

## **Constituency Interests and Delegation in European and American Trade Policy**

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## **Abstract**

Trade policy in the European Union and the United States is to a large extent delegated to executive agents. Existing explanations claim that legislators delegate because they wish to liberalize but are unable to achieve this on their own. We show that legislators delegate powers to obtain foreign market access for exporters and protection for import-competing interests. Confronted with heterogeneous demands from both groups, principals delegate to two sets of agents to confer concentrated benefits on these constituencies, and install control to avoid concentrated losses, while maintaining the flow of resources from lobbying. We derive the empirically observable implication that, with the increase in the share of tradables in the overall economy, delegation as well as control should have steadily increased over time, and then test the validity of this proposition for US trade policy since 1916 and for European trade policy since 1958.

## **1. Introduction**

Students of European trade policy have often wondered whether this policy field is characterized by its gradual supra-nationalization or rather by its re-nationalization.<sup>1</sup> Throughout the 1990s, the question of trade competences was framed in terms of why the member states of the European Union (EU) “sought to regain some of their lost sovereignty in the realm of trade” (Nicolaidis & Meunier, 2002). Debate on American trade policy similarly has often centered on the riddle whether the United States (US) Congress has abdicated its constitutional powers of trade policy in favor of the President, or whether it still dominates the policy process. Important analysts have claimed that, after having abdicated trade policy responsibility for several decades, Congress reclaimed control of this policy field starting in the 1970s and even more so in the 1980s (Destler, 1992; O’Halloran, 1994). With regard to trade policy-making in both Europe and the US, therefore, the scholarly debate has concentrated on how principals’ control over trade policy agents has changed over time. In this article, we take issue with this prevalent view, and provide one single explanation for why principals have consistently delegated ever more trade policy powers for market access as well as protection, and have simultaneously kept close control over trade policy in both political systems.

We develop our explanation by drawing on the language provided by the principal-agent literature. At the same time, we cast doubt on the analytical usefulness of an assumption underlying most of the existing accounts of delegation in the trade policy field, namely that differences in policy preferences for liberalization or protection between constituencies, principals, and agents have led to wide-spread conflict over delegation and control. Some authors regard the agent as more liberal in orientation than principals and their domestic constituencies (Pastor, 1980; Goldstein, 1993; Elsig, 2002; Nicolaidis & Meunier, 2002), whereas others offer reasons that it might be in the bureaucratic self-interest of an agent to be

more protectionist than its principals (Frey and Buhofer, 1986). Still others assume that both principals and agents have more liberal preferences than their constituencies (Bauer, Pool & Dexter, 1964; Destler, 1992; O'Halloran, 1994). The idea that differing preferences produce problems in the principal-agent relationship has led many authors to look for periods of principals' abdication and their reassertion of power, and for the pervasiveness of conflict over trade authority, instead of focusing on why delegation and concurrent control, despite occasional conflict, have come to be the institutional set-up of choice in different political settings.

In our view, constituencies formulate demands to politicians which these seek to satisfy – since they depend on constituencies' resources for their re-election – by conveying concentrated benefits on them.<sup>2</sup> Over the course of time, these constituency demands have increasingly become heterogeneous, i.e. have come from a mix of exporters and import-competing industries, instead of from a clear constituency in favor of either more protection or freer trade. To overcome the transaction costs of dealing with this heterogeneity, principals have delegated to specialized agents. After this initial delegation, the scope of delegation increased because the share of tradables as a percentage of the whole economy increased over time. Principals, however, have not abdicated their trade policy powers, but have always adjusted the degree of control to the increasing scope of delegation. If this theoretical account proves correct, no periods of abdication and reassertion but rather a steady increase of both the scope of delegation and control should be empirically observable.

We thus seek to transcend the single case approach to trade policy so prevalent in the literature, apparent both in the *sui generis* accounts of European trade governance and in the American literature, which tends to be centered exclusively on the US political system. If changes in trade flows are the driving factor and have developed in about the same way in both the US and Europe, there should also be important institutional parallels in the sequence of delegation and control in both cases. By drawing out the main similarities of both political

systems, we seek to reduce idiosyncratic explanations of their institutional arrangements, and relate public authorities and institutions to their governance relationship with private actors. In the following, we first develop this argument; we then apply it in a study of American trade policies over the past century and of European trade policies since the inception of the European Communities.

## **2. The Argument: Which Scope of Delegation and Why Control?**

We structure our theoretical discussion around two major questions. First, why do principals delegate their trade policy powers to agents, and what determines the scope of delegation to the agent? And second, why do they want to keep tight control over these agents? We thus provide a rationale for why agent discretion should not have changed over time.

### *2.1 Heterogeneity, Transaction Costs, and the Institutional Form of Delegation*

We propose that in the trade policy field, delegation is the principals' response to an increase in the heterogeneity of constituency interests. A key characteristic of trade policies is that they confer concentrated costs and benefits on organized groups, while conveying diffuse costs and benefits upon all other sections of society (Frieden & Rogowski, 1996). We should therefore expect political actors to primarily seek to satisfy the demands of exporters and import-competing industries, upon which they seek to bestow concentrated benefits in exchange for resources such as information and possibly, but not necessarily, financial contributions, both of which can be essential to maintain office. Political actors, whether principals or agents, do not have a specific trade policy preference independent of constituency demands. They rather act as office-seekers, avoiding the mobilization of political enemies. Voters experience only diffuse benefits or suffer diffuse costs from trade policies, and they are not capable of organizing effectively on the trade issue (Olson, 1965).<sup>3</sup> However, when well-organized groups feel threatened by concentrated costs from trade policies, they can polarize voters by

supporting an opposition candidate, and thus mobilize voters indirectly. Since legislators face uncertainty about election results, they are eager to make sure that no organized group supports the opposition. Those holding office consequently engineer trade policies that produce only diffuse costs. We propose that this applies to both members of Congress in the US and the representatives of member governments in the EU's Council of Ministers. Whereas members of Congress are directly elected by American voters, the ministers that represent their member states in the Council are installed by national parliamentarians, which in turn are accountable to European voters. Both members of Congress and EU member state representatives thus have an incentive to avoid the imposition of concentrated losses on particular sections of society.

Legislators can easily achieve this objective by way of direct legislation as long as organized constituency interests are homogeneous. When facing a constituency that depends mainly on exports, they legislate for freer trade policies, and when facing a predominantly import-competing constituency, they vote for protectionist policies. In such a setting, parliaments are the only relevant actors determining trade policy. This was arguably the situation as it prevailed in the US and in Europe throughout most of the nineteenth century. Over the course of the twentieth century, however, in developed countries constituency preferences on trade have increasingly become heterogeneous (Hall, 1998; Hiscox 1999).

As a result, many legislators are confronted with lobbying from both exporting and import-competing interests. Facing the dilemma of having to represent the two interests at the same time, they have to engineer policies that are able to deliver both for interests favoring foreign market access and those advocating sustained or increased protection. More in particular, when liberalizing trade, political actors have to be careful to avoid concentrated losses for import-competing interests; and when imposing trade barriers, they have to make sure that exporters will not incur concentrated costs from foreign countries, which may respond by raising barriers too. This means that the individual legislator is confronted with

high transaction costs as she is overwhelmed by competing demands from within her electoral circumscription. She needs to diversify policies according to individual products and sectors, a feat possibly complicated by the requirement to co-ordinate policies with others within the legislature facing the same problem.<sup>4</sup> Delegating trade policy authority to agents, then, serves the functional need to reduce the transaction costs at both the individual and the collective level of making trade policies under the condition of heterogeneous constituency interests. It attenuates the individual legislator's need to choose between freer trade and more protection in every single case that is brought to her attention. At the collective level, it reduces the frequency with which legislators have to coordinate their potentially conflicting positions.

Principals delegate authority to two sets of agents to serve their two main constituencies: they install agents to enhance foreign market access on behalf of their exporting interests, and other agents to impose barriers to imports at the service of import-competing interests. Principals thus strive to designate a specific agent to service import-competing to the exclusion of exporting interests, or vice versa. The US Trade Representative and the European Commission have both been mandated to service exporter constituencies through bilateral or multilateral trade negotiations. Principals have also established market access investigation agents such as the EU Trade Barriers Regulation Unit or the Office for Monitoring and Enforcement within the Office of the United States Trade Representative (USTR). These provide a private industry with a levy to put pressure on foreign markets where they experience market access problems. They have become a particularly potent channel now that such investigations can lead to international dispute settlement and the multilateral authorization of retaliatory tariffs by the Dispute Settlement Body of the World Trade Organization (WTO) (Shaffer 2003).

To serve import-competing interests, principals have mandated the US International Trade Commission and the Anti-Dumping Unit of the European Commission to establish whether dumping has taken place, make injury examinations, and impose antidumping duties

(Finger, Hall & Nelson, 1982; Schuknecht, 1992). EU member states have also entrusted negotiation powers for trade in agricultural products to the Directorate General Agriculture within the European Commission, instead of to the Directorate General for Trade. Similarly, principals entrust yet another agent with the negotiation of trade-restricting agreements (Aggarwal, Keohane & Yoffie, 1987). US Congress created the special position of Chief US Textile Negotiator inside the USTR to negotiate the trade restricting multi-fiber arrangement.

Our account thus addresses remaining inconsistencies in existing explanations and offers one single explanation for why principals choose delegation both for liberalization and protection. Existing accounts have often concentrated on international trade negotiations intended to achieve reciprocal reductions of trade barriers, at the exclusion of delegation for protectionist purposes. One widely held view has come to be that at a particular point in time principals realized that lower domestic tariffs would lead to economically more efficient outcomes. Recognizing that such lower tariffs would not be politically possible as long as the principals themselves made trade policy, they allegedly decided to protect themselves from protectionist pressures by delegating to an agent (Bauer, Pool & Dexter, 1964; Haggard 1988; Goldstein 1993; Lohmann & O'Halloran, 1994; O'Halloran, 1994). This thesis was developed mainly in the American trade policy literature, in which context Destler (1992) coined the phrase that delegation provided "protection for Congress" from protectionist pressures. Having aggravated the effects of the Great Depression, the infamously protectionist Smoot-Hawley tariff of 1930 allegedly had taught Congress that a universalistic logroll among protectionist members led to sub-optimal outcomes (Goldstein, 1993). Congress then "learned" it was institutionally unable to deliver an economically efficient trade policy advantageous to all, and abdicated its constitutional powers to its agent, the executive. In this delegation-for-liberalization view, legislators reacted to mounting protectionist pressures by delegating powers to provide protection to administrative agencies, purposefully deflecting these pressures away from the legislature. Nicolaïdis and Meunier (2002) adopt this view and

posit that by establishing the Treaty of Rome in 1958 the European Community (EC) member states delegated trade policy powers to insulate the policy-making process from domestic pressures. These explanations either implicitly or explicitly adopt the “blame-shifting” argument that is prominent in the general principal-agent literature in which legislators would delegate in order to conceal their contribution to an unpopular policy (Arnold, 1990).

However common in the literature, this explanation is unsatisfactory and misleading for several reasons. First, it seems implausible that legislators can fool their import-competing constituents repeatedly, since these can be expected to learn from policies that do not serve them well. The possibility to put blame on an agent therefore appears to be a convenient side effect of, rather than a motivation for delegation. Second, if parliamentarians were indeed to delegate for reasons of economic efficiency (O’Halloran, 1994), each of them should be tempted to try and obtain protection for her own constituency, while leaving colleagues to vote for the delegation of liberalization powers. The temptation not to contribute, yet to reap the benefits from this far-sighted and trade-enhancing policy should make it difficult for principals to overcome their collective action problems. Third, why would import-competing interests acquiesce with an institutional arrangement that would obviously put them at a disadvantage? The RTAA actually led to an increase rather than a reduction in import-competing lobbying (Hiscox, 1999), making the argument about politicians’ insulation implausible. These inconsistencies in existing accounts of delegation reduce their power to explain why legislators so consistently choose to delegate trade policy.

Over time, and after taking the initial step of delegating, principals have increased the scope of delegation, i.e. have expanded the agent’s authority to cover more sectors of the economy. The expansion of imports and exports which taken together make up the tradables sector in a domestic economy have spurred new demands coming from sections of society hitherto unaffected by increasing trade. This has led ever more firms to become exporters or import-competitors. Formerly, exporters were mainly interested in tariff reductions in foreign

countries. Since then new exporters have demanded better foreign market access conditions in the field of services, intellectual property, investment, competition, and government procurement policies.<sup>5</sup> Politicians have reacted to these new exporter demands by increasing the scope of the delegation, and they have endowed negotiating agents under the US President and within the European Commission with new trade competences in a steady manner. Moreover, as trade flows have intensified, more sectors have felt the strains of increased imports, and have demanded policies to protect their interests. As a result, the principals have acted to satisfy these heterogeneous demands increasing the scope of delegation to open foreign markets and provide relief for import-competing interests.

## 2.2 *Principals' Mechanisms of Agent Control*

So far, we have concentrated our discussion on why politicians might choose delegation, and what might determine their chosen scope of delegation. Analytically distinct, but of course intricately linked to this are the questions of why and how principals exert control over their agents and of how control relates to specific degrees of delegation. We can distinguish *ex ante* and *ex post* controls (Epstein & O'Halloran, 1999; Pollack, 2003). First, *ex ante* controls are the provisions that define the legal instruments available to an agent and the procedures it must follow. Important are the time restraints that principals impose upon the agents: delegation can be permanent, as with the creation of administrative units to conduct antidumping or market access investigations, or they can be temporary, i.e. be limited in time, as with negotiation mandates. With permanent delegation, principals create multiple agents and go to great lengths to specify the agents' procedures in detail, so as to determine as narrowly as possible the main constituency that is to influence the agent.

Second, *ex post* controls are oversight procedures that allow principals to monitor, influence, and sanction agency behavior. Such *ex post* controls can take the form of oversight by specialized committees, of sitting in negotiation meetings, and of principals informing

themselves of administrative decisions by the agent. In the EU, governmental representatives from the so-called Article 133 Committee can sit at the negotiation table, while in the US, selected members of Congress fulfill a similar task. *Ex post* controls can also take the form of sanctioning, be they positive or negative sanctions, such as failure to ratify international treaties negotiated by the agent, budgetary controls, appointments, new legislation or the threat thereof, or the revision of administrative procedures laid down in an agent's mandate. The lower the majority requirement on this issue, the more credible is the threat to sanction the agent. The transaction costs linked to such control are relatively low since each legislator can rely on harmed constituencies voicing their interests in the event an agent imposes concentrated costs on them. Sanctioning, however, should rarely be observed since an agent can foresee the possibility of being sanctioned and thus submits *ex ante* to the preferences of the principals.<sup>6</sup>

We distinguish two major reasons for the control that principals wield over their agents. First, by controlling agents, principals seek to prevent agents from imposing concentrated costs on either of the two well-organized trade policy constituencies, and they thereby pre-empt the emergence of organized opposition to their policies. In its attempt to defend the interests of its assigned constituency, a specialized agent might indeed go too far and end up imposing costs on other concentrated interests, instead of dispersing them to larger groups in society. This holds for the imposition of high anti-dumping duties and for market access investigations, which both may trigger foreign retaliation wreaking havoc on domestic exporters. It also holds for liberalization negotiations, where principals closely follow up the concessions made by their agent in exchange for foreign market access, and check to see whether these do not impose concentrated costs on import-competing groups. Only when prompted by one of their two main constituencies do they use available sanctioning mechanisms, which is why controlling agents entails less transaction costs for legislators than acting themselves.

Second, principals do not grant large discretion or autonomy to an agent since they want to maintain the flow of resources from lobbying. As long as politicians are seeking office, they are dependent on resources, which lobbying provides them with in the form of information, political support, and possibly financial contributions. If politicians delegated the authority to act on trade to an agent without exercising control, the lobbying activities of constituency groups would increasingly be directed to the agent set up to service the constituency, something the principals would want to avoid. In sum, by controlling the agent, and thus signaling that they can still influence policy decisions, principals can make sure that they remain the target of the lobbying of both exporting and import-competing interests, and that no group within society has to bear concentrated costs from the agents' policies agents.

While we argue that principals exert control over trade policy agents, we do not go so far as to say that their control is watertight. A certain discretion is in-built in any principal-agent relationship (Pollack, 2003). Rather than attribute bureaucratic shirking to differing policy preferences, we question the premise underlying this concept, namely that principals (or agents) have a specific policy preference of their own concerning free trade or protectionism. If our intuition is correct, and principals and agents mainly try to satisfy diverging interest group demands, the agents' incentives for shirking become negligible. Our argument for control also stands in contradiction to the view of Lohmann and O'Halloran (1994), who argued that, in the absence of divided government, principals would delegate *all* trade policy power to the agent, given that the agent imposes efficient policies. They thereby imply that principals do not have an incentive to exert control over their agent under unified government. In our analysis, even if the preferences of principals and agents coincide, control is maintained because of the benefits it conveys on the principals.<sup>7</sup>

### **3. Delegation of Trade Policy Powers in the US and the EC/EU**

After having provided a theoretical rationale for why no periods of principals' abdication and reassertion on trade policy should be observable, we now present empirical evidence showing how our reasoning can account for the course of delegation and control in European and American trade policy. We discuss various instances of trade policymaking in the EU and the US that show how principals have systematically delegated new tasks while extending control mechanisms over their agents. We mainly concentrate on international negotiations, market access investigations, and anti-dumping procedures, while merely touching on other trade remedies such as countervailing duties and safeguards. By pointing out delegation and control features in three different historical epochs, we derive conclusions on the balance of delegation and control over time. In particular, we demonstrate that after the initial delegation of trade authority in the first epoch studied, although the scope of trade authority increased over time (see tables 1 and 2), this neither led to principals' abdication in the second epoch, nor to their reassertion in the third epoch.

#### **TABLES 1 AND 2 ABOUT HERE**

##### *3.1 Creating and Controlling Trade Policy Agents*

###### *3.1.1 The Origins of Delegation in US Trade Policy*

Although the American constitution confers the powers to set tariffs and to regulate foreign commerce on Congress, American legislators delegated trade authority to the executive as early as 1890 (O'Halloran, 1994). Congress indeed delegated substantial tariff bargaining authority and the possibility to change the tariff-free treatment of particular items by proclamation to the President, a delegation of powers that was declared constitutional by a Supreme Court decision in 1892. Two decades later, in 1916, Congress set up a permanent agent, the Tariff Commission, with a very narrow mandate, namely of providing "objective" economic information, which Congress could rely on in its task of tariff setting. While the

delegation to the Tariff Commission was intended to serve export interests (Schnietz, 1996), the nearly simultaneous passage of the Anti-dumping Act (1916), which delegated the authority to impose anti-dumping duties against products imported at a price lower than the producer's sales price in the country of origin, satisfied import-competing interests. Only shortly after, in 1922, Congress added a temporary delegation of proclamatory power that allowed the President to increase or decrease tariffs by up to 50 percent. The President, however, could only act upon recommendation from the Tariff Commission. Early on, therefore, delegation in American trade policy followed the principles set out above: delegation to several agents, for both exporting and import-competing interests, and control to ensure that constituency interests are protected.

Nevertheless, until the highly protectionist Smoot-Hawley Act (1930) the principals continued to satisfy at least some of the constituency interests by way of direct legislation. Only in 1934, Congress decided to delegate trade-negotiating authority to the President in the Reciprocal Trade Agreements Act (RTAA), a move that favored American exporting interests. The RTAA included a provision that removed the necessity that trade agreements be ratified by a two-thirds majority in the Senate, a requirement that applies to ordinary international treaties concluded by the US administration. Although this might suggest congressional abdication from trade policy making, this impression is refuted by the fact that the RTAA also included strong control features. Delegation was limited to three years, and, at the end of this period, Congress had to act again to renew the delegation. This introduced a potent oversight control mechanism that ensured that the negotiating agent, in making concessions, would minimize concentrated costs on import-competing groups, and that constituency interests would continue their lobbying of principals. Moreover, the RTAA included *ex ante* controls such as a provision that set out that the executive had to hold hearings before engaging in trade negotiations, and strict limits to agent autonomy through provisions that set out the conditions under which the agent could use its authority. The

existence of these various control features is the most important counter-argument to the view that US legislators used the RTAA to isolate themselves from organized interests (Bauer, Pool & Dexter, 1964; Destler, 1992).

### 3.1.2 *Delegation of Trade Authority in the Early European Communities*

In the early European Communities, delegation and control displayed features similar to the US case consisting of a combination of separate institutional channels within the European Commission through which it served the interests of exporters and import-competing industries. In the Treaty of Rome, the six founding member states of the European Economic Community (EEC) delegated powers to negotiate on foreign market access and import restrictions, and also entrusted the European Commission with permanent powers to raise duties in the event of dumping or foreign subsidization.<sup>8</sup>

For international trade negotiations, member states granted the Commission a general negotiating mandate, while relying mostly on *ex post* control mechanisms, through several committees within the EC Council of Ministers, such as the Committee of Permanent Representatives, the Commercial Questions Group, the Special Committee on Agriculture, specialized sectoral committees, and most importantly, the Article 113 Committee (Johnson, 1998). Member states' representatives controlled their negotiating agent through their presence in negotiations.<sup>9</sup> Principals ensured they could sanction their agent through the rejection of Commission proposals by a veto minority in the General Affairs Council, composed of members' foreign ministers, and that only after an initial transition period of eight years during which decisions would be taken unanimously.

Apart from these temporary negotiation powers, EC member states also delegated permanent powers to a specialized agent within the Commission to service import-competing interests, a fact that stands in contradiction to the view that member states delegated in order to achieve liberalization. They transferred powers from their national executives to the

European level to conduct anti-dumping investigations, giving the Commission autonomy to process complaints from European industry that alleged dumping on the part of foreign producers. In 1968, the year the common customs tariff was completed, EC member states formalized these powers in an act of delegation, stipulating that the Commission decides on the imposition of temporary anti-dumping duties and the termination of proceedings (Holmes & Kepton, 1996; Schuknecht, 1992).<sup>10</sup> They subjected their anti-dumping agent to oversight control by requiring that she report to a number of lower-level specialized committees in the Council and the Anti-Dumping Committee, and by making a decision on the imposition of definitive duties by the Commission subject to a qualified majority in the Council.<sup>11</sup> Finally, member states serviced their import-competing agricultural constituencies by delegating trade aspects of their common agricultural policy, not to the European Commission's directorate-general for external relations competent for trade in industrial goods, but to a separate agent, the directorate-general for agriculture, which they made report to agriculture ministers, rather than to foreign ministers.

### *3.2 Abdicating Trade Authority to the Agent?*

Accounts of delegation and control in American and European trade policy often suggest that after the initial decision to delegate, the principals abdicated trade policy authority to agents (Destler, 1992). In this section, we cast some doubt on this view, and instead show that control has kept pace with the increasing scope of delegation.

#### *3.2.1 Delegation and Control in the Post-war US*

In the years following World War II, several changes in international trade relations, if not in American trade law, increased the scope of delegation in the US. International trade relations were now conducted in a multilateral forum, namely the General Agreement on Tariffs and Trade (GATT), which not only concerned tariffs, but also limited the countries' discretion on such issues as subsidies and customs valuation. As hypothesized, the principals accompanied

these changes by increasing their control over the agent. First, they made the executive include an escape clause in all trade agreements, which enabled the US to withdraw concessions if imports caused injury to American producers. Second, they included what is known as the peril point provision in the 1948 trade legislation, which required the President to abide by the judgment of the Tariff Commission on whether the tariff for a product could be reduced or not without causing injury to domestic producers. The narrative thus supports our conjecture that, when the scope of delegation increases, the degree of control tends to keep pace.

This principle is further illustrated in the Trade Expansion Act (TEA) of 1962, in which Congress delegated authority to the President to make 50 percent linear cuts of tariff rates, and substantially softened the peril-point provision (Zeiler, 1992). While this expanded delegation, other provisions strengthened control procedures. First, Congress determined that two Senators and two members of the House of Representatives should participate in GATT negotiations as ordinary members of the American delegation. Second, following the wishes of Congress, a Special Trade Representative (STR) took over the responsibility for carrying through the negotiations from the State Department. This institutional change enabled Congress to increase its control over the negotiating agent by making sure that it would deal with a weaker agent. In particular, having a separate agent for trade negotiations had the advantage of limiting the agent's ability to make issue-linkages between foreign and trade policy. The TEA also provides some evidence for the principle that trade negotiation authority is delegated for import-competing and exporting interests at the same time. Congress especially pushed the executive to negotiate an international agreement to restrict textile imports (Zeiler, 1992).

The STR used the negotiation powers granted in the TEA to gain market access for American exporters during the ensuing Kennedy Round (1964-1967). At the same time, however, principals ensured control by closely monitoring their negotiating agent. Most

evidently, in June 1966 this control made the Senate pass a concurrent resolution that stated that the STR could only negotiate according to the provisions set out in the TEA (Pastor, 1980, p. 120). When the executive did not heed this order, Congress refused to ratify the agreement on customs valuation at the end of the negotiations, because it feared that this would hinder the efforts of other agents to convey concentrated benefits on import-competing interests. Similarly, in 1968 Congress passed a bill that instructed the International Trade Commission to view American antidumping law as having precedence over a code that the STR had negotiated against the wishes of the principals during the Kennedy Round.

### *3.2.2 Extending Delegation and Control in the EC*

Directly after the establishment of the EC, principals had the Commission negotiate both on the liberalizing and the protecting front. Before embarking on the Dillon (1960-62) and Kennedy Rounds (1963-67) of GATT negotiations on behalf of European exporters, the EC negotiated the international trade-restricting Short- (1961) and Long-Term (1962) Arrangements Regarding International Trade in Cotton Textiles on behalf of its import-competing textiles industries, setting up restrictive quotas for imports from emerging countries. Throughout these negotiations, member states maintained oversight control over their agent by sitting in negotiation meetings and keeping the agent in line with their preferences through the threat of veto from one single member state. By the time the transition period during which unanimity reigned was to come to an end in 1966, member states ensured that this sanctioning mechanism regarding consensus for GATT negotiation outcomes was institutionalized through the so-called Luxembourg compromise, which came about in part because France wanted to retain its veto over the outcome of the Kennedy Round. The French government thus sought to limit concentrated costs for its import-competing agriculture sector, while dispersing the costs to the population at large.

In the beginning of the 1970s, member states delegated market-restricting negotiating authority to the Commission to meet demands from the textile industry under increasing import-competition from emerging markets, leading to the Multi-Fiber Arrangement (MFA) in 1972, which extended the quota and safeguards system based on voluntary export restraints that had been established in 1962. In response to exporter demands, they mandated the European Commission to negotiate the Tokyo Round of GATT negotiations (1973-79), bringing further reductions of foreign tariffs and an extension of the scope of trade policy to non-tariff barriers. The EC thus sought to limit the negative impact of the American Buy America Act by pushing for a Government Procurement Code; by negotiating a Customs Valuation Code, it also sought to limit the negative impact of the American Selling Price mechanism – a protectionist method of valuating chemical imports to the US (Winham, 1986).

Increased imports during the world steel depression prompted member states to delegate further trade policy powers. They granted the Commission the competence it had previously not had under the Treaty establishing the European Coal and Steel Community (ECSC), to negotiate voluntary export restraints for steel products with non-EC countries (Messerlin, 1987).<sup>12</sup> Principals had the Commission negotiate similar safeguards on behalf of other import-competing industries such as semiconductors, automobiles, and consumer electronics (Schuknecht 1992). In 1984, they also increased control over their anti-dumping agent by giving European import-competing industries the possibility to appeal Commission decisions before the European Court of Justice (Jackson & Vermulst, 1989) and made the Commission report yearly on its anti-dumping and anti-subsidy activities.<sup>13</sup>

In the same year, member states introduced injury rules in the EC anti-dumping regulation to make sure the Commission did not go too far in satisfying import-competing interests while imposing concentrated costs on industrial consumers of these imports (Schuknecht, 1992).<sup>14</sup> Also in 1984, principals attempted to service exporter constituencies by

delegating powers to the European Commission to conduct market access investigations, the scope of which they defined in the regulation on the so-called New Commercial Policy Instrument (Bronckers, 1996; Johnson, 1998). The pattern of delegation and control thus confirms that EC member states steadily increased the scope of delegation while extending their mechanisms of control.

### *3.3 Reassertion and Re-nationalization, or further Delegation?*

#### *3.3.1 Delegation with a US Congress on Guard*

From the 1970s onwards, existing accounts have seen a reassertion of congressional control over trade policy agents in American trade policy (Nicolaidis, 1999, p.99). In this section, we show that what can be observed is rather a continuation of the developments in the previous period. Again, the growing share of tradables in the US economy made the principals decide upon an increase in the scope of delegation. Most importantly, Congress conferred powers to engage in negotiations concerning non-tariff barriers (NTBs) upon the STR. While thus extending the scope of delegation, Congress insisted on maintaining control that was to be secured by requiring congressional approval of all agreements concerning NTBs, a procedure known as “fast track” because it specifies time limits within which Congress has to act (Pastor, 1980). Moreover, Congress created an Advisory Committee for Trade Negotiations, representing all sectors of the economy plus labor and consumers, to secure improved oversight control. The Committee was instructed to report to Congress at the conclusion of trade negotiations on the compatibility of an agreement reached with its members’ economic interests. The Trade Act of 1974, therefore, at the same time augmented the scope of delegation and strengthened congressional oversight of the trade negotiators, making sure that the relative autonomy of the agent remained unchanged.

Section 301 of this trade legislation also mandated the STR to initiate investigations into foreign market restrictions, and, if unfair foreign barriers were found, to retaliate. This

offensive trade instrument allowed the STR to act upon exporters' demands for better foreign market access. To satisfy import-competing interests, principals made the countervailing duties instrument more accessible to import-competing industries, by legislating that action on a case had to be taken within a year of receipt of a petition, and that all cases in which relief had been denied had to undergo judicial review (Destler, 1992, pp. 144-145). Congress even made the imposition of countervailing duties mandatory in cases in which imports were proven to be subsidized. The only remaining discretion left to the executive was that the Treasury Department could waive the countervailing duties for four years if there was a prospect of finding an agreement with a foreign country. Furthermore, the escape clause was changed so as to ensure that even the *threat* of injury could be given as a reason for relief from foreign competition. Finally, the negotiations of limits on foreign subsidies in the Tokyo Round provided protection to import-competing interests.

In the Trade Act of 1979, Congress imposed several changes in the organization of its trade policy agents. It transferred the responsibility for the administration of antidumping and countervailing duty laws from the Treasury, which had previously been responsible for investigating foreign trade practices, to the Department of Commerce. This administrative change, which increased Congress' control over its agent by ensuring that the agent would be lobbied by the same constituencies as the principals, was prompted by allegations that the Treasury had been too lenient with foreign trading partners. In the trade bills of 1984 and 1988, and in accordance with the increase in the share of tradables, principals steadily increased the scope of Section 301 intended to open foreign markets to cover not only trade in goods, but also services, investment transactions, intellectual property rights, and workers' rights (Hudec, 1999, p. 158). At the same time, by moving the authority of starting investigations in Section 301 cases from the President to the USTR, principals limited the executive's discretion concerning when to use these instruments. Again, therefore, delegation and control increased at the same pace.

The increasing share of tradables in the economy led to an extension of the scope of trade policy in the Uruguay Round (1986-1994) to include such new issues as trade in services and intellectual property rights, accompanied by an increase in congressional control.<sup>15</sup> The hitherto largely domestic services sectors, such as banking, insurance, and telecommunications pushed for the liberalization of services (Drake & Nicolaïdis, 1992), whereas mainly the pharmaceutical industry aggressively lobbied for a framework agreement that would oblige all GATT members to introduce domestic laws for the protection of intellectual property. At this stage, principals secured control over the negotiating agent by mandating that Congress agree to an extension of the delegation of negotiating authority in 1991 and in 1993. Moreover, at the end of the round, principals made Congress' approval of the WTO conditional on a periodic review of the dispute settlement mechanism. If, in any five-year period, a specifically created commission determined that a WTO panel had exceeded its authority or had acted outside of the scope of agreement in at least three cases, any member of either House could introduce a joint resolution that, if enacted and signed by the President, would mandate the US to withdraw from the WTO agreement. In 1994, the US President received the power to conclude negotiations on unfinished issues of the Uruguay Round, a proclamatory power that was used to implement the WTO Agreement on Information Technology in 1997.

In the following years, principals were unwilling to extend the delegation of negotiating authority to the President (Shoch, 2001), until in 2002 Congress finally passed a new trade bill including the delegation of substantial trade policy authority. Again, this authority came accompanied with features intended to establish control. In several cases, Congress has made clear that it would not accept liberalizing trade agreements that imposed concentrated costs on American import-competing interests. Just as in the other periods discussed above, this period thus saw neither the congressional abdication from trade policy,

nor the reassertion of congressional dominance. Rather, as the scope of delegation increased, principals extended their control accordingly.

### 3.3.2 *New competences for the EU*

The rise in the share of tradables in the EC economy in the first half of the 1980s, especially in the formerly non-tradables sectors of services, resulted in new constituency demands. EC member states responded by increasing the scope of delegation and granting the European Commission with an informal negotiating mandate to conduct the Uruguay Round negotiations in wholly new areas of trade policy, such as trade in services, intellectual property protection, health standards, and investment, while monitoring the negotiations directly (Paemen & Bensch, 1995; Hoekman & Kostecki, 2001).

Inter-institutional conflict over the scope and institutional structure of delegation in regard to these new competences has led commentators to conclude that throughout the 1990s member states were busy trying to claw back trade competences from the Commission (Nicolaidis & Meunier, 2002). Member states, however, did not take back any of the competences they had previously delegated, but rather increased the scope of delegation and extended their control mechanisms. They accompanied the increase in the scope of delegation for new trade policy areas with an increase in control by insisting on the legal formula of mixed agreements, as confirmed by opinion 1/94 from the European Court of Justice (Bourgeois, 1995). Member states ensured that the negotiating agent remained constrained by threatening with national vetoes in the areas of trade in services or the international regulation of intellectual property protection, just as they had always done in the area of trade in goods. Inter-institutional legal controversy over the question of exclusive or shared competencies arose when the European Commission insisted on a clear mandate to exercise its functions, leading to conflict about an appropriate institutional arrangement, rather than about policy choices. In practice, the member states and the Commission had been on the same line

throughout the Uruguay Round and beyond (Paemen & Bensch, 1995; Young, 2002, p. 42). The “new” issues, such as audiovisual services, were thus treated no differently from the traditional areas of industrial goods or agriculture. Illustrative of this continuity is the fact that, on behalf of French wheat growers, the newly elected conservative French government put political blame on the negotiating agent for allegedly having transgressed its mandate at the Blair House agreement with the US on agriculture trade. In substance, however, the renegotiations demanded by France only led to symbolic changes (Nicolaidis & Meunier, 2002).

In the middle of the liberalization negotiations of the Uruguay Round, EC member states stepped up delegation to their anti-dumping agent to secure political support from import-competing sectors. In 1988, they introduced an additional duty for cases in which the foreign exporter accused of dumping does not increase the price on the EC market, that is in which he tries to bear the price of the antidumping duty himself.<sup>16</sup> In 1994, they lowered the approval threshold for definitive anti-dumping measures to a simple majority in the Council (Woolcock, 2000).<sup>17</sup> On the control side, they kept the anti-dumping agent from imposing too high costs on other groups in society by specifying for the first time that not only complaining industries but also consumers and processing industry should be heard during anti-dumping investigations. They also transferred the appeals procedure available to the complaining industry from the European Court of Justice to the Court of First Instance, expecting that the latter would not limit itself to procedure, but would also rule on matters of substance, like calculations (Holmes & Kepton, 1996).

On behalf of exporters, member states extended the scope of permanent delegation by entrusting the Directorate General for External Economic Relations of the European Commission with the conduct of market access investigations. Spurred also by the strengthened WTO dispute settlement mechanism, they charged the Commission with the task of bringing cases against other WTO members, as well as with defending the EU against

allegations of WTO-violations by other WTO members. From 1996, the Trade Barriers Regulation Unit and the Market Access Unit were to process exporting industries' complaints on market access problems, whether in trade in goods, in services, or in the application of intellectual property rules, and, if necessary, they were to process them into a dispute settlement case in the WTO (Shaffer, 2003).<sup>18</sup> By giving exporters the possibility to ask for judicial review at the European Court of Justice, while installing the *ex post* sanction that Commission proposals would only be overturned if a qualified majority of member states was against it, principals ensured the Commission would carry out its task according to the detailed rules set out in the act of delegation.

The further increase in the share of tradables in the services sector and in intellectual property intensive industries during the late 1990s spurred member states to extend the scope of delegation in the Nice Treaty of 2001. After some member states still withheld such an extension of delegation in the Amsterdam Treaty of 1997, they formally confirmed the existing practice which granted the Commission the exclusive right to make proposals on matters of trade in services and on all commercial aspects of intellectual property, while a list of exceptions to this rule limited the scope of this delegation.

#### **4. Conclusion**

The delegation of trade authority is an important feature of both American and European trade policy. We have provided an explanation for the pervasiveness of delegation in contemporary trade policy that starts from the assumption that neither principals nor agents have a clear preference for trade-enhancing and economically efficient policies. For several decades, legislators have been confronted with heterogeneous demands that come from import-competing groups seeking protection on the one hand, and from exporters demanding access to foreign markets on the other hand. As legislators are uncertain which constituency will be most important for their political future, they aim at satisfying the demands of both groups in

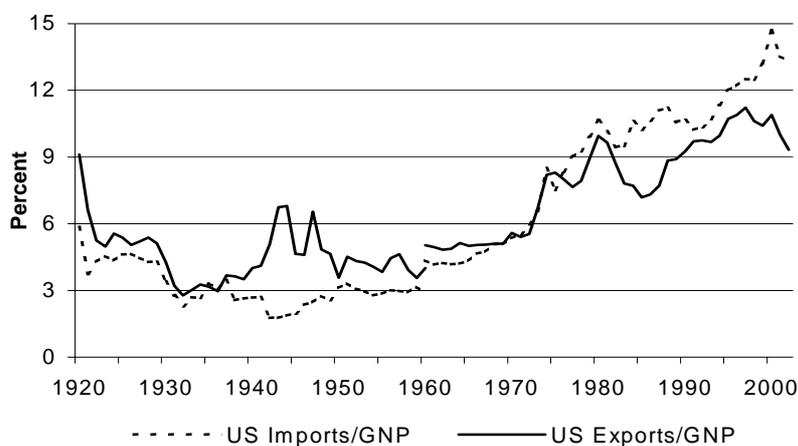
order to forestall the emergence of organized opposition to their policies. The best way of doing so is by delegating trade authority to two sets of agents, one of which is mandated to service import-competing interests, and the other to satisfy the demands of exporters of goods and services. In contrast to existing arguments, this explanation can account for the fact that delegation systematically takes place both for protectionist and for liberalizing political ends, and not just for the latter. At the same time, legislators maintain control over their agents to ensure that delegation does not impose concentrated losses on any part of society, and that interest groups maintain their lobbying activities at the level of the principals. From this argument, we derive the empirical implication that principals accompany an extension in the scope of delegation by parallel increases in the degree of control; put differently, the degree of control keeps pace with the scope of delegation. We have found support for our hypothesis in an empirical study of delegation and control in American and European trade policy.

Whereas the aim of this article has been to show the plausibility of a novel argument for delegation in the trade policy field, future research could engage in a more rigorous test of the argument against some alternative explanations. First, differences in party preferences over trade liberalization versus protectionism may have an influence on principals' decision to delegate trade authority (Schnietz, 2000). Yet, in Europe throughout the period treated here and in the US at least for several decades, parties have hardly disagreed over trade policy issues (Hiscox, forthcoming 2005). This provides some first support for our hunch that the delegation of trade authority requires an explanation different from party politics. Second, the causes for the extension of delegation in both trading entities could be squarely situated with the impact of international trade negotiations. These are essentially exchanges of market access concessions, during which each member is confronted with demands coming from the other negotiating party, and not originating with domestic constituency demands. In the US, however, the passage of trade legislation mandating an agent to engage in trade negotiations normally precedes the start of international trade negotiations, suggesting limitations to this

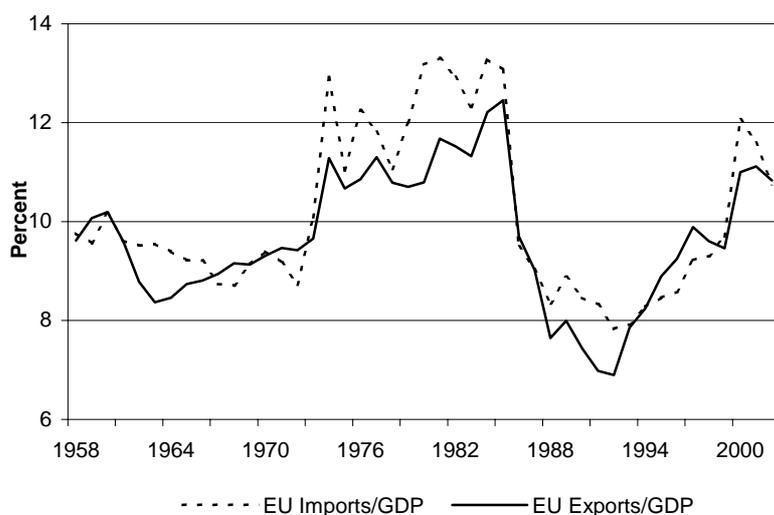
counter-argument. Finally, executive leadership by the US President and the European Commission could have produced an increase in the scope of delegation (Haggard, 1988; Elsig, 2002). However, the American President, who has an electoral base, is subject to the same diverging demands from import-competing and export-oriented constituencies as his counterparts in parliament. In Europe, the European Commission lacks the direct electoral legitimation, necessary to engage in executive leadership. Nevertheless, the jury is still out on which of these competing theoretical arguments performs best empirically.

## Appendix

**Figure 1:** US imports and exports as percentage of gross national product, 1920-2002 (including services from 1960 onwards)



**Figure 2:** EU imports and exports as percentage of gross domestic product, 1958-2002



Sources: Eurostat (various). *External and Intra-European Union Trade—Statistical Yearbook*. Luxembourg: EC; Eurostat (1976). *Monthly External Trade Bulletin: Special Number, 1958-1975*. Luxembourg: EC; Eurostat (various). *National Accounts Aggregates*. Luxembourg: EC; <http://www.ita.doc.gov/td/industry/otea/usfth/tabcon.html> (last accessed on 30 September 2004); Kurian, G. T. (1994). *Datapedia of the United States, 1790-2000*. Lanham: Bernan Press; US International Trade Commission (2004). *Value of U.S. Imports for Consumption, Duties Collected, and Ratio of Duties to Values, 1891 – 2003*. Washington, D.C.: USITC.

## Notes

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<sup>1</sup> We would like to thank Manfred Elsig, Bart Kerremans, Beate Kohler-Koch, Cornelia Racké, Chris Reynolds, Frank Schimmelfennig, Arndt Wonka, Alasdair Young and Thomas Zittel as well as the two anonymous referees for comments on earlier drafts of this article, one of which was presented at the 2004 Joint Sessions of Workshops of the European Consortium for Political Research in Uppsala. We gratefully acknowledge research funding from the EU Research and Training Network Dynamics and Obstacles of European Governance (contract number HPRN-CT-2002-00233) at the Mannheim Center for European Social Research, University of Mannheim.

<sup>2</sup> For convenience sake, we use the term “constituency” both for the geographical notion of electoral district and for the functional notion of key industrial interest.

<sup>3</sup> The same reasoning applies for importers, consuming industries, individual consumers, and factors of production.

<sup>4</sup> This co-ordination can be achieved by what is often referred to as “log-rolling”.

<sup>5</sup> In the US, in 1929, just before the start of the depression, foreign trade accounted for 9.1% of the American economy. This percentage fell to under 5% in 1932, and from then on increased steadily, reaching 10% in 1973, and 20.4% in 2000. Since several rounds of enlargement converted external trade into intra-EU trade, external trade has not increased to the same extent for the EU (see Appendix). Yet, extra-EU trade is likely to have expanded into new economic sectors, as over the same period intra-EU trade replaced external trade in some sectors due to trade diversion.

<sup>6</sup> This is referred to as the problem of “observational equivalence”. The absence of sanctioning by the principals can both signify a complete lack of control, and perfect enforcement (Weingast & Moran 1983).

<sup>7</sup> Two-level game analyses provide a further rationale for control: to increase the bargaining power of a country in international negotiations (Putnam 1988). This explanation fails to work for trade policy instruments that do not depend on negotiations.

<sup>8</sup> In the Treaty of Rome (1957), the main articles defining the functioning of European trade policy are Articles 110-116, the most important of which is Article 113 (since the Treaty of Amsterdam of 1999 Art. 133). Art. 235 (since Amsterdam 308) and Art. 100a (now 95) enable Community action in fields not explicitly set out in the Treaty.

<sup>9</sup> Johnson (1998) quotes a British trade negotiator of the time as saying the Commission negotiator often looked ‘as though he were under close arrest’.

<sup>10</sup> EC Regulation 459/68, OJ L93, 17-4-68.

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<sup>11</sup> Under the European Coal and Steel Community Treaty (1951), member states delegated powers to impose both temporary and definitive anti-dumping duties on steel imports to the Commission without any form of approval in the Council (Holmes & Kepton 1996), although the Treaty reserved all other competences for steel and coal trade to the member states.

<sup>12</sup> These measures were part of the Davignon plans. Article 58 of the ECSC Treaty enabled the Commission to declare a “manifest crisis” which paved the way to a whole range of interventionist and cartel-creating measures such as Community wide production quotas, anti-dumping measures, and threatening market closure, if trading partners were unwilling to agree to “voluntary export restraints”.

<sup>13</sup> EC Regulation 3017/79, OJ L339, 31-12-79.

<sup>14</sup> EC Regulation 2176/84, OJ L201, 30-7-84.

<sup>15</sup> Trade in services as percentage of the American Gross National Product increased from slightly more than 2% in 1960 to just below 5% in 2000, an increase of 150%. See Mitchell (1993) and <http://www.ita.doc.gov/td/industry/otea/usfth/tabcon.html> (last accessed on 30 September 2004).

<sup>16</sup> EC Regulation 2423/88, OJ L209, 2-8-88.

<sup>17</sup> EC Regulation 3283/94, OJ L349, 31-12-94 (amended in Reg. 384/96, OJ L56, 6-3-96). In 2004, the simple majority rule was relaxed again, allowing definitive measures to enter into force unless opposed by a simple majority, while also imposing stricter time limits for investigations (EC Regulation 461/2004, OJ L 77/12, 13-3-2004).

<sup>18</sup> EC Regulation 3286/94, OJ L 3349/71, 31-12-94, as amended by Regulation 356/95, OJ L 41/3, 23-2-95.

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**Table 1:** *The increase in delegation in the US, 1900-2000*

	<i>Permanent</i>			<i>Negotiating</i>		
	<b>Tariffs</b>	<b>Trade remedies</b>	<b>Offensive instruments</b>	<b>NTBs</b>	<b>Services</b>	<b>New issues</b>
<i>1900-30</i>	Partly	Partly				
<i>1931-60</i>	Yes	Yes				
<i>1961-70</i>	Yes	Yes	Partly			
<i>1971-80</i>	Yes	Yes	Yes	Yes		
<i>1981-2000</i>	Yes	Yes	Yes	Yes	Yes	Yes

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**Table 2: The increase in delegation in the EU, 1958-2000**

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	<i>Permanent</i>			<i>Negotiating</i>		
	<b>Tariffs</b>	<b>Trade remedies</b>	<b>Offensive instruments</b>	<b>NTBs</b>	<b>Services</b>	<b>New issues</b>
<i>1958-70</i>	Yes	Yes				
<i>1971-80</i>	Yes	Yes		Yes		
<i>1981-2000</i>	Yes	Yes	Yes	Yes	Yes	Yes

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