Trade Policy and Political Legitimacy in the European Union

Sophie Meunier

Center of International Studies, Princeton University, Bendheim Hall, Princeton, NJ 08544, USA.
E-mail: smeunier@princeton.edu

Accusations of the European Union's (EU's) absence of political legitimacy find a particular echo in the area of external trade policy. Indeed, the combination of decade-old complaints about the EU's democratic deficit, the traditional delegation of trade-making authority to the most central level of government, and the now widespread protests against the governance of international economic institutions since the 1999 'battle of Seattle' make for a potentially explosive mix. Yet whether trade policy in the EU is as illegitimate as its critics claim depends a lot on semantics. By distinguishing between two complementary definitions of political legitimacy — one based on 'process' and one on 'outcome' — this article analyzes whether the institutions for making trade policy in the EU, and in particular the voting rules, can be considered 'legitimate'. The article also reflects upon the recent attempts made in the EU to develop a legitimate, democratic rule at the supranational level, in particular through a rethinking of the input of civil society in its decision-making structures, and explores whether the lessons learned from the EU experience can become an institutional blueprint for the controversial reform of the governance of international economic institutions in an age of globalization.
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Trade policy has a long history of engendering protests, usually fomented by the 'losers' from trade — interest groups adversely affected by liberalization.[1] Policy-makers have often dealt with such protests either by giving in to the protesters' demands and granting them protection, or by compensating the losers in exchange for trade liberalization. Recently, however, a new form of trade protests has emerged, in which demonstrators oppose trade liberalization not only because of its contents, but also because of the process through which it is made. From the streets of Seattle to the streets of Goteborg, Genoa, and Porto Alegre, activists have denounced the 'democraticidal' nature of international economic institutions and have called for a revision of their governance structure in order to make them more politically legitimate.

The grievances regarding the undemocratic nature of trade policy have the potential to be particularly acute in the European Union (EU). First, the global economy is increasingly important in determining the daily lives of EU citizens, whose countries are open (to an extent greater than the United States or Japan) to a world in which financial, commercial, human, cultural, and technological flows are faster and more extensive than ever before.[2] Second, trade policy is also affecting Europeans in a more direct manner than ever before, as the nature of what is now considered as 'trade' and therefore up for international bargaining and deregulation has changed dramatically in the past few years. 'Trade' now covers sensitive regulatory issues that used to be the domain of domestic control and, as a result, one objectively notices a gradual loss of national sovereignty over issues such as food safety or environmental protection. Yet this growing reach of trade policy has not been accompanied by the simultaneous development of new institutions with political legitimacy, which explains in part the current backlash against some effects of globalization on national economies and polities.

Moreover, the upcoming enlargement of the European Union to 10 countries in Central and Eastern Europe will undoubtedly increase the salience of the legitimacy issue in trade policy. The addition of new member states will make national traditions, interests, and political cultures increasingly heterogeneous. In the particular case of trade, this increased diversity is likely to put a strain on the current institutional mechanisms and voting procedures.

Furthermore, the existing procedures for making trade policy may be up for reform as the EU embarks on its ambitious constitutional exercise, supposed to culminate in the drafting of a European constitutions by 2004. Indeed, the debate over the legitimacy of trade policy speaks, more generally, to the heart of the federal debate about the future of the European Union. How member states aggregate their preferences in this oldest, most integrated common policy area should be considered a test for how they can do it in more recent, more sensitive policy areas — such as monetary union or foreign policy.

Globalization, enlargement, and constitutional reform seem to call for a reassessment of the role and design of trade policy-making institutions in the European Union — if only to prevent overwhelming concerns over democratic legitimacy from eroding the efficiency of the current institutional system carefully crafted over more than four decades of common trade policy. The main goal of this article is to assert the empirical and theoretical link between trade and legitimacy. From a theoretical standpoint, I argue that whether trade policy in the EU is as illegitimate as its critics claim depends a lot on semantics. By distinguishing between two separate, but complementary, definitions of political legitimacy — one based on 'process' and one on 'outcome' — this article analyzes whether the institutions for making trade policy in the EU can be considered 'legitimate' after all. From a policy perspective, the article also

reflects upon the recent attempts made in the EU to develop a legitimate, democratic rule at the supranational level, in particular through a rethinking of the input of civil society in its decision-making structures, and explores whether the lessons learned from the EU experience can become an institutional blueprint for the controversial reform of the governance of international economic institutions in an age of globalization. In the end, however, it may well be that no institutional fix will assuage the critics, who have seized on 'legitimacy' and 'globalization' as convenient catchphrases for their disgruntlement.

The Legitimacy Debate in Trade Policy

Trade is the oldest, and most successfully integrated, common policy in the EU.[3] For almost four decades, trade policy was the matter of complex, technical deals between obscure negotiators, and as such raised little media and public interest. However, this has been changing in the EU, as it has been changing at the global level since Seattle in 1999. Today, the legitimacy of trade policy is becoming a political issue. It has indeed become very difficult for statesmen to meet to discuss trade issues without triggering an outpouring of anti-globalization demonstrators in the streets — this is true for EU summits, as it has become true for WTO, IMF, and G8 meetings.

As evidence of this newfound scrutiny over the arcane makings of EU trade policy, it is interesting to contrast the 1997 Amsterdam negotiations, when member states tackled the sensitive issue of competence over trade in services, to the 2000 Nice negotiations, where the same, unresolved issue was addressed once again (Meunier and Nicolaidis, 1999; Nicolaidis and Meunier, 2002). What is striking is how little attention EU trade policy has received in the past. The Amsterdam fight over whom, of the Community or the Member States, was ultimately responsible for negotiating trade agreements in the area of services took place in complete public indifference. By contrast, some civil society organizations mobilized ahead of the Nice Summit, and the media reported their actions, especially a widely circulated document entitled 'Red Alert on the 133'.[4] This document warned about the impending revision of the EU Treaty article that covered the relations between the Commission and member countries with respect to international trade. If European leaders were to modify the voting rules and other institutional procedures for reaching the single EU position in trade, so the document went, the implications would be catastrophic for democratic accountability, cultural diversity, and social policy in Europe.

The greater political spotlight put on the linkage between trade and legitimacy can be explained by the potentially explosive combination of the

perceived 'democratic deficit in the EU'; the traditional distorted interest representation in trade policy-making and therefore the subsequent insulation of the trade policy-making process; and the Pandora's box of democratic legitimacy complaints opened up in Seattle. All are transforming the environment for making trade policy efficiently.

'Democratic deficit' debate in the EU

Before being applied to trade policy, the expression 'democratic deficit' has been widely used since the 1990s to describe, and often overemphasize, the presumed gaps in democracy characterizing the workings of the EU. Abundant literature has disseminated the term, which is used in general to explain popular resistance to integration.[5] According to its numerous critics, the EU's democratic deficit is coming from perceived weaknesses in the three main components of legitimacy: structural, social, and cultural.

Above all is the impression of the undemocratic structure of European institutions. European integration is a process that has been historically driven by elites, not by popular vote (e.g. Banchoff and Smith, 1999). It proceeded, at least in its early days, according to the neo-functionalist logic of spillover — also called the 'Monnet method'. With the 1992 ratification of the Maastricht Treaty on EU, many politicians and citizens in Europe began to question the process of European integration, which appeared to have taken place without popular momentum or support. Since the near defeat of Maastricht following the Danish and French referenda, few major decisions about the future direction of the EU have been put up again for direct public approval. This has further contributed to perpetuating the discourse on the democratic deficit.

Moreover, the institutions of the EU are often referred to as undemocratic, mostly because of the lack of transparency of the policy-making process and the extreme complexity of decision-making procedures, which allegedly makes EU institutions impossible to understand for the average citizen. The European Parliament — the only body directly elected in the EU's complex institutional apparatus — has limited powers and is too weak to provide effective democratic representation. Its role in policy-making has increased in the past decade, but not enough to correct the impression of powerlessness. The Council of Ministers is made up of ministers from the member states, and therefore should be considered legitimate and accountable, but its role is misunderstood by the public at large. As for the Commission, composed of appointed members, it may appear unaccountable to EU citizens. Therefore, as Siedentop (2001) has argued, the EU often appears as an 'alien government of strangers' imposed from a remote capital.[6]

Europe is often portrayed as suffering also from a social deficit, because of the absence of transregional social actors. Critics deplore the lack of a real

cross-national debate on grand societal questions, as well as the non-existence of Europe-wide political parties. In the words of Dehousse and Majone (1999), 'actors such as political parties or unions, which normally "translate" the political debate for public opinion, are still pretty weak at the European level.' Similarly, European elections are 'national by-elections': electoral campaigns focus almost exclusively on national issues and national agendas (Greven, 1998; Scharpf, 1999).

Finally, the EU may suffer from a deficit of cultural legitimacy. Many nation-states (although not all) are bound by a common language, religion, historical tradition, and legal culture. Instead, Europe is composed of a multitude of peoples, each with their own sense of national identity and belonging (Greven, 1998). Therefore, it is difficult for the citizens of Europe to develop attachment to the EU.[7] They feel neither subjective identification (a sense of shared collective identity and loyalty), nor objective identification (based on ethno-cultural criteria) toward the EU (Weiler, 1997).

Not everyone, however, agrees that the EU actually suffers from a democratic deficit. The EU is not a nation-state, and its member states and supranational institutions coexist side-by-side; therefore the EU should not be held to the same democratic standards (e.g. Banchoff and Smith, 1999; Moravcsik, 2002). As Moravcsik (2001) has argued, the true pillars of the EU — economic welfare, human rights, liberal democracy, and the rule of law — appeal to Europeans regardless of national or political identity. Moreover, the EU is not lacking in democratic accountability; is not out of line with the widespread and legitimate practices of Western democracies; is not contributing to an *overall* system biased against social welfare and regulation — that is, 'race to the bottom'; is not dealing with issues that would lend themselves to deliberative ('strong') democracy, even if the political structures were there; and is not handling issues that are very democratic at home, for good reasons, such as the desirability for minority rights protections, the need for expert management, and domestic representative distortions, etc. (Moravcsik, 2001). Furthermore, as Banchoff and Smith (1999) analyze, new patterns of recognition and representation have emerged in the EU: 'while Europeans do not strongly identify with the EU, they increasingly recognize it as a framework for politics alongside existing national and subnational arenas' and 'while the EU lacks strong central democratic institutions, the integration process has created significant informal and pluralist forms of representation'. Indeed, the EU has created many mechanisms through which citizens can now participate in the process and, in doing so, has opened up a lot of democratic space. For instance, because of the EU's fragmented authority, an interest group can now put an issue on the agenda in any of the Member States, as well as in

Brussels. Therefore, the EU has multiplied the number of avenues for civic participation.

Nevertheless, the fact is that even if those who talk about democratic deficit are mistaken, what matters is that these perceptions are widespread. In Max Weber's terms, the 'belief in legitimacy' is more important than actual legitimacy, or lack thereof: if the rule is recognized as legitimate by the political subjects, then it is legitimate (Weber, 1968 [1921]). The mass resignation of the European Commission in March 1999, forced by accusations of corruption and mismanagement, further fueled this sentiment of disconnection between the EU leadership and the people of Europe (even though, ironically, it precisely proved that the Commission was accountable to a Parliament with tangible powers). In trade policy, the resentment is getting even bigger as citizens become increasingly aware that a growing number of decisions affecting their daily lives are being taken at the EU level, while they feel excluded from the process.

Legitimacy concerns in trade policy-making

Trade is certainly a policy area that can arouse suspicions of illegitimacy because of its traditional reliance on delegation, executive authority, and technicality. In the EU as in the US, trade policy-making has often given the impression of shutting off, by design, popular input from the process. Indeed, there are powerful rationales for insulating the trade policy-making process from interest group pressures (O'Halloran, 1994). As a result of in part of collective action problems, there is a chronic imbalance between those who benefit from trade protection and those who pay the costs. Trade creates winners and losers. Those who benefit from trade liberalization are diffuse, and their gains are small, whereas those who lose from trade are concentrated and organized. As a result of this, the trade policy-making process can be easily captured by protectionist interests (such as farmers, manufacturers, and labor unions). Therefore, the authority for making trade policy is often delegated to the executive, in order to bypass these protectionist pressures (Destler, 1992). The EU trade policy-making process is now fairly insulated from interest group pressures, more so than in the US — where the Trade Promotion Authority, won after a fierce battle, came with strings attached and where special interests still have major input, form steel to textiles to bananas. This insulation by-design has paved the way for criticisms of democratic illegitimacy, based on lack of popular participation and lack of transparency.

The other key reason why legitimacy concerns have started to focus on trade policy can be found in the changing nature of trade. When trade liberalization was primarily about tariffs and quotas on certain types of goods, trade politics revolved essentially around economic arguments about jobs and prices. Trade

policy could be manipulated to protect special interests, and when governments decided to open up certain economic sectors to international competition, these special interests could be compensated. With each round of multilateral trade negotiations under the General Agreement on Tariffs and Trade (GATT), however, traditional trade barriers have been further reduced and new types of non-tariff barriers tackled. During the 1987–1993 Uruguay Round, the 'new issues' of services and intellectual property were added to the traditional trade agenda. Subsuming these new issues under the reach of 'trade' naturally led to the inclusion of even more sensitive issues, such as food safety and labor laws, for subsequent discussion in international trade forums. The new areas falling under trade policy, indeed, raise new concerns about legitimacy. Many more people today have reasons to feel critical of trade policy and upset about the substance of decisions being made than they did when it was only about tariff levels. The expansion of the reach of trade without a simultaneous expansion of public involvement in decision-making makes today's trade policy vulnerable to accusations of illegitimacy.

Legitimacy of international trade institutions: Seattle and beyond

Finally, the debate over legitimacy has been particularly salient in trade policy since the Battle of Seattle in November 1999. The origins of popular outcry against the political illegitimacy and undemocratic nature of international trade institutions can be traced back to the 1998 negotiations on the Multilateral Agreement on Investment (MAI), even if it acquired real public visibility only with Seattle (Henderson, 1999; Graham, 2000).[8] This can be explained by the changing nature of trade, which now touches on domestically sensitive sectors (such as education, healthcare, and culture), and therefore impinges on national prerogatives and, at the same time, directly affects definitions of national identity. Conversely, trade is also becoming an extension of the range of very contentious domestic policies, by extending domestic conflicts into the international arena.

To some extent, the WTO's institutional problems parallel the EU's democratic deficit. Its successive enlargements, the enforceability of its decisions, and its increasingly complex agenda have all contributed to this heightened sense of illegitimacy. From the perspective of the EU, however, the most important of these problems is the fact that the WTO dispute-settlement mechanism hands down binding decisions (even though members may always choose to incur sanctions instead of reforming their legislation to comply with the rulings or compensating through concessions in other areas). Any member country can challenge the laws of another country and charge that they violate WTO rules. The complaint is heard by a panel of unelected experts who have the power to find a country guilty of the charge and to authorize economic

sanctions in case the guilty party does not comply, as was the case in the bananas and beef-hormones cases. This crisis of legitimacy is intensified by the fact that the WTO's rulings are perceived to override the democratic rights of people who may well have voted to bar certain products from being available in their own country. Kelemen (2001, 622) summarizes these critics as follows: 'Nameless, unaccountable international bureaucrats will strike down duly enacted domestic laws in the name of free trade, ruling them to be protectionist nontariff barriers to trade'.

Protest against the political legitimacy of trade institutions and, more generally, multilateral economic institutions, has increased since Seattle. Anti-globalization activists as well as academics have questioned the legitimacy of some international and supranational institutions, such as the World Bank and the newly created European Central Bank (Berman and McNamara, 1999; Stiglitz, 2000, 2002). For two years in a row, counter-globalization activists have held their anti-Davos summit, the World Social Forum in Porto Alegre, where they vow to find a more democratic alternative to the current global economic institutions. Judging by the success of the meetings, it is clear that the issue will not go away in the years to come.

Institutional Rules and Trade Policy Legitimacy

Denouncing the 'democraticidal' nature of the EU or the WTO has become an accepted rallying cry among anti-globalization protesters. Yet in order to fix the democratic lacunae of regional and international trade policy bodies, one would have to know, for a start, what 'legitimacy' really means because it is an elusive concept, one that political theorists have been struggling to comprehend for centuries. Only when a clear definition of legitimacy is agreed upon will it become possible to analyze, in a more systematic way, the political consequences of various institutional rules. Should the EU's legitimacy be understood according to the same criteria as those applicable to nation-states?

A working definition of political legitimacy

The issue of legitimacy is one that has long preoccupied political theorists. They have presented several competing, as well as complementary, ways of envisioning what makes a policy 'legitimate'. Indeed, different legitimating criteria can be used to justify different kinds of political systems. Among the multiple methods for defining and operationalizing legitimacy, let me just mention the following few. According to theorists of democracy, chief among them Locke and Rousseau, legitimacy is achieved through democratic representation. Legitimacy is the will of subjects expressed through

representative — that is, democratic — institutions. The will of the majority is indeed the main source of democratic legitimacy according to Tocqueville (1835), although he also warned about the potential menace represented by the tyranny of the majority. For Max Weber, political legitimacy comes from three distinct sources. First is a rational-legal form of legitimacy: a policy is legitimate when it follows the rule of law. Second is a traditional form of legitimacy: a policy is legitimate when it provides continuity with past practices and traditions. And third, a policy is legitimate when it is 'charismatic' — that is, when it is carried out by international leaders with personal qualities.

In more recent times, writing specifically on the EU, Weiler (1997) has updated this discussion over what makes a policy 'legitimate'. Like Weber, he argues that there are three main types of legitimacy: legitimacy as legal validity (but the rules themselves could be illegitimate), legitimacy by reference to foundational myths (issues of identity), and empirical/social legitimacy (popular support). In their study of EU legitimacy, Beetham and Lord (1998) also highlight three criteria making political authority legitimate: effective performance in respect to agreed ends; democratic authorization, accountability, and representation; and agreement on the identity and boundaries of the political community. A quite different vision of political legitimacy from these more traditional liberal-democratic criteria is the one offered by Scharpf (1999). Scharpf distinguishes between two forms of democratic legitimacy, which traditionally coexist side-by-side in democratic nation-states: one that focuses on the policy process (government by the people), and one that focuses on the policy outcomes (government for the people).

Trade policy is often presented as involving a fundamental trade-off between efficiency and legitimacy. Every movement in the direction of swifter negotiations, which ultimately become internationally adopted agreements, would entail some loss of legitimacy because actors have less opportunity to influence the process. Conversely, every movement in the direction of increased legitimacy would, supposedly, reduce the margin of maneuver of negotiators and impede their ability to conclude complex international agreements. What Scharpf's definition suggests is that efficiency and legitimacy are not antagonistic but, on the contrary, complementary. While the central distinction between government 'for the people' and 'by the people' is an ancient one, Scharpf's dichotomy captures in a simple way the essence of the democratic question in the 21st century. Therefore, I have chosen to base my analysis of the legitimacy of the EU's trade policy on this definition.

Adapting Scharpf's distinction to the study of EU trade policy, I suggest that we can therefore conceive of political legitimacy as having two distinct, but

complementary, components: one based on process, and one based on outcomes.

1. *Process legitimacy*: This vision of legitimacy focuses on the process by which decisions are made. It is based on the assumption that the people are the only source of sovereignty. Policies are legitimate when policy-makers are representative, accountable and placed under public scrutiny — that is, citizens participate directly in the policy process (for instance, by referendum or direct elections), policy-makers are accountable to their constituencies (for instance, by being able to be removed from office through a competitive electoral process), and the decision-making procedure is transparent (for instance, by the opening up of debates to the public).

    On the surface, EU trade policy does not appear very legitimate in this dimension, since it is carried out by unelected Commission officials, with almost no input from national legislatures and the European Parliament, seemingly limited accountability, and opaque procedures which may make it difficult for civil society to get involved.

2. *Outcome legitimacy*: This vision of legitimacy focuses on the policy eventually made, and not on the process through which it was made. In this case, what makes a policy legitimate is its capacity to solve problems requiring collective solutions, and solve them in a way benefiting the 'public interest'.[9] If a policy is efficient — that is, if it delivers on its promises and improves the conditions of all, or almost all, individuals and groups in society — then it should be considered legitimate. Questions over legitimacy should be raised in particular when policies are redistributive — that is, they improve the conditions of one group at the expense of another.

    Trade is obviously one realm where policies are redistributive in nature. The opening up of national borders to goods and services from the outside can bring wealth to competitive firms, while it can drive to ruin uncompetitive providers or wipe out an entire national industry. Therefore, trade policy is particularly susceptible to accusations of illegitimacy. The losers from trade make their voices heard and may give the policy the impression of illegitimacy, even if in the long run, the absence of restraints to trade may be easier to legitimize than protectionism. In the EU, these accusations of illegitimacy are compounded by the fact that losers (or winners) may be concentrated in a few countries. The opening up of agricultural trade, for instance, may disproportionately affect French farmers. The question of the legitimacy of trade policy thus refers us back to the central sticking point in the whole European endeavor: national sovereignty. However, if we start thinking outside of the sovereignty box, by looking at European citizens as consumers or workers instead of French or British nationals, for instance, then EU trade policy may not be as illegitimate as it first seems.

A caveat, however, is that not all politics of protest against trade liberalization conform to this 'old' model, in which the protesters organize along sectoral lines, seeking to protect the privileged status of the sector in which they work by articulating the interests of that sector to the national interest.[10] While farmers and steelworkers have been prominent in anti-globalization demonstrations at Seattle and elsewhere, this does not mean that all such demonstrators are there simply to defend a narrow sectoral interest. Most of the demonstrators are there *as* consumers, and attend these events well aware that any success they have in derailing the trade negotiations may be at the expense of foregone future consumption possibilities. Yet, many are protesting against the very expansion of future consumption possibilities, should they be at the expense of the rights and the working conditions of producers elsewhere in the world. Appealing to citizens as consumers does not, therefore, automatically increase the 'outcome legitimacy' of trade liberalization negotiations. This will certainly not be the case in circumstances in which citizens have moral reservations about the way in which their rights as consumers are enhanced.

Majority or unanimity: which rule is the most 'legitimate'?

The public debate over the democratic deficit in the EU usually assumes the definition of legitimacy based on process. Critics of EU trade policy complain about the lack of influence of 'civil society' in the process through which decisions are made. The majority of scholars studying the democratic deficit have focused on the design of EU institutions and on concrete steps to adapt the European Parliament, the decision-making process in the Council and the Commission, and the European party system in order to increase democratic accountability.[11] By comparison, there has been very little debate in the literature on what institutional rules produce more legitimate outcomes than others.[12] Yet both 'process' and 'outcome' are essential components of political legitimacy. They are intimately linked, because the quality of the process may influence the quality of the outcome.

Trade policy in the EU involves two levels of delegation (Meunier and Nicolaidis, 1999). First, the 1957 Treaty of Rome formally transferred the competence to negotiate and conclude international agreements on trade in goods from the individual Member States to the collective entity — this is often referred to as 'exclusive competence' or 'Community competence'.[13] This transfer of competence manifests itself at the negotiation stage (where the Commission acts upon a mandate agreed upon by the Council of Ministers), as well as at the ratification stage (where individual Member States no longer have the power to formally ratify international engagements but instead

delegate this power to the collective Council of Ministers). In other cases — mostly in transport, cultural, and educational services — trade policy is governed by the regime of 'mixed competence', which allows for parliamentary control at the national level.

From a 'process' perspective, therefore, the legitimacy of EU trade policy in cases of exclusive competence can be questioned since the European Parliament is completely absent, with neither prior nor final say on the making of European trade policy. Whereas the legitimacy conferred by proper democratic procedures is lacking, some 'deliberative' legitimacy coming from civil society applies to trade policy. Many interest groups have a way of being heard, either through formal consultation or informal lobbying. Moreover, trade policy is made by the Council of Ministers, which then gives a 'mandate' to Commission negotiators. Therefore, one could except the Council, made up of national ministers, presumably chosen in the wake of competitive elections, to be perceived just as 'legitimate' as a parliament, unlike the reproach that can be made to the unelected panels of judges in Geneva adjudicating WTO disputes. From an 'outcome' perspective, this delegation of competence to the supranational level means that special interests have less opportunity to impact or disrupt the conclusion of complex multilateral trade agreements which may be, overall, beneficial to society at large. It also means, however, that entire groups may suffer negatively from the economic consequences of such agreements without having been able to influence them.

The second level of delegation in EU trade policy is the practical transfer of competence from the Council of Ministers to the European Commission (Meunier and Nicolaidis, 1999). The Commission elaborates proposals for the initiation and content of international trade negotiations. The key policy discussions take place in the 'Committee 133' composed of senior civil servants and trade experts from the member states as well as Commission representatives. The Committee examines and amends Commission proposals on a consensual basis, before transmitting them to the Committee of Permanent Representatives (COREPER) and subsequently the General Affairs Council (composed of foreign ministers from the member states), which then hands out a negotiating mandate to the Commission. In most cases, at least in theory, this mandate is agreed upon on a qualified majority basis. In practice, however, member states have always managed to reach consensus on a common text at this stage of the process, as with most other areas of policy-making in the EU. Commission officials representing the Union under the authority of the Commissioner in charge of external economic affairs conduct international trade negotiations, within the limits set by the Council's mandate. Member states are allowed to observe but not speak in WTO plenary sessions. At the conclusion of the negotiations, the Council approves or rejects the trade agreement.

There are different ways according to which the procedures for making democratic decisions can be organized, chief among them are the traditional categories of 'majoritarian' *vs* 'consensual' models, (Lijphart, 1999). In the EU, in policy areas that have been 'communautarized', these two models exist, and sometimes coexist side-by-side, with some decisions being taken according to majority rule, and others according to unanimity rule or consensus. In the particular case of trade policy, Court jurisprudence and treaty articles spell out the cases in which policy decisions are made according to majority or unanimity — for instance, majority for trade in manufactured goods, but unanimity for trade in cultural goods (Meunier and Nicolaidis, 1999; Meunier, 2000).

From the 'process' perspective, both rules seem to have the same effect on participation and transparency. However from the 'outcome' perspective, the effects of majority and unanimity voting seem to differ. The answer to the question of which institutional rule produces more legitimate outcomes than others depends on whose interests are taken into account, since the benefits from trade liberalization or protection are distributed unevenly. A useful dichotomy is the one distinguishing between the collective interests of the state and the individual interests of citizens or special social groups. Another useful distinction is whether the benchmark by which a trade policy is judged successful is a fair repartition of resources or the provision of special welfare to some elements of society.

The supranational aspects of policy-making in the EU pose an additional challenge to the determination of the political legitimacy of certain institutional rules. The common belief is that 'government is responsible to a given people, accountable to that people, and obliged to serve the best interests of that people' (Greven and Pauly, 2000, 1). But who is the 'people' in the case of the EU, since there does not seem to be a 'European people'? If the majority rule is an accepted means of ensuring democracy, and thus legitimacy, in a national setting, it does not transpose automatically to a supranational setting. Can a policy still be legitimate if it overrules the democratically expressed will of a sovereign people?

Qualified majority: One quasi-universally accepted way of ensuring a democratic government is in recognizing, according to Tocqueville, 'the absolute sovereignty of the majority.' The majoritarian model of democracy is straightforward because the best way to come up with a common rule for all individuals intuitively seems to be to go with the wish of the majority. Can this majoritarian model designed for individuals within a state be easily transposed to individual, but sovereign, states within a supranational polity? From the 'process' perspective, majority (especially when qualified by voting weights) seems, on the face of it, a fair rule for aggregating the diverse interests of the EU member states into a coherent common position for trade negotiations,

since it gives every member a say in the process. From the 'outcome' perspective, majority also seems a fair rule. Since the opening up of trade barriers has a redistributive effect, creating winners and losers, there will inevitably be conflict over such redistribution. Majority voting seems equipped for resolving such conflict in a legitimate manner.

Why, then, did the counter-globalization activists, who demonstrated loud and clear during the preparation of the December 2000 Nice summit whose agenda included the reform of trade policy-making institutions in the EU, demand the opposite? They claimed that majority was not legitimate because, from the 'outcome' perspective, it tends to produce more liberal, less protectionist policies. In the eyes of many critics, majority is illegitimate at the supranational level because it enables member states to override the interests and preferences of another sovereign member state. This is why, for instance, NGOs were so insistent in Nice that France did not give up unanimity on trade in cultural goods but instead enshrines in the treaty the clause known as cultural exception (Nicolaidis and Meunier, 2002). Anti-globalization protesters were thus put in the difficult position of denouncing the voting rule traditionally accepted as the most democratic.

If Tocqueville talked about the 'sovereignty of the majority', however, he also warned about the 'tyranny of the majority.' The majoritarian process may be legitimate, but the outcome may not necessarily be so. Even a proper majority, which follows proper democratic procedures, may produce decisions that affect a minority so negatively that the outcome may seem illegitimate. In the supranational EU, majority voting is particularly contested in those areas where decisions may negatively impact the interests not of a specific social group but of the entire country at large — as would be the case in the field of cultural policy *vs* agriculture, for instance. This is why, even though most of trade policy in the EU is now made according to qualified majority rule, battles over the preservation of a veto right have been so salient.

Unanimity/consensus: The main alternative to the majoritarian model for ensuring democracy while aggregating diverse preferences is the 'consensus model' (Lijphart, 1999). In this model, particular policies are chosen when they can muster broad agreement, mostly by inclusiveness, bargaining, and compromise. In the EU, many decisions are made according to consensus, even when the formal rules as laid out in the treaties state otherwise. In trade policy, even though the default voting rule is majority, most decisions on agriculture, for instance, have been made on a consensual basis.

From the 'process' perspective, the unanimity/consensus rule does not seem less legitimate than majority rule, especially since the actors whose preferences may be passed over in a majoritarian setting are entire states, each representing millions of individuals. In plural societies, where homogeneity and common sense of purpose are absent, the majority rule can be undemocratic and dangerous in

the long run, 'because minorities that are continually denied access to power will feel excluded and discriminated against and may lose their allegiance to the regime' (Lijphart, 1999, 33). To the contrary, the consensual model of democracy ensures that no large groups are left out of the possibility to control and influence the policy process. From the 'outcome' perspective, unanimity/consensus may seem one obvious remedy to the legitimacy shortcomings of majority voting because it is less exclusive and, additionally, protects the rights of minorities. Dahl's (1998, 116) remarks on the possibility of democracy in international organizations could apply to the EU as well: 'Given huge differences in the magnitude of the populations in different countries, no system of representation could give equal weight to the vote of each citizen and yet prevent small countries from being steadily outvoted by large countries; thus all solutions acceptable to the smaller democracies will deny political equality among the members of a larger demos.' All these arguments suggest that consensual policy-making would make EU trade policy more legitimate.

On the other hand, one can also make the argument that a majority of member states should not be held hostage to the preferences of a single state, just for the sake of being inclusive. In trade, a policy with redistributive effects, the need to achieve consensus may lead to unfair results. Why would it be more legitimate for France to be dictating the course of Europe's protectionist position on agricultural negotiations than for the majoritarian advocates of liberalization to do so? As the EU enlarges to more countries, unanimity might pose even more problems in terms of political legitimacy, since the divergence in member states' preferences can be expected to widen as new countries join the club. In the areas where trade policy continues to be made according to the practice of de facto unanimity (e.g. agriculture) or the rule of unanimity (e.g. cultural services), a consensus will be harder to find with the increase in the number of potential vetoes resulting from enlargement. When qualified majority voting is used, the interests of the new members will transform the current balance of interests, thereby infuriating some domestic interest groups.

EU as Institutional Blueprint for the World?

The perceived lack of legitimacy of EU trade policy is not leaving 'Eurocrats' indifferent. On the contrary, they realize that their very survival depends on their ability to reduce the gap between perception and reality, and the Commission has therefore engaged in a massive PR effort to convey the message that 'civil society' had been heard and was from now on included in the process. This attempt to develop a legitimate, democratic rule at the supranational level has no exact historical precedent. Europe is facing a moment of historical innovation, which shares some resemblance, but also dissimilarities, with past efforts at building

federal states (Nicolaidis and Howse, 2001). The EU is different from typical international institutions, but it is not a federal state either. Even though the EU polity has many peculiarities and idiosyncrasies, the current European attempts at addressing concerns of political legitimacy while continuing to ensure efficiency of policy-making in the field of trade could perhaps serve as a blueprint for issues surrounding the governance of international economic institutions.

EU response to concerns over trade policy legitimacy

Faced with this new context of trade protests on behalf of 'democratic legitimacy', the EU has attempted to come up with novel institutional arrangements to deliver policies visibly legitimate in both their process and outcome dimensions. Even if trade policy in Europe is already quite legitimate in both dimensions, what matters, in Weberian terms, is the perception of a democratic deficit. The issue of 're-legitimizing' Europe goes well beyond the narrow field of trade policy. It is part of a massive effort by the Commission, as well as the Member States, to shed the burden of the perceived 'democratic deficit' and to bring Europe closer to its citizens.

Reforming European governance[14]
Not surprisingly, EU efforts to close the perceived democratic gap have focused mostly on 'process' legitimacy, since it is the most apparent and the most discussed publicly. The European Commission, long accused of being the main locus of 'illegitimacy' in the EU, has tried to come up with concrete proposals on how to enhance the democratic legitimacy of European institutions through a Euro-wide brainstorming exercise known as the 'governance debate.' To this aim, the Commission published in 2001 a White Paper on European Governance, with suggestions for including more people and organizations in the shaping and delivering of EU policy.[15] In particular, the White Paper proposes to work towards enhancing the openness and accountability of European institutions, the participation of citizens to policy-making, and the effectiveness and coherence of the policies made. The White Paper has been criticized on many fronts, however, mostly for not going far enough in its proposals and for increasing the role of the Commission at the expense of other, more direct sources of political legitimacy in the EU (Scharpf, 2001).

The European Council reiterated many of the same goals in its 2001 Laeken declaration, which vows to 'clarify, simplify and adjust the division of competence between the Union and the Member States' and to 'increase the democratic legitimacy and transparency of the present institutions'.[16] The European Convention, born out of the Laeken summit, was created to craft a formal constitution for Europe. In drafting the constitution, the participants

are addressing precisely questions of legitimacy and governance, such as: What do European citizens expect from the Union? How is the division of competence between the Union and the Member States to be organized? How can the Union's democratic legitimacy be ensured? And how can the efficiency and coherence of the Union's external action be ensured? The last two questions in particular apply directly to the current concerns facing trade policy, where the increasingly sensitive nature of what qualifies as 'trade' is putting both the legitimacy and the efficiency of EU action into doubt.

Civil society and trade policy. The involvement of non-governmental actors in the making of trade policy is nothing new. Trade unions, industry associations and business groups have long had a place for lobbying on trade policy, both at the national and the supranational levels. NGOs claiming to represent 'civil society' complain, however, of the closer links and privileged consultation methods between the makers of EU trade policy and groups representing European business — as illustrated, for instance, by the formally organized consultations within the framework of the Transatlantic Business Dialogue (Cowles, 2001).

Yet the role of civil society in trade policy has changed in recent years, both because of the evolving nature of trade and because of technological developments, such as the internet, which have 'made the market for political ideas contestable' (Lamy, 2002). As a result of the new ease of access to information, NGOs have seen their means of oversight and influence increase considerably. In order to rein in some of these critics and address its perceived lack of political legitimacy, the Commission has engaged in an ambitious program of consultation with civil society in the specific area of trade. Launched in 1998 at the initiative of its Trade Directorate General, in the wake of the public mobilization around the Multilateral Agreement on Investment, the 'Trade dialogue with civil society' was designed to associate representatives of civic organizations more closely to the trade policy-making process.[17] This dialogue has consisted of a number of 'general meetings' (where the Trade Commissioner informs representatives about the state of WTO negotiations, presents the EU position for upcoming trade negotiations and gives them a chance to voice concerns and ask questions), as well as 'issue groups' (thematic meetings where representatives of civil society present to the Commission proposals of their own).[18]

This dialogue has the potential for bridging 'process' and 'outcome' legitimacy. Involving representatives from civil society with special expertise to the policy-making process can presumably improve the quality of the policy outcome. The Commission believes, for instance, that the position eventually defended by the EU is the case of 'access to medicine' was better than it would have been in the absence of industry involvement and recommendations from NGOs, such as Doctors without Borders.

This move on the part of the Commission was designed to quench the complaints of many civil society groups, who have organized, in recent years, to investigate and participate in the making of trade policy in Europe. In particular, they have put under scrutiny the links existing between trade, environment and labor standards. The legitimacy of such groups, however, is itself questionable. From a process perspective, NGOs want participation and transparency. But governments are elected, whereas they are not. They are self-appointed spokespersons for a cause and as such would pass neither the 'representative' nor the 'accountable' test. Often, their only legitimacy is the one they have created for themselves. Yet these unelected activists have taken on an increasingly preeminent role in shaping the agenda for trade policy in recent years. From an outcome perspective, it is not clear that 'civil society' passes the legitimacy test either. In several instances, 'first world' NGOs denounce injustices in third world countries (such as child labor), but those on behalf of whom they claim to be speaking may believe conversely that the erection of new trade barriers is not the best solution to lift them out of poverty and dismal social conditions.

Lessons from the EU institutional experiment for a globalizing world?

Clearly, the EU is a very unique beast. With its multilayered levels of governance, coexistence of supranationalism and national sovereignty, idiosyncratic institutions, it is neither a federal state nor an international institution. Globalization — that is, the creation of a global marketplace thanks to freer and more rapid flows of transportation and information — also erodes the borders around nations, and therefore the boundaries separating the citizens of those nations, although in a less systematic, organized way as did European integration. Globalization has put new constraints on states, it has limited their margins of maneuver and consequently eroded their sovereignty. Many issues have become global, transnational issues which can hardly any longer be addressed and solved uniquely at the national level (e.g. Florini and Simmons, 2000). As a result, globalization has also highlighted some need for international governance.

Even though the EU is unique and is hardly a template for a legitimate institution, the world at large can still learn valuable lessons from its institutional experiment in the field of trade policy-making. One such lesson would be to explore whether the concept of 'multi-level governance' could be useful at the international level. As a growing number of EU scholars have shown, there is not necessarily a binary opposition between national and European institutions and identities. Instead, European polities are characterized by a constellation of institutions embedded in a dense network of informal interactions bringing together supranational, national, and subnational actors.

Indeed, individuals in Europe now feel multiple allegiances. On some occasions, the EU level of governance can be even more responsive to some societal interests than the national level. For example, organized producer interests, which are relatively entrenched in domestic politics, may lose their advantage over broader 'civic' interests, such as consumers and environmentalist, in the European arena (Majone, 1996). This coexistence of multiple levels of identity (to a region, to a country, to a social group, etc.) may be used in some settings to legitimize governance at the international level as well.

Another lesson from the EU experience with legitimacy in trade might be to extend some of these debates to other regional trading arrangements, such as APEC and Mercosur, as well as to some sovereign countries. In particular, the EU is dealing with many issues similar to the ones involved in the United States' debate on the delegation of trade negotiating authority — once known as 'fast-track', and now as 'trade promotion authority'. Chief among these common concerns is how to balance democracy (the 'process' legitimacy) and efficiency (the 'outcome' legitimacy). The fact that individual states fear exclusion from the trade policy-making process in Washington when authority is delegated to the executive has long blocked the renewal of the granting of fast-track in the US. Actually, the EU process for participating in international trade negotiations is quite similar to the US fast-track procedure, with states (individual in the US, sovereign nation-states in the EU) delegating authority (through the 'fast track' vote in the US, through a negotiating mandate in the EU) to the most centralized level of government (the office of the trade representative, directly dependent on the White House in the US, the Directorate General for trade and the external trade commissioner in the EU). The debates surrounding the delegation of trade authority in both settings could usefully inform one another.

It may be more difficult to extend the lessons learned form the EU experience to other international governance structures — such as the G8, the IMF, or the WTO. Even though anti-globalization supporters have often lumped the EU together with these international organizations in their criticisms of neo-liberal free trade, they are of quite a different nature. The EU is a supranational polity, whereas the WTO and the IMF, for instance, are not. One of the unique characteristics of the EU, by which it resembles a federal structure more than an international organization, is the supremacy of European over domestic law. The decisions of the EU are ultimately binding, whereas WTO decisions are not. As long as it remains the case, this means that EU decisions will be more legitimate than those of the latter, since the peoples of Europe have willfully transferred some sovereignty to the supranational level.

Also, as several scholars of federalism and European integration have noted, the EU distinguishes itself from other international organizations in that it can achieve both 'negative' and 'positive' integration (Scharpf, 1999; Kelemen,

2002). Most attacks on the supposed illegitimacy of international economic institutions are triggered by 'negative' integration — mostly when a court strikes down a national regulation as illegal and, as a result, lowers regulatory standards. Such critics flare, for instance, whenever WTO judges deem national regulations to be trade barriers (e.g. ban on hormone treated beef). International organizations are ill-equipped to counter these accusations because they can only introduce new regulations to replace the ones stricken down by opening up whole new international negotiations. By contrast, the EU has the capacity to undertake 'positive' actions and legislate to create common standards. Therefore, the supranational EU is better positioned to claim back its legitimacy because it can respond to its critics by re-regulating. In that respect, the EU resembles a federal entity more than an international organization.

Finally, the level of democratization of other polities is a major obstacle to the direct applicability of the complex EU trade policy-making system. It seems uncertain, to say the least, that institutional rules designed for mature economies and democracies (liberal societies with democratic politics, active social groups and private business sectors) are also desirable and transposable to other types of countries. The EU is made up of advanced industrialized democracies — indeed, democracy is a prerequisite for membership. Other international economic organizations do not share such a prerequisite. Therefore, one cannot expect to hold the organization collectively to a higher standard of political legitimacy than each of its members individuals.

Conclusion

Trade and legitimacy are now inextricably linked. The question is whether they are antithetical or can coexist. Efficiency and legitimacy are often opposed, as if representing two contradictory pulls on trade policy. As this article has shown, however, they are indeed two sides of the same coin. Most of the public protest and criticism in the social science literature against existing trade institutions emphasize procedural aspects — the representativity, accountability and transparency of the trade policy-making process. When one judges EU trade policy according to the traditional liberal-democratic criteria of legitimacy, critiques of the democratic deficit abound. These criteria, however, may not be directly applicable to the institutions of the EU, whose supranational polity cannot be held to the same standards of legitimacy as sovereign states. By breaking down the analysis of political legitimacy into its 'process' and 'outcome' components, this article has shown that the infamous democratic deficit may not be as important as is commonly perceived and that the remedies put forth by protesters may not be as legitimate as they claim — especially when criticizing the 'process' serves as an easy pretext to denounce unwanted policy 'outcomes'.

National governments have a large part of responsibility in propagating perceptions of the EU's democratic deficit. More often than once have European politicians blamed unpopular decisions on the EU, thereby fueling the misperception that Brussels can dictate its will and act forcefully against the interests of some of its sovereign member states. Indeed, the EU has become a scapegoat for justifying unpopular measures that national leaders do not have the political courage to put forth. The spectacular gains by extreme-right and Euroskeptical protest parties in several recent elections throughout Europe showed that voters did not favor giving more power to Brussels; to the contrary, they blamed Europe as the source of their society's ills.

Politicians, however, are not the only ones to blame for this perceived illegitimacy of the European Union. Voters have some responsibility too. In the traditional democratic framework, legitimacy rests on political parties and elections. Yet how could the EU ever be considered legitimate when nearly half of the European voters abstain from casting their ballot in the European elections every five years? By not using their own political right to vote, and thereby failing to influence the direction and evolution of European integration, European citizens also contribute to creating the illegitimacy to which representatives of 'civil society' are so quick to point.

Overall, this general political scapegoating has only reinforced the impression of a democratic deficit in the European Union. As a result, it has become commonplace, and commonly accepted, to lump together criticism of the EU and criticism of the various institutions of international economic governance — the IMF, the WTO, the G8, to cite a few. Yet the amalgamation of the so-called democratic deficit in the EU and the problems of governance in international economic institutions can only go so far. The EU is not solely a precursor and a miniature version of globalization, with all its neo-liberal excesses. Paradoxically, it is also a tool against globalization, a bulwark against deregulation and lower standards. If European politicians had the courage to advertise this to the public, then suddenly the EU might seem very legitimate.

In the end, however, one can wonder whether any institutional fix could ever content the critics. The EU, as well as the WTO or the IMF for that matter, often seems to be targeted on grounds of legitimacy more because it is an easy target than because of its real nature. The disgruntled tend to turn their anger against those institutions that are easy targets, thanks to the constant political scapegoating and the fact that it is difficult to change the course of international organizations. Whether tweaking in either the 'process' or the 'outcome' dimensions of Euopean legitimacy could ever assuage the critics is doubtful.

Notes

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2 In 1999, trade (exports plus imports) as a share of GDP, a proxy commonly used to measure the economic openness of a country, was 49% in France, 49% in Germany, and 57% in the UK, compared to 25% in the US and 21% in Japan (source: World Bank, *World Development Indicators*).

3 In a table summarizing issue arenas and levels of authority in Europe, 'commercial negotiations' is the only issue out of 28 to be coded as having all policy decisions taken at the EC level. The table, originally designed by Philippe Schmitter, is reproduced in Donahue and Pollack (2001).

4 For the text of 'Red Alert on the 133', see for instance http://attac.org/fra/list/doc/georgeen.htm.

5 On the controversial issue of the 'democratic deficit,' see among others Moravcsik (2001), Siedentop (2001), Cederman (2000), Banchoff and Smith (1999), Scharpf (1999), Schmitter (2000), Weiler (1997), Majone (1996), Wallace (1993) and Williams (1991).

6 See Moravcsik (2001) for an elaborate critique of Siedentop.

7 Several scholars have explored patterns or support for and identification with the EU at the level of public opinion. See for instance Anderson (1995) and Franklin et al. (1994).

8 One can argue that the birth of the civil society uprising and the organization of NGOs against the illegitimacy of trade policy even goes back to the Tuna–Dolphin case of the early 1990s (Vogel, 1995; Kelemen, 2001).

9 For a thorough discussion of the 'public interest' in Scharpf's vision of legitimacy, see Moravcsik and Sangiovanni (unpublished).

10 I would like to thank an anonymous reviewer for raising this issue.

11 See for instance Hix (1998).

12 With the exception, for instance, of McKay (2000).

13 The Community was granted exclusive competence in trade policy through Article 113, renamed Article 133 in the 1997 Amsterdam Treaty.

14 I use the same definition of 'governance' as the one provided by the European Commission in its White Paper on European Governance: 'Governance means rules, processes and behavior that affect the way in which powers are exercised, particularly as regards openness, participation, accountability, effectiveness and coherence.'

15 Commission of the European Communities (2001).

16 Presidency Conclusions-Laeken, 14 and 15 December 2001 SN300/1/01 REV1.

17 In 1999 Trade Commissioner Pascal Lamy took along with the EU delegation to Seattle an advisory group of civil society representatives drawn from organizations representing social, consumer, development, environmental, business, etc., interests.

18 Of course, involving civil society in the preparatory phase of decision-making is not the same as inviting it to directly participate in the decision. As long as representatives of various groups are only making suggestions and voicing out their concerns but there is no obligation to integrate their input into the final decision, this involvement of civil society may be seen as more window-dressing than real legitimation.

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