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Civil Society Participation and Environmental Protection in the European Community’s Multilateral Trade Negotiations Policy and Procedure

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**Part One: The EC, The WTO and Protection of the Environment.**

The competence of the EC to negotiate and conclude external trade agreements forms part of the EC’s Common Commercial Policy. The expansion of international trade since the 1970s, the enlargement of the EC and progressive integration of the common market has resulted in a significant increase in the importance of that policy.² A major component of the EC’s Common Commercial Policy consists of its role in relation to the WTO. EC competence in relation to the WTO is based on Article 133 (ex Article 113) of the Treaty Establishing the European Community.³ Paragraph 1 of that provision states:

The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

Article 133 (ex Article 113) and Article 228 (ex Article 300) regulates the extent and exercise of EC competence to negotiate international trade agreements with non-EC States or international organisations. Paragraph 7 of Article 228 (ex Article 300) makes it clear that applicable international trade agreements negotiated and concluded by the EC bind both EC institutions and Member States. Nicolaidis and Meunier propose that there were two reasons for delegation of power from Member States to the EEC under Article 113 of the original Treaty of Rome. The first reason was to insulate policy making from

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² Two figures indicate the scale of the expansion in international trade in recent decades. In 1960, the value of international trade was $629 billion. In 2003 it was worth $9,100 billion: J.A. Scholte, *Democratising the Global Economy: The Role of Civil Society*, (Centre for the Study of Globalisation and Regionalisation, University of Warwick, 2004) at 10.

domestic pressures with a view to promoting trade liberalisation. The second was to help achieve conclusion of international trade agreements and increase the EEC’s external influence in their negotiation.⁴

European Community (EC) adoption of the results of the Uruguay Round (1986-1994) of multilateral trade negotiations prompted disagreement between the European Commission on the one hand and the European Council and several EC Member States on the other about the extent of the powers conferred on the EC under Article 133 (ex Article 113) of the EC Treaty. Kovač has summarised the issue in the following terms:

The main problem of the EC involvement within the WTO was whether all of the subject matter of the WTO was covered by exclusive Community competence under Article 113 of the amended EC Treaty, as it was first viewed by the Commission. This would lead to the Community becoming a member alone, what has been opposed by the Member States and the Council which believed that the WTO Agreement covered important subjects remaining within the members’ powers.⁵

The disagreement between the Commission and the Council of Ministers and several EC Member States led to a request to the European Court of Justice (ECJ) for an Advisory Opinion on the extent of EC competence to conclude and implement the WTO Agreement.⁶ The Court’s Opinion indicated that Article 133 (ex Article 113) raised several fundamental issues about the division of powers between the EC and its Member States in relation to the negotiation and conclusion of external trade agreements, the relationship between international treaty law and that of the EC and the position of the EC in the WTO. The key aspect of the ECJ’s Advisory Opinion for the purposes of the present paper is its finding that, under Article 133 (ex Article 113) of the EC Treaty, the

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EC has exclusive competence to negotiate and conclude international agreements on external trade in goods.\(^7\)

Since the mid 1990s, a number of WTO trade disputes have demonstrated that obligations under the WTO Agreement have to be borne in mind when the EC and other WTO Members are implementing measures for the protection of human health and the environment. The 2006 WTO Panel Report in *EC-Biotech Products* is the most recent of those disputes.\(^8\) Here, the Panel upheld claims by the United States, Canada and Argentina that the EC had failed between October 1998 and 29 August 2003 to make final decisions about the approval of biotech products and that this failure was inconsistent with EC obligations under Article 8 and Annex C (1) (a) of the 1994 WTO Agreement on the Application of Sanitary and Phytosanitary Measures (‘the SPS Agreement’). In particular, the Panel found that a ‘blocking minority’ of EC Member States existed that effectively prevented adoption of decisions in the Council of Ministers approving biotech products. The Panel also held that prohibitions imposed by certain EC Member States on specific biotech products after they had been approved at EC level for Community-wide marketing were inconsistent with WTO law.

On the basis of its findings, the Panel concluded that under the terms of Article 3.8 of the WTO’s 1994 Understanding on Rules and Procedures for the Settlement of Disputes (DSU) benefits accruing to the US, Canada and Argentina under the WTO Agreement had been nullified or impaired.\(^9\) On 21\(^{st}\) November 2006, the Panel’s recommendations that


\(^9\) In relation to the US, see Panel Report at paragraphs 8.15 (general moratorium), 8.19 (approval of specific products) and 8.31 (EC Member State safeguard mechanisms). In relation to Canada, see Panel Report at paragraphs 8.35 (general moratorium), 8.39 (approval of specific products) and 8.47 (EC Member State safeguard mechanisms). In relation to Argentina, see Panel Report at paragraphs 8.54 (approval of
the EC bring its impugned measures into conformity with EC obligations under WTO law were adopted by the WTO’s Dispute Settlement Body. On 19th December 2006 the EC indicated both its intention to implement those rulings and recommendations in a manner consistent with its obligations under WTO law and its willingness to discuss an appropriate timeframe for doing so with the US, Canada and Argentina under Article 21.3(b) of DSU.

Implementation of the WTO Panel’s findings in EC-Biotech Products seems likely to facilitate much greater use of GMOs in agriculture throughout the EC. To some extent, GMO use in food can be addressed through adequate product labelling requirements. Consumers can then exercise a choice about whether to use those foods or not. The use of GMOs in agriculture and feedstuffs is more problematic as individuals and communities may have little knowledge about its usage. Persons involved in organic farming may be particularly affected in an adverse manner by the increased use of agricultural biotechnology.

The WTO Panel Report, EC-Biotech Products, suggests that the ECJ’s 1994 Advisory Opinion failed to address a gap between EC competence to negotiate and conclude international trade agreements and subsequent decisions in the Council of Ministers that are needed in order to implement obligations undertaken in those instruments. This gap, the impact of trade obligations on non-trade issues such as protection of human health and the environment and the EC’s wish to deepen the scope of international trade agreements to cover the making domestic rules, supports the case for adequate democratic governance in the exercise of EC competence under Article 133 (ex Article 113) of the EC Treaty. The need for such democratic governance is reinforced when the complex set of legal and policy issues that require attention in the use of agricultural biotechnology products is considered.

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Part Two: Legal and Policy Issues Raised by Agricultural Biotechnology Products

The use of agricultural biotechnology products raises several legal and policy issues for society including challenges to the capacity of traditional legal remedies to address consequences of their usage.

Limitations on use of the mechanism of judicial review of decisions of regulatory regimes to license GM production is evident in the decision of the English Court of Appeal in *R..v Secretary of State for the Environment and MAFF, ex parte Watson.* In that case, the English Court of Appeal held that it was not irrational for the National Institute for Agricultural Botany to approve a trial planting of GM maize in Devon without securing a guarantee of no cross-pollination of crops of an organic farmer on an adjoining farm.

Difficulties are also posed for tort remedies such as actions in private nuisance, negligence and the rule in *Rylands v. Fletcher* because of problems in applying its established concepts such as foreseeability of harm, causation, and quantification of loss in relation to the impact of GMOs on third parties.

The deliberate release of agricultural biotechnology products also raises complex issues about the balance to be struck between protection of intellectual property rights in GMOs and the prevention of liability being unjustly imposed on farmers whose crops are unwittingly cross-pollinated with patented genetic material. The potential for the imposition of such liability is strikingly evident in the action taken by Monsanto against Percy Schmeiser in which that Canadian farmer was initially ordered to pay damages for infringement of Monsanto’s patented RT73 gene due to his use of seeds set aside from his own rapeseed crop which had become mixed with the patented material.

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Public policy issues provoked by the deliberate release of GMOs into the environment include the appropriate level of protection of public health, the correct balance between public interest in the maintenance of biodiversity and individual choice to use agricultural biotechnology products that might cause its diminution. Appropriate forms of regulation for importation, manufacture, transportation, sale and use of agricultural biotechnology and of liability regimes to secure compensation for harm caused to the environment involve complex issues such as the definition and measurement of environmental harm and the feasibility of restoration of biodiversity that is lost as a result of GMO cultivation.14

A challenge for all societies in the twenty-first century is to provide appropriate responses to such issues. The WTO Panel Report in the EC-Biotech Products case confirms that the parameters of WTO obligations have to be considered when those responses are being made. The existence of those parameters highlights important questions about the extent of democratic governance in the area of multilateral trade negotiations and how it may benefit from enhanced civil society participation.

**Part Three: Civil Society Participation and democratic governance in relation to multilateral trade agreements.**

Civil society participation involves the expansion of concept and practice of democracy from traditional forms of representative government in which the public participate predominantly through exercise of a vote in parliamentary and presidential elections to one where there is much greater involvement in governance.

A number of challenges exist in enhancing civil society participation where the EU – and other States- exercise competence to negotiate and conclude international trade agreements. One challenge arises from the fact that a wide variety of sectors have

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interests - and often competing ones - in the outcome of negotiations on an international trade agreement. A more basic issue however concerns the nature of civil society participation itself.

Scholte provides the following helpful functional definition of civil society:

> In today’s context we might define civil society as 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.\(^{15}\)

Controversy exists whether a characteristic dimension of civil society participation is inherently normative, that is, directed to the advancement of values such as social justice and respect for human rights.\(^{16}\) Wild suggests the key challenge in development of the progressive normative dimension of global civil society participation requires strengthening it in four ways.\(^{17}\)

The first way is through promotion by donor, international institutions and private foundations of a fully inclusive global civil society. This involves support for networks of civil society participation in developing countries including their capacity for research, policy analysis, financial independence, sustainability and advocacy training.

The second way is in support for national and international environments that assist diversity of media opinion, access to information and opportunities for communication and organisation across frontiers.

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\(^{17}\) Ibid, at 2.
The third way is through improvement of accountability and transparency in the activities of global civil society. An important contribution in this area is being made by *Humanitarian Accountability Partnership – International*. That Partnership has articulated several principles on accountability and transparency that are to be applied in its participating agencies. Those Principles involve commitments to humanitarian standards and the rights of beneficiaries; to standard setting and capacity building for their implementation; to communication with and involvement of stakeholders; monitoring and reporting on compliance; and to implementation when working with partner agencies.\(^{18}\)

The fourth way identified by Wild relates specifically to the theme of this paper. That area involves the establishment of a new relationship between civil society and global institutions. Key principles that form the basis for that new relationship are articulated in the 2004 Cardoso Report on Civil Society, the United Nations and Global Governance.\(^{19}\) Enhanced civil society participation has been a feature of the work of the United Nations Organisation throughout the 1990s not least in the area of protection of the environment.\(^{20}\) The Cardoso Report builds on that work and highlights a need to redefine the concept of multilateralism so that it includes a multiplicity of actors encompassing civil society and business as well as central and local government. That Report also encourages the building of stronger connections between the global and the local to surmount democratic deficits in global governance.

Apart from the United Nations, provision for civil society participation has also been addressed in relation to environmental protection in the 1998 *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in* 

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Environmental Matters. That international instrument is providing a significant impetus for the establishment of adequate mechanisms for civil society participation in relation to environmental matters in a European context.\footnote{V. Rodenhoff, 'The Aarhus Convention and its Implications for the 'Institutions' of the European Community' 11 (2002) Review of European Community & International Environmental Law, 343.}


One way to gauge the extent of civil society influence in EC multilateral trade negotiations on the current WTO Doha Development Agenda trade talks is through the role it has been given in the Sustainability Impact Assessment (SIA) of that Round commissioned by the EC. It is noteworthy that consultation and stakeholder participation
are one of the components of SIA methodology. In addition, submissions from stakeholders were taken into account in quantitative and qualitative analyses of the potential impacts of the Doha Round negotiations. However, as the joint response made by the World Wildlife Fund and Oxfam to the Phase 3 SIA Methodology observed:

SIAs are important tools that can help deliver more sustainable trade, but they are limited. They cannot rectify negotiating agendas that are inadequate which fail to recognise and address the impacts of trade on sustainable development.

This observation is particularly relevant in the light of the key role that the EC played in the inauguration of the Doha Development Agenda Round of trade negotiations. That observation suggests that an adequate role for civil society participation in EC multilateral trade negotiations will only be realised when that sector is given a voice in defining the future agendas for such talks. It is suggested that lessons learned about civil society participation in relation to environmental protection both in the work of the United Nations and under the Aarhus Convention provide a useful resource for accomplishing that goal.

27 Ibid.