



Working Paper

Delegation and Control in European and American Trade Policy

Dirk De Bièvre

Andreas Dür

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Editorial Note:

Dirk De Bièvre is post-doctoral researcher at the MZES. He obtained his PhD in the Social and Political Sciences from the European University Institute in San Domenico di Fiesole, Italy, in May 2002. Among his research interests are the effects of international trade institutions on industry collective action, European trade policy, as well as judicialisation and positive integration in the World Trade Organization. Comments are welcome at: Dirk.DeBievre@mzes.uni-mannheim.de.

Andreas Dür is post-doctoral researcher at the MZES. He just finished his PhD with a thesis entitled "Protecting Exporters: Discrimination and Liberalization in Transatlantic Trade Relations" in the Department of Political and Social Sciences at the European University Institute in San Domenico di Fiesole, Italy. His research interests include trade liberalization, decision-making, and state-society relations. He can be reached at Andreas.Duer@mzes.uni-mannheim.de.

Abstract

Trade policy in both the European Union and the United States has been characterized by a high degree of delegation to the executive. Existing explanations for delegation claim that legislators delegate because they wish to liberalize trade policy but are unable to achieve this aim by acting on their own. As a result, scholars have been led to try and distinguish periods where legislators abdicated their powers in order to have the executive impose liberalization, from periods where principals reasserted their control to provide protection. We take issue with this prevalent view, show that legislators delegate powers to achieve foreign market access for domestic exporters as well as powers to provide protection to import-competing interests, and explain why there has been a steady increase in delegation and a concurrent extension of control. Since principals are confronted with heterogeneous demands from both exporting and import-competing groups, they 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. We test the validity of this proposition for both political entities over the past half century.

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1 Introduction

Students of European trade policy have often wondered whether this policy field is characterized by its gradual supra-nationalization or rather by re-nationalization.¹ 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” (Meunier & Nicolaïdis, 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 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 yet erroneous view, and show how principals have consistently delegated ever more trade policy powers and have kept close control over trade policy in both political systems.

We present a new approach to delegation and control in the field of trade policy by drawing on the analytical 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 preferences between constituencies, principals, and agents, regarding trade liberalization or protection, 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; Meunier & Nicolaïdis, 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 and 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

¹ We would like to thank Pieter Bouwen, Bart Kerremans, Cornelia Racké, Chris Reynolds, Frank Schimmelfennig, Michael Smith, 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 to European Governance” (contract number HPRN-CT-2002-00233) at the Mannheim Center for European Social Research, University of Mannheim.

them.² 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 should be empirically observable, but a steady increase of both the scope of delegation and control should be.

We thus seek to transcend the single case approach to trade policy so prevalent in the literature, apparent 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 trade flows 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. We draw out the main similarities of both political systems, 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, a proposition we subsequently substantiate in an analytical narrative on EU and US trade policy.

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. The main 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 organized groups. On the one hand these are exporting industries; on the other, they are import-competing industries, upon which politicians seek to bestow

² 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.

concentrated benefits in exchange for resources such as information and possibly, but not necessarily, financial contributions, both of which can be essential to obtain office. Political actors thus do not have a specific preference regarding trade orientation, but act as office-seekers. 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).³ 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 concentrated group supports the opposition. Those holding office consequently engineer trade policies that produce only diffuse costs.

As long as organized constituency interests are homogeneous, legislators can easily achieve this objective by way of direct legislation. They legislate for freer trade policies when facing a constituency that depends mainly on exports, and legislate for protectionist policies when facing a predominantly import-competing constituency. In such a setting, parliaments are the only relevant actors determining trade policy. This was arguably the situation as it prevailed in the U.S. 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). Nowadays, many legislators are confronted with lobbying from both exporting and import-competing interests; they thus face the dilemma of having to represent both interests at the same time. They have to engineer policies that are able to deliver both for interests favoring freer trade 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 other principals within the legislature facing the same problem.⁴ Delegating trade policy authority to agents, then, serves to reduce the transaction costs of making trade policies under the condition of heterogeneous constituency interests at both the individual and the collective level. It reduces 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 multiple 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. On the one hand, principals can mandate agents like the US Trade Representative and the European

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

Commission to service exporter constituencies by way of bilateral or multilateral trade negotiations. They also establish 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). On the other hand, the US International Trade Commission and the Anti-Dumping Unit of the European Commission mainly serve import-competing interests by establishing whether dumping has taken place, making injury examinations, and imposing antidumping duties. Similarly, US Congress created the special position of Chief US Textile Negotiator to service the import-competing textile industry by negotiating the trade restricting multi-fiber arrangement. In the EU, member states have 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.

Our rationale for delegation to agents in the trade policy field differs from existing accounts. So far, most authors have concentrated exclusively on one aspect of delegation, namely international trade negotiations intended to achieve reciprocal reductions of trade barriers. Thus the most common explanation 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; 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. Meunier & Nicolaïdis (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 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 parliamen-

⁴ This co-ordination can be achieved by what is often referred to as "log-rolling".

tarians 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 delegation. 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? 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 more sectors of the economy. The expansion of the tradables sector relative to the non-tradables in the domestic economy have spurred new demands coming from sections of society hitherto unaffected by increasing trade.⁵ 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 procurement policies. Politicians have reacted to these new exporter demands by increasing the scope of the delegation, and they have endowed the negotiating agents in the US and the EU, the President and the European Commission, with new trade competences in a slow but steady manner. Moreover, as trade flows have intensified, more sectors have felt the strains of increased imports, and have thus demanded policies to protect their interests. Since their demands tend to be very product specific, principals have instructed agents to provide case-by-case protection. The principals, consequently, have delegated authority to agents to engage in trade negotiations and secure more trade liberalization, but at the same time they have delegated the powers necessary to 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 how and why 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). 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

⁵ 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. See <http://www.ita.doc.gov/td/industry/otea/usfth/tabcon.html> and Mitchell (1993).

lengths to specify the agents' procedures in detail, so as to determine the main constituency that will be able to influence an 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 lack of ratification of 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. 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.⁶

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, however, a specialized agent might go too far and end up imposing costs on other concentrated interests, instead of dispersing them to larger groups in society. This holds for acts of delegation such as anti-dumping or market access investigations; it holds even more importantly for liberalization negotiations, where principals 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 need to use their full array of sanctioning mechanisms. This is the reason why controlling agents entails less transaction costs for legislators than making trade policies 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. 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 the society has to bear concentrated costs from the policies of the agents. Trade policy

External trade has not increased to the same extent in the EU, since several rounds of enlargement converted external trade into intra-EU trade.

⁶ 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).

lobbying has not decreased in recent decades. Indeed, it has become more intensive, and it has specialized in line with specific sector demands (De Bièvre 2003). From this discussion we derive the following hypothesis: *Whenever an increase in the share of tradables makes principals increase the scope of delegation, control over the behavior of agents also increases.*

While we argue that control over trade policy agents tends to be high, we do not go so far as to say that the control is watertight. A certain discretion is in-built in any principal-agent relationship. However, instead of joining other studies in stressing the importance of contractual problems, information asymmetries, agenda setting, transnational constituencies, and differences among principals (Pollack, 2003), we question the premise underlying these studies, namely that principals (or agents) have a strong specific 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, since this concept fundamentally depends on a difference in preferences of principals and agents. 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.⁷

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 provide 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 extended control mechanisms while delegating new tasks to their agents. 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, this neither led to the abdication of principals in the second epoch, nor to the reassertion by them in the third epoch.

⁷ 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.

3.1 Creating and Controlling Trade Policy Agents

3.1.1 The Origins of Delegation in US Trade Policy

The American constitution confers the powers to set tariffs and to regulate foreign commerce on Congress. American legislators, however, 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. The fact that delegation occurred for both constituencies at the same time demonstrates that delegation was not intended to shift blame for trade liberalization, but rather was a way to serve heterogeneous constituency 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 under tight control.

Nevertheless, the principals continued to satisfy at least some of the constituency interests by way of direct legislation until the highly protectionist 1930 Smoot-Hawley Act. 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, which made sure that constituents would continue to lobby principals, is the most important counter-argument to the prevalent view that the principals used the RTAA to establish "protection for Congress" 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 similar features in the combination of separate institutional channels through which the interests of exporters and import-competing industries were being served by different agents within the European Commission. When six western European countries created the European common market in 1958, member states also delegated trade policy-making powers. In the Treaty of Rome, the member states of the European Economic Community (EEC) not only delegated powers to negotiate the enhancement of foreign market access or restrictions of imports, and also delegated permanent powers to raise duties in the event of dumping or the foreign subsidization to the EC Commission, establishing the rule that the European Commission would have an exclusive right to propose any of these trade policy measures.⁸

For international trade negotiations, member states established the practice of granting the Commission a general negotiating mandate, while relying mostly on *ex post* control mechanisms, through a large number of 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). Negotiation mandates to the Commission were given on a general and *ad hoc* basis; they were fine-tuned in these committees, while member states representatives controlled the negotiating agent through their presence during negotiations.⁹ Member states ensured they could sanction their agent through the rejection of Commission proposals by a veto minority in the General Affairs Council, which is composed of members' foreign ministers, and that only after an initial transition period of eight years during which decisions would be taken unanimously.

Simultaneously while granting their agent 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 with the common 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. Principals thus gave 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 explicit act of permanent delegation, in which they stipulated that the Commission could autonomously decide on the imposition of temporary anti-dumping duties and the termination of proceedings (Holmes & Kepton, 1996; Schuknecht, 1992).¹⁰ At the same time, they subjected their anti-dumping agent to oversight control, requiring that he report to a number of lower-level specialized committees in the Council and the Anti-Dumping Committee. They also made a decision on the im-

⁸ 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.

⁹ Johnson (1998) quotes a British trade negotiator of the time as saying the Commission negotiator often looked 'as though he were under close arrest'.

sition of definitive duties by the Commission subject to the *ex post* sanctioning mechanism of a qualified majority in the Council.¹¹

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 Losing Control of the Agent?

Most accounts of delegation and control in American and European trade policy have suggested that the principals lost control over their trade policy agents after delegating authority, as outlined in the previous section. 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 they 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. They thus constrained the discretion of the President in trade negotiations and ensured that the GATT negotiations in the 1950s produced very limited results. 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 (Zeiler, 1992), in which Congress delegated authority to the President to make 50 percent linear cuts of the rates existing on July 1, 1962, and substantially softened the peril-point provision. While this suggests a lowering of control, other provisions offset this effect; the net result was a simple shifting of control from *ex ante* provisions to *ex post* procedures. First, Congress determined that two Senators and two members of

¹⁰ The EC antidumping instrument was codified in 1968 in Regulation 459/68, OJ L93, 17-4-68.

¹¹ 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.

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. Establishing a separate agent for trade negotiations had the advantage of limiting the agent's ability to make issue-linkages between foreign and trade policy. This institutional change enabled Congress to increase its control over the negotiating agent by making sure that it would deal with a weaker agent. 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. In particular, Congress pushed the executive to negotiate an international agreement with the countries exporting textiles to the U.S. to restrict textile imports (Zeiler, 1992).

With the TEA, Congress delegated considerable negotiation powers to the STR to gain market access for American exporters during the ensuing Kennedy Round (1964-1967). At the same time, however, principals kept tight control over their negotiating agent. Even before the negotiations were concluded, the Senate passed a concurrent resolution on 29 June 1966 that stated that the President 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. The executive tried to sell the anti-dumping code negotiated in the Kennedy Round as an executive agreement that could be implemented without congressional approval, but in 1968 Congress passed a bill that instructed the International Trade Commission to view American antidumping law as having precedence over the code. As hypothesized in this paper, therefore, principals' control over the agent remained tight throughout this period.

3.2.2 Extending Delegation and Tightening 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 tight oversight control over their agent by sitting in negotiation meetings, reminding the agent of their power to sanction misbehavior 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 the sanctioning mechanism regarding consensus for GATT negotiation outcomes was prolonged and institutionalized through the so-called Luxemburg 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.

Briefly before the start of the Tokyo Round of GATT negotiations, member states delegated market-restricting negotiating authority to the Commission yet again to meet demands from the textile industry. This led to the Multi-Fiber Arrangement (MFA) in 1972, which extended the quota and voluntary export restraints system that had been established in 1962. At the same time, EC member states acted on behalf of exporter interests, by granting the European Commission a general mandate to negotiate the Tokyo Round of GATT negotiations (1973-79) for tariff reductions in industrial goods, while exercising tight oversight control through the Article 113 Committee and their seats at the negotiation table. Apart from another exchange of tariff concessions in industrial products, exporter constituencies demanded that the EC extend its scope of negotiations to non-tariff barriers. Among other things, the EC 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).

After the end of the Tokyo Round in 1979, the further increase in the share of tradables in the overall economy spurred more import-competing sectors of industry to apply for anti-dumping measures. This expanded the number of industrial sectors on behalf of which the anti-dumping unit of the European Commission was to establish market restrictions. Principals accordingly increased control over their anti-dumping agent by further specifying the procedural rules.¹² They gave European import-competing industries the possibility to appeal the Commission's actions before the European Court of Justice (Jackson & Vermulst, 1989) and obliged the Commission to report yearly on its anti-dumping and anti-subsidy activities. Deeper liberalization, combined with a world steel depression, further prompted member states to delegate trade policy powers in steel products to the Commission, which had been excluded under the Treaty establishing the European Coal and Steel Community (ECSC). They did so by granting the Commission the competence to negotiate voluntary export restraints for steel products with non-EC countries (Messerlin, 1987).¹³

In 1984, member states specified the particular procedure their agent would have to follow in conducting anti-dumping investigations by introducing injury rules in the EC anti-dumping regulation that make sure the Commission does not go too far in satisfying import-competing interests while imposing concentrated costs on industrial consumers of these imports (Schuknecht, 1992).¹⁴ In that same year, principals attempted to service exporter constituencies by delegating powers to the European Commission to conduct market access investigations, the scope of which was defined in the regulation of 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 accordingly.

¹² EC Regulation 3017/79, OJ L339, 31-12-79.

¹³ 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 meas-

3.3 Reassertion and Re-nationalization, or Delegation as Usual?

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 the following section we show that what can be observed is 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 tight 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. It was instructed to report to Congress at the conclusion of the negotiations on the compatibility of an agreement reached with the committee’s members’ economic interests. The Trade Act of 1974, therefore, strengthened congressional oversight of the trade negotiators at the same time as it augmented the scope of delegation, making sure that the relative autonomy of the agent remained unchanged. The same legislation also permanently delegated trade authority to an agent by introducing an offensive trade instrument, generally known as Section 301. This section allowed the STR to initiate investigations into foreign market restrictions, and, if unfair foreign barriers were found, to retaliate. 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 all cases in which relief had been denied had to undergo judicial review (Destler, 1992, pp. 144-145). It even made the imposition of countervailing duties mandatory in cases in which imports were proven to be subsidized. The only remaining discretion 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.

In the Trade Act of 1979, Congress imposed several changes in the organization of its trade policy agents. Congress 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 order to cover not only trade in goods, but also services, investment transactions, intellectual property rights, and workers’ rights in the trade bills of 1984 and 1988, and in accordance with the

ures such as Community wide production quotas, anti-dumping measures, and threatening market closure, if trading partners were unwilling to agree to “voluntary export restraints”.

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

increase in the share of tradables, principals steadily increased the scope of the administrative instruments intended to open foreign markets (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. Moreover, after 1974, trade bills introduced new procedures that the executive is to follow in using these instruments, such as the deadline for retaliation that was included in the 1988 trade legislation.

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.¹⁵ The hitherto largely domestic services sectors, such as banking, insurance, and telecommunications pushed for the liberalization of services (Drake & Nicolaïdis, 1992), whereas it was mainly the pharmaceutical industry which 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 World Trade Organization (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 any of the Houses could introduce a joint resolution that, if enacted and signed by the President, would mandate the US 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 (for trade politics in the US in this period, see 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 tight 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 tightened their control accordingly.

3.3.2 Delegating and Controlling Competences in the EU

In response to new constituency demands, resulting from the strong rise in the share of tradables in the overall economy in the 1980s, especially in the formerly non-tradables sectors of services, EC member states increased the scope of delegation. They granted the European Commission with a

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

broad, and not even formally adopted, 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 retaining the established practice of tightly controlling the negotiations (Paemen & Bensch, 1995; Hoekman & Kostecki, 2001). Conflict over the exact scope and institutional structure of delegation in regard to these new competences has led numerous commentators to conclude that throughout the 1990s member states were busy trying to claw back trade competences from their agent (Meunier & Nicolaïdis, 2002). In reality, member states did not take back any of the competences they had previously delegated, but rather increased the scope of delegation and tightened their control mechanisms accordingly. In the middle of the liberalization negotiations of the Uruguay Round, EC member states increased control over 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.¹⁶ In 1994, they lowered the approval threshold of definitive anti-dumping measures, only requiring a simple majority in the Council (Woolcock, 2000).¹⁷ In addition, they tightened control to keep the 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 (CFI), because they expected that the CFI would not limit itself to procedure alone, but would also rule on matters of substance, like calculations (Holmes & Kepton, 1996).

Member states extended the scope of permanent delegation intended to serve exporter interests 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 (TBR) Unit and the Market Access Database 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 gather them into a dispute settlement case in the WTO (Shaffer, 2003).¹⁸ By giving exporters the possibility to ask for judicial review at the ECJ, 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.

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

¹⁷ 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).

Principals 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. The question of whether the EU had exclusive or shared competences in these areas was a subject of inter-institutional and legal controversy throughout the 1990s. The “new” issues were thus in no way treated differently from the traditional areas of industrial goods or agriculture, where on behalf of French wheat growers, the newly elected conservative French government had even been prepared to 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 (Meunier & Nicolaïdis, 2002).

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 formally 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 started our discussion with considering the frequent assertion in the literature that by delegating, principals abdicate trade policy authority to agents. In the US, the argument goes, congressional delegation of trade policy competences to the President led to a loss of control that was only remedied by congressional reassertion from the 1970s onwards. In the EU, similarly, the standard argument is that after abdication of member state control over trade policy, only in the 1990s member states reasserted their authority in this policy field. We have chosen another route to come to grips with the pervasiveness of delegation in contemporary trade policy by doubting that principals 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. To accomplish this feat, however, they have to overcome high trans-

¹⁸ The EU TBR was created by Regulation 3286/94, OJ L 3349/71, 31-12-94, as amended by Regulation 356/95, OJ L 41/3, 23-2-95.

action costs on the individual and the collective level. On the individual level they have to decide in every single case whether to provide protection or to liberalize, and on the collective level they have to coordinate such a decision with all their fellow legislators.

In order to reduce these prohibitively high transaction costs, they delegate to a set of agents, one set of which is mandated to service import-competing interests, and the other set of which is given the task to satisfy the demands of exporters of goods and services. At the same time legislators maintain tight 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. The transaction costs linked to control are relatively low since each legislator can limit herself to checking that agents do not impose concentrated costs on import-competing or exporter interests within their electoral circumscription. 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. From this general hypothesis, 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 over the last half-century. Delegation has not led to any form of abdication of trade policy authority by the principals in both political systems.

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