurilateral request/offer negotiations alongside bilateral negotiations. While participation in the plurilateral negotiations is voluntary, members were urged to “consider such requests”\textsuperscript{111} and “to participate actively in these negotiations towards achieving a progressively higher level of liberalization of trade in services, with appropriate flexibility for individual developing countries as provided for in Article XIX of the GATS.”\textsuperscript{112}

In February 2006, “Friends Groups” of demandeur countries presented collective requests to targeted WTO members. These requests were discussed in a series of services meetings at the WTO between 27 March and 7 April. The “Friends of Environmental Service Group”\textsuperscript{113}, chaired by the European Union, sent out a plurilateral request to 22 countries.\textsuperscript{114} Notably the request explicitly “does not address in any way water for human use (i.e. the collection, purification and distribution of natural water).”\textsuperscript{115}

\textsuperscript{110} Details are available at \url{http://www.wto.org/English/tratop_e/serv_e/s_negs_e.htm}

\textsuperscript{111} Annex C on Services in the Hong Kong Ministerial Declaration (WTO 2005c).

\textsuperscript{112} WTO 2005c.

\textsuperscript{113} This group includes Australia, Canada, the European Communities, Japan, Korea, Norway, Switzerland, The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States.

\textsuperscript{114} The text of the collective request for environmental services is available at \url{http://www.esf.be/pdfs/Collective%20Requests/Environmental%20Services%20C%20R.doc}

\textsuperscript{115} \url{http://www.esf.be/pdfs/Collective%20Requests/Environmental%20Services%20C%20R.doc}
Some consider this omission to be a signal that the EU has withdrawn its requests for water for human use. This conclusion is both premature and narrow-sighted. The politically contentious nature of the plurilateral request-offer process itself and the fact that partners in the plurilateral process do not share the same strategic interests in this sector help explain why water for human use was left off the table in these negotiations. Moreover, Norway, a member of the Friends of Environmental Services Group, formally withdrew its requests in a range of sensitive essential service sectors including energy, higher education and water in December 2005. It would have been politically impossible for Norway to participate in the collective requests had water for human use been part of the demands.

One must recall that the plurilateral negotiations are occurring alongside bilateral negotiations. Indeed, both the European Union and the United States made clear at Hong Kong that the plurilateral requests do not replace existing bilateral requests. Also, all WTO members will benefit from water services liberalization by virtue of the MFN principle regardless of whether they are party to the initial negotiations for market access. Similarly, the EU actively pursues water services liberalization through the negotiation of regional and bilateral trade agreements such as Economic Partnership Agreements (EPAs) with African, Caribbean and Pacific countries. All these signs indicate the EU has not relinquished its position on water services liberalization. Despite the fact that no country has yet acceded to the requests, third country market access requests for water services for human use including water collection, purification and distribution remain on the GATS negotiating table, despite the efforts of the GATS: Water Campaign.

116 ICTSD 2006.
Although critical of both the revised requests and the plurilateral negotiations, NGOs had all but abandoned the campaign to convince the European Union to withdraw its water requests by the end of 2005. Momentum amongst the key players (WDM, ATTAC, CEO, 11.11.11) in the GATS: Water Campaign dropped off as NGOs became preoccupied with other pressing issues on the trade agenda such as agriculture, NAMA and Economic Partnership Agreements (EPAs). The decline of interest in the issue was reflected in the CSD agenda throughout 2006 and 2007. Although there were several very well attended meetings convened by the highest level DG Trade officials, there were no sessions dedicated solely to services between May 2005 and March 2008. Instead, a series of DDA Update or debriefing meetings was held where Commission officials reported on the state of play of plurilateral negotiations and the proposal to develop a “Chair’s text“ that would go beyond Annex C in the Hong Kong Ministerial Declaration. Attending NGOs took a very low profile in these meetings. Although there remains a sustained international campaign against water privatization\(^\text{117}\), it seems that the EC’s water requests in the context of GATS 2000 negotiations have been let off the hook at least for the near term.\(^\text{118}\)

**VI. Conclusion**

The intent to derail multilateral trade negotiations on services and bring about a moratorium on GATS is at the core of the campaign to exclude water services from the EC’s requests for third country market access in the context of the GATS 2000 Negotiations. NGOs working on this issue view the GATS as a Trojan horse that will

\(^{117}\) See for instance [www.waterjustice.org](http://www.waterjustice.org)

\(^{118}\) For example, the 2008 World Water Day NGO statement makes no mention of the EU’s GATS requests [http://www.worldwaterday.eu/](http://www.worldwaterday.eu/)
undermine people’s rights to basic necessities including water for human use and constitutes a massive attack on the ability of governments to regulate in the public interest. From the point of view of EU technocrats, water services liberalization is an essential step towards meeting the Millennium Development Goals of reducing by half the proportion of people without sustainable access to safe drinking water and basic sanitation by 2015. Given the fundamental disagreement over basic economic principles and the adversarial relationship between NGOs and EU technocrats, neither common understanding nor co-optation was possible in this case. Instead, actors in a position of power, European technocrats and trade experts, have worked to marginalize and de-legitimize NGOs campaigning against the inclusion of Water in the EC’s GATS requests by emphasizing fundamental flaws, hyperbole or misunderstandings in their grievances. Consequently, the core activities of NGOs working on this issue occurred outside EU level mechanisms designed to improve access, participation and transparency of external trade policymaking. With the exception of access to information requests, NGOs launched a public education/outreach campaign that operated almost entirely outside the context of newly created avenues for access and participation at the EU level.

Despite the marginalization of NGOs in formal dialogues with EU technocrats and in the media, the achievements of the GATS: Water Campaign in bringing about a more legitimate and qualitatively enhanced external trade policymaking process in Europe are significant. On the procedural side of the equation, NGOs played the roles of educators and agenda setters, generating awareness and giving a voice to broader societal concerns at the EU, national and municipal levels. They worked both through newly created formal channels at the EU level and through informal networks to empower
marginalized people and to encourage the redistribution of both economic and political resources. Although differential access to EU policymakers persists, NGOs worked to make the EU’s consultative arrangements more transparent. The quality of the Civil Society Dialogue clearly falls short of meeting the criteria of a true dialogue. Nonetheless, the participation of NGOs in this forum has widened policy debates to accommodate the expression of multiple views, including those that challenge prevailing policy orthodoxy. Finally, NGOs have pushed EU technocrats to take greater responsibility for their actions and policies by publicizing their grievances in the media.

However, EU technocrats continue to pursue a policy line that runs contrary to the demands of NGOs. Despite the NGO-led public awareness campaign, diminishing public support from the EU’s water industry, pressure by Members of the European Parliament and several key EU member states including the UK and Belgium, EU technocrats remain committed to including water services in the GATS 2000 negotiations. They are in a position to do so because GATS negotiations are incredibly complex, fraught with minute technical details and require a high degree of secrecy. This pooling of functional authority in the hands of European technocrats and trade experts is compounded by the offer-request format of country-by-country GATS negotiations and EU technocrats could justify pulling away from the broadly participatory context of the CSD as the issues at stake became more technical.

Since no country has yet made a commitment to liberalize the distribution of water for human use under environmental services in GATS negotiations, the jury is still out on the related substantive implications. Moreover, since GATS negotiations are part of the Single Undertaking, any new commitments hinge on the successful conclusion of
the current round of multilateral trade negotiations. However, what is clear is NGOs were unable to convince EU policymakers to withdraw their water requests. Nor have NGO efforts led to improved efforts to redress persistent economic inequalities between the north and south and widespread social injustices resulting from previous rounds of multilateral trade negotiations through the GATS requests. Indeed, from the point of view of NGOs, the EC’s requests will further exacerbate those injustices. At bottom, there are no causal links between the demands made by NGOs, improvements in procedural legitimacy and more just, equitable or fair external trade policies in this case.
Chapter 7: Conclusion

I. Introduction

Do more open trade policymaking processes that include non-governmental entities, by virtue of the divergence of interests represented, lead to a stronger, more legitimate and qualitatively enhanced international trade system? In the European Union, do improvements in participatory and access conditions for NGOs result in more legitimate external trade policymaking as many would expect? These are the key questions that animated this study.

In the preceding chapters, I presented four major arguments. First, I argued that, despite inconsistencies in the number of access points and the frequency of contact between economic and non-economic actors, changes in the EU’s political opportunity structure led to significant, aggregate improvements in consultation and participatory conditions for a wide range of CSOs, including special interest lobbies such as business forums, trade unions and farmers, consumer advocates, faith-based organizations, philanthropic foundations, development co-operative initiatives, local community groups, think tanks and NGOs in the EU’s external trade policymaking process since 1995. These changes reflect a robust democratic imperative in the European Union and define the context within which NGOs are clamouring for a voice in external trade policymaking.

Second, I demonstrated that the advent of GATS and TRIPS shifted services and intellectual property rights into the legal/liberal episteme that is entrenched in the international trade regime. In so doing, WTO members defined what policy options would be conceivable in subsequent negotiations. The ideational and legal constraints
embedded in the episteme inevitably impact and structure dialogue and consultation between CSOs and policymakers in the EU. The remainder of the study examined how the legal/liberal episteme interacts with NGO claims to democracy, justice, equity and fairness and structure patterns of empowerment in the EU’s external trade policymaking process.

Third, I demonstrated that there are no clear, causal links between burgeoning, formal channels of participation and improvements in both procedural and substantive legitimacy. The two case studies vary on the degree to which NGO activities are formally integrated into the external trade policymaking process in Europe. NGOs working on TRIPS and access to medicines were invited to serve as interlocutors and enjoyed a deeply institutionalized relationship with EU policymakers, at least in the early phases of policy development. By contrast, with the exception of access to information requests, NGOs working on GATS and water services liberalization launched a public education/outreach campaign that operated almost entirely outside the context of newly created avenues for access and participation at the EU level. At the same time, EU policymakers worked to marginalize and de-legitimize their work and their concerns.

Despite the variations across cases, NGO activities did indeed result in enhanced public education activities and public awareness campaigns, public debate and deliberations about substantive policy issues, growing empowerment and involvement of otherwise marginalized people, more transparent decision-making, and greater public accountability. This occurred despite disparities in the degree to which different NGOs were formally integrated into the EU’s external trade policymaking process. Moreover,
the diminishing role of NGOs against the backdrop of growing opportunities for participation in the TRIPS and Access to Medicines case is puzzling.

In this study, I found that NGOs working on TRIPS and access to medicines were not more successful in bringing about improvements in substantive legitimacy than NGOs working on GATS and water services liberalization. NGOs were unable to convince policymakers to pursue policies that they believed would ensure greater access to medicines, reduce disparities in access to medicines between the North and South, and which place public health concerns over IPR protection. Similarly, NGOs working on GATS were unable to convince EU policymakers to withdraw their requests for water services liberalization in developing and least developed countries. Instead, the policy lines pursued by the EU in each case ran contrary to the demands of NGOs and will, in their view, further exacerbate persistent economic inequalities and widespread social injustices resulting from previous rounds of multilateral trade negotiations.

Finally, I argued that the Epistemic explanation provides the most plausible account of external trade policymaking in Europe. Epistemes, the deepest level of the ideational world, comprised of shared, intersubjective or taken for granted causal and evaluative assumptions about how the world works, and not changes in political opportunity structures, best account for the patterns of empowerment and policy outcomes observed across the two cases examined in this study. By focusing on epistemes as the building blocs of post-national governance, I drew attention to the ways in which ideational and legal constraints discipline the choices made by EU policymakers.
This approach looks to the ways in which epistemes endow some actors with the authority to maintain and reproduce the norms, consensual scientific knowledge, and ideological beliefs upon which they are built. Technocrats and experts, in particular, possess an authoritative claim on knowledge. The more technical and complex the issue area, the more decisive power to make authoritative interpretations of the rules, develop standards in technical areas or develop policy prescriptions as the bases for new rules pools in their hands. Of course, the propensity for technocrats to exercise their functional authority depends, to a certain extent, on the degree of homogeneity of scientific beliefs.

In the two case studies examined in this dissertation, EU technocrats shared a very high degree of commitment to finding policy solutions that fit inside the legal/liberal epistemes. For example, there was virtually no contestation amongst EU technocrats working in the European Commission over the projected benefits for European multinationals of water services liberalization in developing and least developed countries.

Epistemes work to determine the limits of the possible in policymaking, to define who is friend or foe in the process, and to empower particular actors over others. In this study, I demonstrate that although NGOs have been instrumental in providing education, raising awareness, and giving a voice to broader societal concerns about the social, health-related and environmental aspects of proposed trade deals, they have been unable to reaffirm social prerequisites over the legal/liberal episteme within which services and intellectual property rights are entrenched; the market remains dis-embedded from broader societal values or purposes, despite the best efforts of NGOs. The legal/liberal episteme conflicted and ultimately hamstrung NGO attempts to achieve more just,
equitable and fair external trade policies in the EU, regardless of their formal involvement in the external trade policymaking process.

Below, I discuss the implications of these findings for the theoretical understanding of post-national governance, for the promise of global civil society more generally, and for the empirical and political realities in which NGOs are embedded.

II. Theoretical Implications

A. Post-National Legitimacy

I began the study with a detailed discussion of “Post-National Legitimacy”. I drew insight from the recent proliferation of IR literature that takes a moral or principled view of legitimacy to construct a benchmark against which external trade policymaking in Europe can be evaluated. I endeavoured to move beyond a state-oriented conception of legitimacy and the assumptions that either legitimate forms of governance cannot exist beyond the state or that post-national governance structures ought to mimic the Westphalian notion of a liberal democratic state. The primary objective was to devise a benchmark against which new democratic/participatory mechanisms beyond the state can be evaluated and to provide normative insight into how post-national governance can be reconfigured to achieve these standards.

In Chapter 2, I made a case for why Post-National Legitimacy must be evaluated along two lines: the way the policy was made (procedural legitimacy) and the projected outcomes of policy (substantive legitimacy). In other words, we must arrive at policies through a democratic process and they must pursue just, equitable and fair objectives. In terms of procedural legitimacy, I argued that, given the reconfiguration of political authority in a globalizing world, democratic mechanisms cannot remain nested solely
inside the state. Instead, individual rights, democracy and deliberative principles constitute the ideal foundation for a post-national order wherein political decisions made on the transnational level increasingly affect people and public policy. Moreover, this changing locus of political authority is accompanied by greater public attention to economic and human rights inequities. There is a growing global social responsibility to secure fair, equitable and sustainable policies. A global consciousness and the belief that social justice is not and should not be the sole responsibility of the state in a globalizing world are requisite conditions for post-national substantive legitimacy. In these ways, the conception of Post-National Legitimacy advanced in this study serves as a corrective to the predominant theories of EU governance predicated upon components of legitimacy in liberal democratic states.

B. The Promise of Global Civil Society

Cosmopolitans envisage a central role for Global Civil Society, and NGOs more specifically, in achieving Post-National Legitimacy in regional and global governing arrangements. As both agents of change and subjects of post-national governance, GCS is conceived as a constitutive part of a global democratic order. On one hand, progressive NGOs are engaged in a struggle to establish a new global ethic wherein democratic norms and social justice infuse all levels of decision-making. On the other hand, NGOs are impacted by the growing range of decisions in sensitive issue areas increasingly taken at the transnational level. Given this dual role, NGOs represent global citizens’ demands, constitute a basic form of popular representation, and are able to hold decision-makers to account for their policy choices.
In Chapter 2, I delineated a number of very specific expectations that should result from the formal inclusion of NGOs in the external trade policymaking process if they are to serve as key conduits for democracy and social justice in a globalizing world. On the input side of policymaking, we should observe enhanced public education activities and public awareness campaigns, more public debates and deliberations about substantive policy issues, growing empowerment and involvement of otherwise marginalized people, more transparent decision-making, and greater accountability. In terms of the projected outcomes of policy, we should see improved efforts to redistribute the benefits and burdens associated with membership in the WTO, to enshrine fair trade policies in the WTO Agreements, and to develop policies that respond to social and environmental concerns, not just economic demands.

In the stories told in this study, the activities of NGOs did matter but not in the ways envisaged by Cosmopolitans. There is no question that improvements in procedural legitimacy were achieved as a result of NGO activities working in the two issue areas. However, these improvements did not necessarily come about because of their formal involvement in the external trade policymaking process or new mechanisms for access and participation.

As we observed in both cases, NGOs played the role of educators, generating awareness and giving a voice to broader societal concerns. They stimulated public debate and worked to empower marginalized people, particularly those in developing countries. They also encouraged the global redistribution of both economic and political resources. Although differential access to EU policymakers remains, NGOs worked to make the EU’s consultative arrangements more transparent and they pushed EU policymakers to
take greater public responsibility for their actions. The comparative case studies in
Chapters 5 and 6 reveal the potential of NGOs to qualitatively enhance the policymaking
process and to provide greater representation to the interests and concerns of developing
countries, both when they are formally integrated into the policymaking process and
when they operate on the margins of the governing arrangement.

However, these case studies revealed that NGOs encountered very real and very
significant obstacles to bringing about substantive changes in policy outcomes,
particularly when the issue areas are complex and fraught with technical detail. I argued
that, in light of these outcomes, we should adjust our optimism about the potential of
NGOs in general to bring about substantive policy changes through formal policymaking
channels. It is clear that NGOs are not conduits for democracy and social justice in post-
national governing arrangements. Ultimately, I argued that what determined the precise
role of NGOs in policymaking, and the corresponding patterns of empowerment and
policy outputs, was not their formal inclusion in the process but rather the “fitness” of
their demands with the prevailing legal/liberal episteme.

C. The Power of Epistemes

As I discuss at length in Chapter 2, in this study I conceive of power in global governance
as rooted in knowledge and manifested in epistemes.1 I focus on the ways in which
epistemes enable and delimit agency in external trade policy governance in the EU. This
usage of the concept does not tell us anything significant about the dynamics of epistemes
– the study of why and how some epistemes are created and come to dominate social
reality – but it does acknowledge the possibility of agency or opposition to a prevailing
episteme. Indeed, the prevailing episteme is only one among many possible social

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1 Adler and Bernstein 2004.
structures that are both constituted by and products of agents, some of whom are endowed with the power to maintain and reproduce the episteme. How resistance is manifested and delimited by an episteme was a central concern of this study. Moreover, I sought to identify patterns of empowerment and to determine the ways in which claims to democracy, justice and fairness interact with the prevailing legal/liberal episteme in the EU’s external trade policymaking process.

In my attempt to build upon the broader literature on epistemes in international relations, I devised a set of expectations about the precise role of NGOs in external trade policymaking. In so doing, I employed the episteme concept as an analytical construct and infused the analysis with a concern for the normative implications of my findings. Therefore, the discussion in each of the case studies straddled analytic and normative IR theory.

I argued that EU policymakers responded positively to NGO demands for a voice and a role in external trade policymaking. In an effort to reproduce and legitimize the legal/liberal episteme, steps were taken to make policymaking more transparent, accountable and open to participation by a wider range of both economic and non-economic actors. New opportunities for access and participation enabled actors who accepted the main tenets of the legal/liberal episteme to serve as interlocutors in the policymaking process; where discussions concerned the broad trajectory of policy, these actors played the role of educators and agenda setters. However, where policy discussions concerned the nuts and bolts of trade agreements and/or highlighted technical aspects of trade negotiations, policymakers “pulled away” from broadly participatory processes. Because technocrats and experts possess an authoritative claim on knowledge,
the more technical (as opposed to political) the issue, the more functional power pooled in their hands as opposed to either corporate actors or NGOs. This development is especially the case when: 1) bureaucratic officials were required to make authoritative interpretations of the rules; 2) bureaucratic officials were required to develop standards in technical areas or; 3) through specialized cause-effect knowledge their [policy] prescriptions gained legitimacy as focal points for cooperation, or the bases for new rules.\(^2\)

As I discuss in detail in both Chapters 2 and 4, the legal dimension of the episteme is designed to protect against political interference with the free functioning of the market. Therefore, political compromises were only struck when they were necessary to further the core goals of the episteme. Since technocrats and experts are themselves the product of the dominant episteme, they worked to co-opt and absorb forces of civil society who resisted or rejected the main tenets of the legal/liberal episteme. NGOs who operated on the margins of the governing arrangement or who rejected the legal/liberal episteme wholesale were cast as outsiders; they were marginalized and people in a position of power (technocrats and experts) worked to de-legitimize their grievances.

This pattern of empowerment precluded the possibility of introducing the policies advanced by NGOs because they were inconsistent with the requirements of the prevailing episteme and therefore, largely incomprehensible as policy solutions to decision-makers. Thus, the legal/liberal episteme conflicted with NGO attempts to move external trade policies in a more sustainable and just direction and thereby stunted the realization of moral or more substantively legitimate external trade policy governance.

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\(^2\) Adler and Bernstein 2004, 14.
As I argue at length in Chapter 2, if post-national governance is to be sustainable it must pursue just, equitable and fair ends. This taps into the broader view advanced by scholars such as John Ruggie that such social “embedding” – the idea that markets must be embedded in broader societal values or purposes, whether domestically or globally – is necessary for the ongoing legitimacy of an international liberal economic order.³

The question of whether justice, equity and fairness are requisite criteria for legitimate post-national governance cuts to the core of normative IR theory. In this study, I advanced a principled conception of legitimacy, as opposed to a sociological or legal conception. The debate over whether this is the best possible conception of legitimacy for an increasingly globalized world cannot be adequately resolved here. However, it is the predominant conception of legitimacy advanced by Cosmopolitan scholars and which is linked to the promise of global civil society in a globalizing world.

Moreover, most would agree with Ruggie’s view that justice, equity and fairness are required for post-national governance arrangements to endure. Evidence of declining legitimacy entails, at a minimum, a decline in confidence amongst those affected by the rules in the ability of the governing arrangement to secure these values. It is widely acknowledged that WTO rules have thus far not distributed the benefits of membership in the international trade regime evenly. Evidence that the regime is unsustainable in the face of such inequities is increasingly present in ongoing multilateral trade negotiations. It is also evidenced by the recent profusion of bilateral trade agreements orchestrated by both the United States and the European Union. Thus, it is not controversial to say the international trade regime suffers from a crisis or, indeed, a loss of legitimacy. Given the findings in this study, we must look to new means of altering power dynamics in the

³ Ruggie 1982; Polanyi 1944.
EU’s external trade policymaking process and the international trade regime more generally if it is to be sustainable.

III. Empirical and Policy Implications

The findings in this study also raise a number of issues that relate more directly to policy questions or analyses of the processes of post-national governance. Below, I review some of the policy implications of the empirical findings in the case studies.

The EU stands out amongst major trading powers for its significant and dramatic efforts to broaden and deepen its consultations with a wide range of NGOs. However, patterns of empowerment did not correspond to the degree to which the different actors were formally involved in the external trade policymaking process. This suggests we need to reconfigure our understanding, or at least our optimism, about the value of direct consultations between NGOs and policymakers.

In this study, I compared the role of NGOs in the EU’s external trade policymaking process in two cases. The first concerned the formulation of the EC’s position in TRIPS and access to medicines negotiations. The second concerned the development of the EC’s requests for water services liberalization in GATS 2000 negotiations. NGOs achieved significant and notable improvements in procedural legitimacy through their advocacy campaigns in both cases. Although they pursued fundamentally different strategies, NGOs were instrumental in providing education, raising awareness, and giving a voice to broader societal or otherwise marginalized concerns about the impact of proposed trade rules. Undoubtedly, NGO work qualitatively improved the input side of policymaking and the outlook for developing
countries, in particular, would be far worse in the absence of a robust civil society in Europe.

However, improvements in procedural legitimacy alone cannot alter the power dynamics in the international trade regime. As we observed in the two case studies, persistent economic inequalities and widespread social injustices resulting from previous rounds of multilateral trade negotiations are entrenched and, indeed, exacerbated by new rules being negotiated during the Doha Round of Multilateral Trade Negotiations. International trade rules continue to privilege the interests of developed countries and entrench rights for corporate actors.

In the TRIPS and access to medicines case, EU policymakers pursued a policy line that was in conflict with the expressed preferences of NGOs. The generic and research-based pharmaceutical industries pursued contradictory strategic interests. In turn, technocrats and experts exercised a fair amount of bureaucratic creativity in crafting a legalized, market-based solution to the so-called Paragraph 6 problem, designed to strike a middle road between the demands of the patent-holders and generic industries. Unfortunately, it was so bound up in bureaucratic red tape that it is unlikely to be used in practice. Instead, it is expected that market forces alone will adjust to ensure adequate access to affordable medicines in countries lacking pharmaceutical manufacturing capacity. According to actors directly involved in the export, sale and distribution of medicines including research-based firms, generic industry and NGOs, the TRIPS Amendment is likely to widen disparities in access to affordable medicines in developing and least developed countries.
Similarly, Members of the European Parliament, NGOs, trade unions and several key EU Member States are all opposed to water services liberalization in the context of GATS 2000 negotiations. Yet, EU policymakers continue to include water for human use including water collection, purification and distribution in the EC’s requests for market access. In this case, in the face of a public relations nightmare and despite water industry pleas to keep water off the GATS 2000 agenda, EU technocrats anticipated the future strategic interests of the European water industry by keeping open the door to water services liberalization. These requests are widely considered by NGOs to constitute a full frontal attack on democracy, human rights and equitable access to basic necessities in developing and least developed countries. If developing and least developed countries sign on without fully understanding the long-term implications of GATS commitments, they will effectively forfeit the regulatory autonomy required to ensure universal, equal and affordable access to water.

These cases reveal that we have an unsustainable international trade regime that does not meet basic normative requirements for post-national governance. In the absence of rules aimed at securing justice, fairness and equity, the system cannot endure. Given that the European Union is well ahead of other major trading powers in its efforts to improve the legitimacy of its external trade policymaking process, it remains our best model for channeling NGO representation and their concerns about the normative impact of trade rules upwards through local, regional and national levels of governance. Unfortunately, the case studies in this analysis reveal that its efforts fall dramatically short of what is required to alter the power relations entrenched in the international trade regime. Moreover, it is clear that the highly technical and legalized nature of services-
and IP-related trade policy discussions work against NGOs’, developing countries’, and MEPs’ ability to participate or formulate independent and substantive policy recommendations.

This study should not be read by critics as an attempt to downplay the significance of the institutional framework in helping to determine policy outcomes in the European Union. The European Parliament, in particular, is renowned for displaying considerable moral authority in the European Union, even if it lacks co-decision powers in this area. This power is evident in many highly political issue areas such as the debate over Genetically Modified Organisms (GMOs) in Europe. However, in this study, the institutional framework became less important as the issues in question became more complex and technical.

For example, the European Parliament played a central role, alongside NGOs, in framing the initial debate over access to medicines in the TRIPS case. However, once the issue shifted to the highly technical question of how to solve the Paragraph 6 problem, MEPs were effectively sidelined in the policymaking process. As I discussed at length in Chapter 5, although MEPs took issue with the TRIPS Amendment (Article 31bis) and effectively stalled its ratification, the final outcome did not depart significantly from the status quo. Instead, there are clear signs that the MEPs were only temporarily appeased by the reading of the Council statement in plenary; there are significant signs indicating that this was little more than an exercise in political posturing designed to curb criticism and push the amendment through the European Parliament. Similarly, the European Parliament was very reluctant to take a firm stance on the question of water services.

The author thanks Grace Skogstad for highlighting this significant point.
liberalization, largely because its members lacked the requisite technical know-how to engage meaningfully in debates on the EC’s requests for third country market access.

Essentially, these case studies revealed that a range of actors including NGOs and MEPs have the potential to exercise their moral authority and play an instrumental role in shaping the agenda on highly political matters. However, where policymaking concerns very complex, technical issues, the institutional framework, and the European Parliament in particular, play a backseat role to European technocrats and experts in the European Commission.

Further institutional reforms on the input side of policymaking in the EU are unlikely to correct or reverse these patterns of empowerment. Even if it were possible to create purely deliberative contexts in which policy debates are dominated by argumentative rather than strategic interests, actors do not abandon the background, intersubjective knowledge that helps them filter reality and disposes them to behave in certain ways. This is because epistemes are not reducible to material power or strategic interests. Thus, even if it is possible to override egoistic or strategic interests so that actors argue about which norms can be justified or which policies are in the common good, resistance will either be delimited or co-opted by the prevailing legal/liberal episteme.

Also, the efficiency costs of the institutional reforms required to create purely deliberative contexts would be too great. Indeed, such reforms would likely lead to institutional stalemate or collapse because too many voices would be clamouring to be heard. Adding to the institutional burden of EU policymakers will not be successful or sustainable in the long term. Moreover, most NGOs are already operating at full
capacity. The NGOs examined in this study lack the capacity to participate fully in the participatory and consultative processes already available to them. Adding to their formal EU-level commitments will further tax already scant resources and is thus unlikely to yield any significant qualitative improvements in policymaking.

If NGOs are to exercise their might and alter power dynamics in the international trade regime, their best hope is to build up their strategic policy capacity and technical know-how. There is no shortage of intelligent and well-educated people working for NGOs. The talents of these people should be further developed and used to help educate disempowered and marginalized members of the international trade regime both collectively and individually. Only by developing, articulating and defending autonomous policy choices can developing and least developed countries alter the patterns of empowerment in the international trade regime. NGOs could play a central role in helping these countries better control their fate by securing trade rules that pursue more equitable, fair and just ends.

IV. Conclusion

Throughout this dissertation, I have repeatedly questioned whether NGOs really do have the potential to add democracy, justice and fairness to post-national governing arrangements. In many ways, the findings in this study suggest significant improvements, at least on the input side of policymaking, have been achieved as a result of NGO advocacy and public education campaigns. I have celebrated the potential for NGOs to represent global citizens’ demands, constitute a basic form of popular representation and hold decision-makers in check. Although the bulk of the analysis was preoccupied with looking at whether there are requisite institutional links between the
activities of NGOs and policymaking necessary to achieve improvements in procedural and substantive legitimacy, this study opened the door to broader questions about the power dynamics in the international trade regime and the possibility of moral governance in a globalizing world. Foremost among them was the question of how NGOs can retool their efforts to alter patterns of empowerment in the international trade regime in favour of the interests of the least advantaged members.

However, I would like to conclude this study on a note of caution. We must beware of the tendency to overstate the potential for NGOs to serve as conduits for democracy and social justice in a globalizing world. As authority fragments and shifts away from the state, we should resist the temptation to defer responsibility for securing fairness and justice in the world to non-state actors. Although moral boundaries no longer correspond with territorial boundaries in a globalizing world, the full weight of global social responsibilities should not rest solely in the hands of NGOs. If the international trade regime is to be sustainable, we bear a collective responsibility to ensure new rules respond to social and environmental concerns and not just economic demands, work to redistribute the benefits and burdens associated with membership in the international trade regime, and secure fairer terms of trade.

Moreover, if we can agree that a fully functioning multilateral trade regime is preferable to the law of the jungle, then much more work is required to ensure that developing and least developed countries have the capacity to develop, articulate and defend autonomous policy positions in international trade negotiations. This means that all WTO members hold a collective responsibility to ensure their trade partners have adequate resources and technical know-how to participate fully and meaningfully in trade
negotiations and processes of adjudication – with no strings attached. Considered in light of current negotiations on agriculture and non-agricultural market access (NAMA) in the Doha Round of Multilateral Trade negotiations, the need to alter the power dynamics in the international trade regime and build capacity in developing and least developed countries seem all the more pressing.
Appendix 1: Interview Participants*

EU-Level Bureaucratic Officials

Desk Officer, DG Trade, Unit H2: New Technologies, Intellectual Property and Public Procurement. Interview by author. 2 February 2006.**

Thomas Morgens Christensen. Policy and Negotiations Desk Officer, DG Trade, Unit F1: Coordination of WTO, OECD, Trade Related Assistance, GATT, and Committee 133. Interview by author. 21 September 2004.

Senior Level Official, DG Trade Unit A2 – Inter-institutional Relations and Communications Policy. Interview by author. 29 September 2004.**

Paolo Garzotti. Acting Head of Unit, DG Trade, Directorate E – Sectoral Trade Questions and Market Access, Bilateral Trade Relations. Interview by author. 5 October 2004.

Senior Level Official, DG Trade, G1 - Trade in Services and Investment; GATS and Investment. Interview by author. 8 October 2004.**

Senior Level Official, DG Trade, G1 - Trade in Services and Investment; GATS and Investment. Interview by author. 14 June 2005.**


Antti Pekka Karhunen. Project Manager responsible for EU-US relations. DG Enterprise, Unit A2: External Aspects of Enterprise Policy. Interview by Author. 31 May 2005.

Policy Desk Officer, DG Trade, Unit G1: Trade in Services and Investment, GATS and Investment. Interview by author. 8 October 2004.**

Senior Level Official, Secretariat-General Directorate B: Relations with Civil Society. Interview by author, 10 June 2005.**

Desk Officer in charger of international aspects of intellectual property, DG Trade, Unit H2: New Technologies, Intellectual Property and Public Procurement. Interview by author. 2 February 2006.**

* Unless otherwise indicated, all interviews were conducted by the author in Brussels, Belgium and all professional titles reflect the position of the individual at the time the interview was conducted.

** This symbol indicates that the interview participant requested confidentiality.
Desk Officer - Policy and negotiations, DG Trade, Unit F1- Coordination of WTO, OECD, Trade Related Assistance; GATT; and 133 Committee. Interview conducted by author. 12 October 2004.**

Desk Officer - Policy and negotiations, DG Trade, Unit F1- Coordination of WTO, OECD, Trade Related Assistance; GATT; and 133 Committee. Interview conducted by author. 1 June 2005.**


Sabine Weyand. DG Trade. Member of Pascal Lamy’s Cabinet, Responsible for Relations with European Parliament; Social Partners and NGO's; Transport; Energy; Sustainable Development; Employment and Social Affairs; Environment; European and Social Committee (ESC) until November 2004. Interview by Author. 2 June 2005.

Nikolaos Zaimis. Head of Unit, DG Trade, Unit F2- Dispute Settlement and Trade Barriers Regulation. Interview by author. 4 September 2004.

**EU Member State Representatives**

Permanent Member State Representative; Member of Committee 133; Council of the European Union; Department of Enterprise, Trade and Employment Counsellor. Interview conducted by author, 11 October 2004.**

Permanent Member State Representative; Former Chair of Committee 133. Interview conducted by author, 4 October 2004.**

**Members of the European Economic and Social Council (EESC)**

Jean-François Bence. Head of Division, External Relations, European Economic and Social Committee – EESC. Interview by author. 23 September 2004.

Dimitrios Dimitriadis. Member of EESC, First Vice-President of the National Confederation of Hellenic Commerce, President and CEO of Business Architect consultancy firm. 11 October 2004.

Member of EESC, Director MTK - Central Union of Agricultural Producers and Forest Owners. 29 September 2004.**

**EU Industry Representatives**

Trade Policy Advisor, Union of Electricity Industry - Eurelectric. Interview by author. 3 June 2005.**

Pascal Kerneis. Managing Director of the European Services Forum. Interview by author. 15 June 2005.

Strategy Analyst, working primarily in the working group on Foreign Economic Relations, European Roundtable of Industrialists (ERT). Interview by author. 7 October 2004. **


Peter McNamee. Legal Advisor, Council of Bars and Law Societies of Europe (CCBE). Interview by author. 10 June 2005.

Advisor/Advocacy Officer/lawyer, European Foreign Trade Association (EFTA). Phone interview by author. 27 September 2004.**

Marc Pouw. Secretary General, Association of European Public Postal Operators (PostEurop). Phone interview by author. 1 July 2005

WTO Advisor, Union of Industrial and Employers’ Confederations of Europe (UNICE). Interview by author. 24 September 2004.**

Mark van der Horst. Chairman, Competition and Market Reform Committee, European Express Association (EEA). Interview by author. 7 June 2005.

**Trade Union Representatives**

Peter Coldrick. Former Confederal Secretary of the European Trade Union Confederation. Interview by author. 18 May 2005.


**NGO Representatives**

Louis Belanger. OXFAM International: EU Advocacy and Media Officer. Interview by author. 8 February 2006.


Senior Official, European Public Services Federation (EPSU). Phone interview by author 10 May 2005.**


Stijn Oosterlynck. Advocacy Officer, Attac-Flanders. Interview by author. 18 May 2005.

European Trade Policy Officer, World Wide Fund (WWF). Interview by author. 4 October 2004.**

Erik Wesselius. Campaigner and Researcher at Corporate European Observatory and GATSwatch. Interview by author. 23 May 2004.
## Appendix 2: Key NGOs involved in the TRIPS: Access to Medicines and the GATS: Access to Water Issues in Europe

<table>
<thead>
<tr>
<th>Name of Organization involved in the TRIPS Access to Medicines Campaign*</th>
<th>EU Advocacy Office</th>
<th>Country of Origin</th>
<th>Contact</th>
<th>Website</th>
<th>Description/Purpose of the Organization²</th>
</tr>
</thead>
<tbody>
<tr>
<td>Médecins Sans Frontières: Access to Medicines Campaign</td>
<td>Rue Dupré, 94, 1090 Brussels, Belgium</td>
<td>France</td>
<td>Alexandra Heumber, EU Advocacy Liaison Officer serves as the interface of the MSF Access Campaign with the EU Email: <a href="mailto:alexandra.heumber@brussels.msf.org">alexandra.heumber@brussels.msf.org</a></td>
<td><a href="http://www.accesmsmed-msf.org/">http://www.accesmsmed-msf.org/</a></td>
<td>The MSF-Access Campaign is the advocacy arm of MSF. In the field, MSF doctors are constantly frustrated by the lack of adequate medical tools to give quality care to the patients we treat. In response, Médecins Sans Frontières set up the MSF Access Campaign in 1999 to improve access to existing medical tools (medicines, diagnostics, vaccines) and to stimulate the development of urgently needed better tools for people in countries where MSF works. From the start, we faced two major challenges – the high cost of existing medicines and the absence of treatments for many of the diseases affecting our patients. Our response has been on the one hand to challenge the high costs of existing drugs or outdated treatment policies. On the other hand, we have worked to stimulate research into new medicines for neglected diseases such as tuberculosis, sleeping sickness and malaria.</td>
</tr>
<tr>
<td>Oxfam International Brussels - EU Advocacy</td>
<td>22 rue du Commerce 1000 Brussels, Belgium</td>
<td>Netherlands</td>
<td>Luis Morago, Head of Office Email: <a href="mailto:luis.morago@oxfaminternational.org">luis.morago@oxfaminternational.org</a></td>
<td><a href="http://www.oxfam.org">www.oxfam.org</a></td>
<td>Oxfam's Make Trade Fair Campaign targets politicians, corporations and the public at large in 21 countries of Asia, Africa, Latin America, Europe and North America to transform trade into part of the solution to world poverty, instead of part of the problem. Oxfam is calling for a radical reform of the international trading system so that trade can become an engine for poverty reduction. Details of Oxfam's demands are available at: <a href="http://www.maketradefair.com">www.maketradefair.com</a></td>
</tr>
</tbody>
</table>

¹Please note that this list is not exhaustive. These are the main NGOs involved in the respective campaigns. Many others played a minor role. A list of all stakeholders registered to participate in DG Trade’s Civil Society Dialogue and their contact information are available at http://trade.ec.europa.eu/civilsoc/search.cfm?action=form

²Included here is a self-description by each organization. Where membership information is available online, a link is included.
<table>
<thead>
<tr>
<th>Organization</th>
<th>Address</th>
<th>Contact Person</th>
<th>Email</th>
<th>Website</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oxfam Solidarité</td>
<td>60 Rue des Quatre-Vents, 1080 Brussels, Belgium</td>
<td>Isabel Verriest, Head of Dept for International Trade</td>
<td><a href="mailto:isabel@oww.be">isabel@oww.be</a></td>
<td><a href="http://www.oxfamsol.be/fr/">http://www.oxfamsol.be/fr/</a></td>
<td>Oxfam-Solidarity Belgium works to advance all of the Oxfam International Campaigns in Europe.</td>
</tr>
<tr>
<td>Health Action International - Europe</td>
<td>Overtroom 60/II 1054 HK Amsterdam, The Netherlands</td>
<td>Teresa Alves</td>
<td><a href="mailto:teresa@haiweb.org">teresa@haiweb.org</a></td>
<td><a href="http://www.haiweb.org/01_about_europe.htm">http://www.haiweb.org/01_about_europe.htm</a></td>
<td>HAI Europe is a non-profit, growing, European network of consumers, public interest NGOs, health care providers, academics, media and individuals with 25 years experience in representing the voice of civil society, the poor and the marginalized in medicines policy debate. HAI Europe works towards a world where all people, especially the poor and disadvantaged, are able to exercise their human right to health, through equitable access to affordable quality health care and essential medicines. HAI advocates for greater transparency in all aspects of decision-making around pharmaceuticals, for example, by reducing industry secrecy and control over important clinical data. HAI promotes the rational use of medicines: that all medicines marketed should meet real medical needs; have therapeutically advantages; be acceptably safe and offer value for money. HAI works for better controls on drug promotion and the provision of unbiased, independent information for prescribers and consumers. Whether working locally, nationally, regionally or internationally, HAI Europe uses various methods to reach its goals. This includes campaigning, information sharing, action-oriented research, workshops and training, development of tools and new evidence, and advocacy. Membership information is available at: <a href="http://www.haiweb.org/01_about_members.htm">http://www.haiweb.org/01_about_members.htm</a></td>
</tr>
<tr>
<td>ActionAid International - Europe</td>
<td>Rue de Commerce 41 1000 Brussels, Belgium</td>
<td>Louise Hildich, Head of European Affairs</td>
<td><a href="mailto:miossa@actionaid.org">miossa@actionaid.org</a></td>
<td><a href="http://www.actionaid.org">http://www.actionaid.org</a></td>
<td>ActionAid is one of the largest development agencies, working in partnership with communities in over 40 countries in Africa, Asia, Latin America and the Caribbean to fight poverty and its causes. Since 1987, ActionAid has been at the forefront of community-based responses to HIV/AIDS, including supporting community-based organizations, developing the innovative Stepping Stones programme, supporting home-based care and VCT and advocating for the rights of people with HIV/AIDS and those vulnerable to it. ActionAid country programmes around the world work together to change the social and economic factors that drive the epidemic at community, national and international levels. In January 2004, ActionAid International was founded with its HQ in Johannesburg.</td>
</tr>
<tr>
<td>ActUp-Paris</td>
<td>BP287 75525 Paris cedex 11, 75525 Paris, France</td>
<td>Khalil Elouardighi, Treatment Access Campaign Worker</td>
<td>Elouardighi, Treatment Access Campaign Worker E-mail:</td>
<td><a href="http://www.actuppars.org">http://www.actuppars.org</a></td>
<td>ACT UP is a diverse, non-partisan group of individuals united in anger. Act Up-Paris is an activist group, a lobby and a militant group. Act Up-Paris tries to attract media attention by staging Zaps, i.e. quick and very spectacular actions focused on particular issues.</td>
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</table>
Our aim is to encourage the media to report on the situation, to force people to react, to expose specific problems, to urge onlookers to respond and take a stand, and to show to what degree of violence we are confronted daily. Act Up-Paris has been recognized as expressing the point of view of people with AIDS by political parties, members of parliament, pharmaceutical companies, research institutions, health care providers and AIDS education authorities. Act Up-Paris has proved capable of organizing massive demonstrations joined by several thousands of sympathizers. The purpose of those demonstrations is to establish our representativeness and ensure that the institutions listen to our demands. Act Up-Paris has to be present on all fronts: in the streets, in the media and in the offices of policy-makers, for that is where decisive action must be taken, day after day, in the fight against AIDS.

The Consumer Project on Technology was started in 1995. Our work is documented extensively on the CPTech web page. Currently CPTech is focusing on issues concerning the production of and access to knowledge, including medical inventions, information and cultural goods, and other knowledge goods. Much of this work concerns intellectual property policy and practices, but some of it concerns different approaches to the production of knowledge goods, including for example new business models that support creative individuals and communities, and new incentive systems for investments in medical and agricultural inventions, such as those involving prizes and/or competitive Intermediaries. We also do some work on electronic commerce and competition policy.

<table>
<thead>
<tr>
<th>Name of Organization involved in the GATS: Water Campaign*</th>
<th>EU Address</th>
<th>Contact</th>
<th>Website</th>
<th>Description/Purpose of the Organization</th>
</tr>
</thead>
<tbody>
<tr>
<td>CPTech</td>
<td>24 Highbury Crescent N5 1RX London UK</td>
<td>James Love, Director Email: james.love@ cptech.org</td>
<td><a href="http://www.cptech.org">http://www.cptech.org</a></td>
<td>The Consumer Project on Technology was started in 1995. Our work is documented extensively on the CPTech web page. Currently CPTech is focusing on issues concerning the production of and access to knowledge, including medical inventions, information and cultural goods, and other knowledge goods. Much of this work concerns intellectual property policy and practices, but some of it concerns different approaches to the production of knowledge goods, including for example new business models that support creative individuals and communities, and new incentive systems for investments in medical and agricultural inventions, such as those involving prizes and/or competitive Intermediaries. We also do some work on electronic commerce and competition policy.</td>
</tr>
<tr>
<td>World Development Movement</td>
<td>66 Offley Road, London UK SW9 0LS</td>
<td>Benedict Southworth, Director Email: <a href="mailto:wdm@wdm.org.uk">wdm@wdm.org.uk</a></td>
<td><a href="http://www.wdm.org.uk/">http://www.wdm.org.uk/</a></td>
<td>The World Development Movement (WDM) tackles the underlying causes of poverty. We lobby decision makers to change the policies that keep people poor. We research and promote positive alternatives. We work alongside people in the developing world who are standing up to injustice. Information on the various campaigns in available on the organization's website. Information on how the organization functions is available at: <a href="http://www.wdm.org.uk/about/index.htm">http://www.wdm.org.uk/about/index.htm</a></td>
</tr>
<tr>
<td>Third World Network</td>
<td>rue de Lausanne 36 1201 Geneva, Switzerland</td>
<td>Martin Khor, Director of Third World Network Email: OR Cecilia Oh, Legal Advisor and Head of TWN:</td>
<td><a href="http://twinside.org.sg">http://twinside.org.sg</a></td>
<td>Third World Network (TWN) is an independent non-profit international network of organizations and individuals involved in issues relating to development, Third World and North-South affairs. Its main objectives are: to conduct research on economic, social and environmental issues pertaining to the South; to publish books and magazines; to organize and participate in meetings and seminars; and to provide a platform representing broadly</td>
</tr>
<tr>
<td><strong>Corporate Europe Observatory (CEO), Trade Observatory and GATSWatch</strong></td>
<td><strong>De Wittenstraat 25 1052 AK Amsterdam, Netherlands</strong></td>
<td><strong>Geneva Email:</strong> <a href="mailto:twn.@igc.apc.org">twn.@igc.apc.org</a></td>
<td><strong>Southern interests and perspectives at international fora such as the UN Conferences and processes. Further information on TWN activities is available at <a href="http://www.twnside.org.sg/twnintro.htm">http://www.twnside.org.sg/twnintro.htm</a>.</strong></td>
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<td></td>
<td></td>
<td>Erik Wesselius, Campaigner and Researcher Email: <a href="mailto:erik@corporateeurope.org">erik@corporateeurope.org</a></td>
<td>CEO is a European-based research and campaign group targeting the threats to democracy, equity, social justice and the environment posed by the economic and political power of corporations and their lobby groups. The Corporate Europe Observatory (CEO) team of campaigners and researchers currently consists of: Belén Balanyá, Kim Bizzarri, Olivier Hoedeman, Nina Holland, David Leloup, Martin Pigeon, Oliver Shykles, Yiorgos Vassalos, Erik Wesselius. Roel van den Bosch is our financial administrator and Aniruddha helps out with our IT infrastructure. Our advisory board consists of: Pratap Chatterjee (India/US), Ann Doherty (The Netherlands/US), Ramon Fernandez Duran (Spain), Susan George (France), Adam Ma'aniit (UK/US), America Vera-Zavala (Sweden) and Thomas Wallgren (Finland). Information on sources of funding for 2005-2007 is available at: <a href="http://www.corporateeurope.org/docs/CEO-income-2005-07.pdf">http://www.corporateeurope.org/docs/CEO-income-2005-07.pdf</a></td>
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<tr>
<td><strong>ATTAC (especially ATTAC-Belgium)</strong></td>
<td><strong>Rue Blanche 15, B-1050 Brussels, Belgium</strong></td>
<td></td>
<td>ATTAC was founded in 1998 and its first concrete proposal was the taxation of financial transactions in order to create a development fund and to help curb stock market speculation. This is what gave A T T A C its name: the Association for the Taxation of Financial Transactions to Aid Citizens. Today, the ATTAC network is present in many countries and is active on a wide range of issues: the WTO and international financial institutions, debt, taxation of financial transactions, tax havens, public services, water, free-trade zones (Mediterranean, American, European etc. In each country, the association has groups working on various themes. All of these groups are involved in national and international campaigns whose aim is to propose concrete alternatives to neoliberal orthodoxy, based on solidarity.</td>
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<tr>
<td><strong>Friends of the Earth Europe</strong></td>
<td><strong>Rue Blanche 15, B-1050 Brussels, Belgium</strong></td>
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<td>Friends of the Earth Europe campaigns for sustainable and just societies and for the protection of the environment, unites more than 30 national organizations with thousands of local groups and is part of the world's largest grassroots environmental network, Friends of the Earth International. FOEE is the largest grassroots environmental network in Europe campaigning for sustainable solutions to benefit the planet, people and our common future. Its members are united by a common belief in strong grassroots activism and effective national and international advocacy. The European branch of Friends of the Earth International is the world's largest grassroots environmental network uniting 73 national member organizations and some 5,000 local</td>
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<tr>
<td>Organisation</td>
<td>Address</td>
<td>Contact Person</td>
<td>Email(s)</td>
<td>Website/Notes</td>
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<tr>
<td>World Economy, Ecology and Development (WEED), Germany</td>
<td>Torstr. 154, Berlin D-10115, Germany</td>
<td>Peter Fuchs, Project Manager International Trade and Investment Programme</td>
<td><a href="mailto:peter.fuchs@weed-online.org">peter.fuchs@weed-online.org</a> OR Christina Deckwirth, Trade Campaigner and Researcher Email: <a href="mailto:christina.deckwirth@weed-online.org">christina.deckwirth@weed-online.org</a></td>
<td><a href="http://www.weed-online.org/themen/english.html">http://www.weed-online.org/themen/english.html</a></td>
</tr>
<tr>
<td>Oxfam International Brussels - EU Advocacy, Belgium</td>
<td>22 rue du Commerce 1000, Brussels, Belgium</td>
<td>Luis Morago, Head of Office</td>
<td><a href="mailto:luis.morago@oxfaminternational.org">luis.morago@oxfaminternational.org</a></td>
<td><a href="http://www.oxfam.org">www.oxfam.org</a> see above</td>
</tr>
<tr>
<td>Oxfam Solidarité Belgium</td>
<td>60 Rue des Quatre-Vents, 1080 Brussels, Belgium</td>
<td>Isabel Vertriest, Head of Dept for International Trade</td>
<td><a href="mailto:isabel@oww.be">isabel@oww.be</a></td>
<td>see above</td>
</tr>
<tr>
<td>Save the Children (Europe and UK), UK</td>
<td>1, avenue des Arts 1210, Brussels, Belgium AND 1 St John's Lane, London EC1M 4AR, UK</td>
<td>Marta Ballesteros, Head of Brussels Office and Karin Lundell European Policy and Advocacy Officer</td>
<td><a href="mailto:info@savethechildren.be">info@savethechildren.be</a></td>
<td><a href="http://www.savethechildren.org">http://www.savethechildren.org</a> <a href="http://www.savethechildren.net/brussels">www.savethechildren.net/brussels</a></td>
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Save the Children Europe Group is a network of Save the Children organisations working in eight European Union (EU) states and four non-EU states. Like other Save the Children organisations, its members work with and for children in their own countries and abroad. Save the Children Europe Group has an advocacy office in Brussels and works towards its goals by conducting research and lobbying the EU institutions. Save the Children Europe Group also works with other nongovernmental organisations (NGO networks) in the fields of social policy, development, migration/asylum, and poverty. Save the Children is the world’s largest independent organisation for children, making a difference to children’s lives in over 120 countries. From emergency relief to long-term development, Save the Children helps children to achieve a happy, healthy and secure childhood. Save the Children listens to children, involves children and ensure their views are taken into account. Save the Children secures and protects children’s rights – to food, shelter, health care, education and freedom from violence, abuse and exploitation. Information on Member Organizations is available at
<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
<th>City</th>
<th>Country</th>
<th>Website</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>The Coalition of the Flemish North-South Movement 11.11.11</td>
<td>Vlasfabriekstraat 11, 1060 Brussels, Belgium</td>
<td>Belgium</td>
<td>Belgium</td>
<td><a href="http://www.11.be/index.php?id=8015">http://www.11.be/index.php?id=8015</a> &amp;option=content&amp;task=section</td>
<td>11.11.11 combines the efforts of 90 organizations and 375 committees of volunteers who work together to achieve one common goal: a fairer world without poverty. 11.11.11 concentrates on lobbying policy makers, because a good policy framework is essential for a well-balanced and sustainable development. They do this in cooperation with their members, with their partner organizations in the South and through international networks of like-minded organizations.</td>
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