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## The Commission and its Principals

Delegation Theory on a Common  
European External Trade Policy  
in the WTO

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## **Abstract**

Understanding the consequences, for states and citizens, of making policy on the EU level is central to the reception of the European project and questions of democracy in the EU. This analysis places EU policy-making, trade policy in particular, in the context of bureaucratic power literature and theory. The focus is on modelling this delegation in order to draw conclusions about the role of institutional structures and Commission agency in making trade policy. The underlying question is: what effects do the institutions of this delegation and the external effects of World Trade Organization (WTO) membership have on the Commission's ability to shape policy, and what effect does that have on policy content? It is suggested that the institutions of trade policy delegation, and the collective principal in particular, both empower the Commission and bias policy against parochial interests. Furthermore, external pressure (in the form of the WTO), serves to increase possibilities for Commission influence.

## **Keywords**

Agency Theory - Common Commercial Policy - GATT - Interest Intermediation - International Trade - Multilevel Governance - Non-Majoritarian Institutions - Trade Policy



## Introduction – the context of this contribution

The question of the prospects for democracy in our globalised world characterised by inter-, super-, and transnational governance is one of vital interest for contemporary scholarship and politics. This question is no where more vibrant and the political realities of a post-national space are no where closer at hand than in the European Union. The research program Reconstituting Democracy in Europe (RECON), and RECON's work package 9 (WP 9) in particular, to which this paper hopes to contribute,<sup>1</sup> examines the impact of globalisation processes on nation state democracies and on the democratisation of the European Union. In examining the EU within the context of other globalisation processes, and the international trading regime in the form of the World Trade Organization (WTO) in particular, we then face two levels of interacting functional regimes governing in concert with, and at times over, European democracies. The RECON project undertakes the challenge to identify and understand what effects the interaction between these functional regimes and (national) democratic structures have on the substance, procedures, and potential for democracy in Europe.

While the specific players and dynamics examined in RECON WP 9 are in many ways new and invite novel theoretical conceptions and analyses, some of the underlying questions have previously been examined at some depth. The context of existing research may have been different, but the theoretical framework is largely compatible and the questions posed are often strikingly similar. The literature in question is the bureaucratic power literature examining the policymaking competence of unelected officials or agencies in the United States government and what it means for democratic control and US democracy in general. The rational-choice/institutionalist theoretical approaches to the delegation of policy-making, and the principal-agent approach (PA approach) in particular, emerged from this literature.

The PA approach is being increasingly utilised by European scholars in studies of the EU, examining features of EU governance through the perspective of a delegation of policymaking powers. For our projects as well, this method of analysis for the EU and its transnational context could be enriching. The rational-choice/PA approach lends itself well to the broad questions concerning the impact of the EU on democracy in Europe or the relationship between democracy and the EU. Thus this contribution seeks to bring into the context of our project an approach that is gaining ground in parallel research that focuses on EU institutions and even on various questions surrounding the EU as a trading power in the WTO. Furthermore, although the relationship is complicated, the PA analyses can be consistent with RECON's theoretical framework of the EU as exemplified in the RECON models.

Eriksen and Fossum's three different models of democratic order serve as a common conceptual language for RECON.<sup>2</sup> In general outlines model one refers to delegated democracy, envisioning the EU as 'a functional regime that is set up to address problems' whereby legitimacy remains tied to the member states; model two is a federal democracy in which the EU is 'a Union that is institutionally equipped to claim direct legitimation'; and model three, conceptually the most complex,

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<sup>1</sup> RECON's WP 9 examines the conditions and prospects of democratization in European transnational legal and political arrangements, and in postnational constellations more generally.

<sup>2</sup> See Eriksen and Fossum 2007a, 2007b.

represents a cosmopolitan democracy order, positioning 'the European Union at the trans- and supranational level of government in Europe, and as one of the regional subsets of a larger cosmopolitan order'. In other terms, this model views the EU as 'the institutional configuration of representative democracy and of the political unit', or a government order. 'The idea is that since "government" is not equivalent with "state", it is possible to conceive of a non-state, democratic polity with explicit government functions' (Eriksen and Fossum 2007a: 11, 16, 20). On the surface, delegation theory and PA approach are most closely aligned with RECON model one of delegated democracy and functional regimes.<sup>3</sup> However, in general PA theory, as a positivist political-science theory, exist on a level separated from questions concerning the legitimacy of delegation per se or legitimate governance design – seeking to structure analysis of what is rather than describing what should be. Nonetheless, as this paper seeks to indicate, a PA analysis can be relevant to normative considerations that fall in line not only with model one, but also with model three. More than offering a complete design of legitimate governance on its own, PA analyses can illuminate the details of existing governance design both in complex, multilevel, multiplayer environments, and the policy effects. These details can then inform the designing of legitimate governance.

In a delegation theory perspective, the EU as a trade power in the WTO represents the delegation of trade policy making authority from the member states to the Commission (following an initial delegation from electorate/legislature to the member states' executives). This analysis focuses on modeling this delegation in order to draw conclusions about the role of institutional structures and Commission agency in making trade policy. The underlying question is; what effects do the institutions of this delegation and the external effects of WTO membership have on the Commission's ability to shape policy, and what effect does that have on policy content?

In approaching these questions I begin with a general overview of the most common methodology of delegation studies, the PA approach, followed by a summary of the literature applying PA theory to the EU. Then a particular aspect of the delegation relationship, the complex principal, will be examined in more detail as it is judged to be an under-examined feature of particular importance in the EU context. The general PA model with a collective principal will then be applied to the complex policy environment of EU trade policy with a view to a more accurate modeling of the delegation. Building on conclusions of related studies, finally certain (untested) propositions are presented regarding the impact of these institutions of policy delegation on Commission autonomy and influence as well as emerging policy. The broad suggestion is that the institutions of trade policy delegation, and the collective principal in particular, both empower the Commission and bias policy against parochial interests. Furthermore, external pressure (in the form of the WTO), serves to increase possibilities for Commission influence. The relevance of these conclusions to EU democracy and global governance research and the normative implications will then be addressed in the final part of this paper.

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<sup>3</sup> Indeed PA scholar Mark Pollack is cited in model 1 by Eriksen and Fossum (2007a: 11).

## Principals and agents

The method of choice for contemporary analyses of delegation to non-majoritarian institutions (NMIs) draws from the new institutionalism in rational choice theory. This theory or approach is referred to as PA Theory as it 'begin[s] with the premise that the political control of agencies is a principal-agent problem' (McCubbins et al. 1987: 243).

A PA problem arises when responsibility and authority are delegated from the original 'owners' (principal) to an agent (individual or body). For example, a PA relationship exists when shareholders hire an executive to run a company or the legislature gives control over a policy or policy area to an agency. The principal-agent problem inherent in an act of delegation is explained by Kewiet and McCubbins (2001) as follows:

In such a relationship the agent seeks to maximize his or her return subject to the constraints and incentives offered by the principal. The principal, conversely, seeks to structure the relationship with the agent so that the outcomes produced [...] are the best the principal can achieve [...] There is, then, a natural conflict of interest between the two [...] In political settings [the conflict] is more likely to be over the course of action the agent is to pursue. The policy agenda of agency bureaucrats, for example can be quite at odds with the preferences of the elected official who oversee them.

(Kewiet and McCubbins 2001: 24)

Part of the PA problem, as McCubbins et al. (1987) outline, is the lack of a perfect solution:

In general, principal-agent problems do not have first-best solutions that guarantee perfect compliance. Moreover, the best available solution typically consists of a method for altering the incentives of the agent (here, the agency). Usually this involves some mechanism for (costly) monitoring of the agent, combined with a system of rewards and punishments. Standard political oversight - hearings, investigations, budget reviews, legislative sanctions - corresponds nicely with this form of solution to a principal-agent problem.

(McCubbins et al. 1987: 243-244)

The PA problem was first theorised in the 1970s in the field of business management (e.g. Alchian and Demsetz 1972; Fama 1980), but was soon adopted by studies of US domestic politics, Congress, and regulatory agencies (e.g. McCubbins 1985; McCubbins and Page 1987; Epstein and O'Halloran 1994, 1999). More recently it has been increasingly applied to the EU (Pollack 1997, 2003; Franchino 2000, 2007)<sup>4</sup> and to international organisations (e.g. Hawkins et al. 2006).

PA analyses were originally motivated by concerns about agent autonomy and principal control. Scholars wanted to identify the level of autonomy of different agencies, or to put it more polemically, to what extent policy making had been handed over to unelected agencies. The early years of political science, PA research in

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<sup>4</sup> For an overview of PA literature on the EU see e.g. Pollack (2002, 2003), Franchino (2007) and Tallberg (2002).

the United States were characterised by a back and forth between scholars citing runaway bureaucracies and others showing adequate agency control by legislatures. A watershed in this regard was the identification of the 'observational equivalence' problem by Weingast and Moran (1983). In their study of the Federal Trade Commission they noted that observations used to support bureaucratic dominance theories, i.e. the rare use of control or sanctioning mechanisms by congress, can equally support congressional dominance theories. Perhaps the sanctioning mechanisms of congress are so effective that they need only be utilised rarely, if at all; the mere anticipation of sanctions or congressional disapproval could be enough to make bureaucrats stay inline with congressional preferences. This problem of observational equivalence, by which perfect control and no control look identical to outside scrutiny, is also characterised as the *rational anticipation* of sanctions by agents (See also Pollack 2002). Agents may anticipate which policy borders they (would not dare to) overstep without any obvious control mechanisms being utilised by the principals. In this case, the agents are indeed being adequately controlled by the principals. This form of control is however extremely hard to identify and quantify for outside observers.

As a result of the difficulty to find reliable empirical support for agency hypotheses, PA literature in the last decades has focused on the formal delegation contract rather than agency. That is to say, rather than trying to identify the amount of autonomy and influence the agent has in practice, given the initial delegation contract and various modifying circumstances (such as asymmetrical information), scholars have taken an institutional turn focusing on the instruments of control and the conditions influencing the delegation contract (Pollack 2002: 207). In particular, the emphasis is on the level of discretion allocated to an agent, discretion being the intentionally - designed range of independent action allotted to the agent according to the delegation agreement.<sup>5</sup>

To summarize briefly the literature, following PA functional logic principals delegate in order to lower transaction costs. For clarity I divide transactions costs into two parts; the costs involved in deciding on/agreeing on/setting policy (transaction costs) and the costs involved in maintaining commitment to a set policy (commitment costs, often found referred to as 'credible commitments' in the EU literature). Thus principals delegate whenever they anticipate that the transaction or commitment costs will be lower than if they make and/or maintain the policy themselves. Therefore they will delegate when policy-related expertise is necessary (and too costly to gain personally); when delegating improves the efficiency of decision-making; when delegating reduces the costs of monitoring compliance (by delegating compliance oversight to a separate body, thereby tying everyone's hands equally); or when delegating reduces the political costs for unpopular policy (by shifting blame). In addition, factors such as the level of conflict among principals, the complexity of a policy, and the bargaining environment will affect the level of discretion granted to an agent (Franchino 2007: 10). Furthermore, while principals seek to control agents, perfect control is unattainable (or too costly to be worthwhile). Therefore delegation creates agency losses and agency costs. Agency losses are incurred when agents engage in undesired independent action, i.e. act against principal's preferences. Agency costs are the costs involved in controlling and monitoring agents (to minimize

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<sup>5</sup> Epstein and O'Halloran (1999) define discretion as the net of initial delegation minus the administrative and oversight mechanisms established to limit shirking.



agency losses). Thus principals will seek to structure delegation so as to receive the most benefits with the least agency losses and costs.

## PA theory and the EU

The literature applying PA theory to the EU is still modest, but rapidly multiplying. As EU and member states have increasingly delegated to non-majoritarian agencies, researchers have increasingly applied a PA approach to the EU (See e.g. Billiet 2006; Elsig 2002; Meunier 2005, 2000). The most comprehensive PA studies of delegation in the EU have been offered by Pollack (2003) and Franchino (2007).<sup>6</sup> There is consensus that delegation in the EU is consistent with the predictions of the PA approach. Pollack finds that The EU's member states delegate to the Commission precisely the types of functions emphasised by the principal-agent literature, including most notably monitoring compliance with EU law, adopting efficient and credible regulations, and setting the legislative agenda in the Council of Ministers (Pollack 2006: 194).

One notable distinction is that EU delegation seems to be more often motivated by concerns of commitment costs, or credible commitments (rather than informational costs), than delegation by the US Congress to agencies (Pollack 2003).<sup>7</sup> However, this variance is likely not the result of fundamental character differences or theoretical inconsistency, but instead it can be explained by the EU's meager resources relative to member-state national bureaucracies in which is not the case in the United States. Limited resources greatly limit the informational efficiency of EU institutions. Franchino's (2000, 2007) new study in particular delivers a comprehensive PA analysis of delegation in the EU. To a greater extent than previous studies, Franchino addresses a wide range of policy making<sup>8</sup> arenas and reformulates PA hypotheses to address EU institutional particularities such as Council decision-making rules and the possibility to delegate to the state level rather than the community level. In doing so, Franchino (2007: 11) also tests the robustness of the PA theory of delegation itself, a test which the PA theory withstands.

What is proposed here is a further step in adapting and reformulating existing PA propositions to the more complex policy environment presented by EU external policy, offering at the same time a more challenging test of the boundaries of a PA approach. Furthermore, a return to the question of agency is also envisioned. Unlike Franchino's analysis, which remains on a relatively high level of abstraction in order to give a broad overview and make use of quantitative, correlative empirical data, this paper focuses on a qualitative analysis of the particularly complex, multi-level policy area of international trade.

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<sup>6</sup> There are many other notable less-comprehensive PA-driven studies of delegation to the EU, among them Tallberg (2002), Meunier (2000), and Meunier and Nicolaïdis (1999).

<sup>7</sup> The exception is the delegation of powers to the European Parliament (Pollack 2003: 16).

<sup>8</sup> Pollack's most comprehensive study focused on treaty decisions, not secondary legislation.

## Complex principal

Not specifically addressed as such in the comprehensive studies by Pollack and only secondarily addressed by Franchino is the 'complex principal' factor. Although the concept of a complex principal is not new, it has not yet been given special consideration as an important factor in delegation to the EU.<sup>9</sup>

Accurate evaluation of the empirical results depends on faithful depiction of the principal(s)-agent relationship. The *single principal* scenario – in which a single individual or completely homogeneous unit/group commissions a single agent – represents the simplest PA relationship and the PA approach at the highest level of abstraction. However, relationships containing more *complex principals* are not only more common, they require different assumptions and analyses. Complex principals can either refer to multiple or collective principals. Following Lyne et al. (2006), *multiple principals* are 'organisationally distinct' from each other – each having its own separate contract with the agent, whereas *collective principals* may be distinct individuals or units. but they, in contrast, must cooperate in their relationship with the agent and cannot individually 'recontract' with the agent.<sup>10</sup> Collective principals are the most common in international organisations (IOs), where generally a majority or super-majority is required to alter delegation agreements between members and the IO secretariat. As Lyne et al. demonstrate, evaluations that define the United States as a single principal may inaccurately judge an agent to be out-of-control and a PA relationship to be ineffective or even failed. However, when a closer look identifies that there are two principals at work, namely the Congress and the Executive, the agent's behavior and the lack of apparent sanctioning or control over it becomes predictable. This is the case because preference heterogeneity among principals is related both to the agent's autonomy and discretion. Autonomy or discretion is the range of independent action open to the agent, taking all the control mechanisms into account. As mentioned above, and following the usage of Hawkins et al (2006), discretion refers to part of the contract between the principal and the agent, the extent to which the 'how' is left open to the agent. That is, when authority is given to achieve certain goals but the specific actions that must be taken to reach the goals are not prescribed, then the agent has discretion over its methods. Autonomy, on the other hand, is according to Hawkins et al. (2006: 8) 'the range of independent action available to the agent'. The two are related, and greater discretion often means more autonomy. However, an agent given substantial discretion and submitted to rigorous oversight with strong control mechanisms may have less autonomy than an agent given stricter guidelines and left unmonitored and uncensored. Thus discretion is intentionally designed and included in the delegation contract by the principal whereas autonomy is 'an unavoidable by-product of imperfect control over agents' (Hawkins et al. 2006: 8).

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<sup>9</sup> It can be argued that implications of complex principal arrangements take on particular importance when dealing with international delegation arrangements; the concept receives particular attention in the articles collected by Hawkins et al. (2006) that apply PA theory to various international organizations. See in particular the article 'Who Delegates? Alternative models of principals in development aid' by Lyne et al.

<sup>10</sup> Similar concepts of 'collective principals' can be found in earlier delegation literature as well, e.g. Moe (1984); Kewiet and McCubbins (2001).

PA theory modeling predicts that agents are given greater discretion when there is greater preference heterogeneity within the principal – assuming majority decision-making and a change from the status quo and/or non-delegation is widely desired. Similarly, preference heterogeneity should increase autonomy because it impedes coordinated control by the principals. This implies that even if one principal does not like a particular course the agent who is pursuing it cannot hinder the agent alone.<sup>11</sup> Additionally, preference heterogeneity allows the agent more preference-bundling options and increased agenda-setting power.

In the simplest Figure 1, one-dimensional representation of the effects of preference heterogeneity is given. The range from X to Y represents the full range of preferences possible for a given policy. For simplicity's sake, only five members of a collective principal are listed, A-F, which can also be understood as like-minded groups. Depending on coalition politics and power-balances between the members, the agent might be able to choose any position between the poles of A and F, which in the case of great preference heterogeneity (1) means a greater variety of positions and in cases of relative preference homogeneity (2) a very limited range. When principals' preferences are more aligned, the continuum of flexibility between principal-preference poles (represented roughly by the gray dotted line in both figures) is/ will be more limited (Figure 2) than given a wider range of preferences (Figure 1).<sup>12</sup>



Figure 1



Figure 2

These dynamics of preference heterogeneity illustrate the simplest scenario of a multiple principal or majority voting among a collective principal made up of equal members and an undesirable status quo. A different case is presented by unanimous voting rules whereby a single preference outlier can determine the outcome and majority-building is rendered useless. An agent in this case is particularly limited should even only one of the principals prefer the status quo.

In regard to the Commission and the member states we can clearly identify a collective principal constellation. Individual states or coalitions of states cannot individually renegotiate the arrangement with the Commission (certainly nothing less

<sup>11</sup> Similar estimations of effect of principal preference heterogeneity on agent autonomy and/or discretion can be found in e.g. Moe (1984); Kewiet and McCubbins (2001); Martin (2006); Epstein and O'Halloran (1999: 154) argue that discretion is greater in a divided government. On the other hand, Moravcsik (1998: 75) and Pollack (2003:26-34) have argued that in the EU Commission discretion will decrease with more intense conflict in the Council (Franchino 2007: 295).

<sup>12</sup> Martin (2006) uses a similar horizontal-continuum depiction.

than QM, and generally not even QM would suffice). Instead their delegation contract must be established in collaboration, through treaty changes or secondary legislation. The fact that the Commission is the agent of a collective principal has important implications for its autonomy. With a collective principal, coalition politics – driven by the decision rules for aggregating members' preferences – will determine the shape of instruction to and contracts with agents (Lyne et al. 2006: 46). Where preferences diverge we can expect greater delegation and more room for agent autonomy. When principals' interests converge, we can expect less delegation, tighter control of the agent, and less opportunity for the agent to influence policy.<sup>13</sup>

While the general dynamics illustrated in Figure 2 hold true, the maneuverability of the Commission within the continuum of member-state preferences is generally more complex than simply the 'space' between any two extreme positions. Power-balances and blocking minorities would determine available preference-bundling options. In general however, the collective principal analysis would predict strict guidelines (less discretion) and very limited autonomy for the Commission when member states concur.

Franchino (2000, 2007) offers the first wide-scale empirical testing and support for some of these hypotheses in the EU context. His quantitative and qualitative analyses revealed that (with majority voting) a higher level of conflict in the Council does lead to greater discretion for the Commission. On the other hand, Franchino's study does not address the effects of collective principal dynamics and/or preference heterogeneity on Commission autonomy. The boundaries to the available conclusions reflect the empirical limits of existing data, as well as the confines of a rigid PA methodology, which as mentioned above has largely abandoned questions of agency in favor of discretion. Thus, while the PA driven propositions about preference heterogeneity and formal discretion have been confirmed in the context of Council-Commission delegation, related questions about Commission agency have not been studied with similar comprehensiveness.<sup>14</sup> Indeed, this is not the only interesting underexamined feature of the principal constellation to the Commission's agent.

## Theory and practice – focus on trade

For the next step of a PA driven examination of delegation at a lower level of abstraction, the focus will be on the Common Commercial policy and the aspect of making external trade negotiations in the WTO in particular. While this is not the only policy area that lends itself to such analysis, external trade is of particular interest for two reasons. First, external trade is one of the most Europeanised areas, i.e. an area in which the most substantial of powers have long been delegated to the Commission.<sup>15</sup> Secondly, this delegation is not only inner-EU, but is also played out on a global level in an area that boasts a highly developed level of international policy making in general. Globalisation is nowhere more pronounced than in the international

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<sup>13</sup> Martin (2006) draws the same conclusions, although she uses the term 'distributional concerns' to refer to preference heterogeneity.

<sup>14</sup> A notable exception is Meunier (2000), which will be addressed in more detail below.

<sup>15</sup> In treaty delegation Pollack (2006: 186-187) judges the executive powers given to the Commission in the area of Common Commercial Policy to be near the top of the delegation scale. Franchino (2001: 45) confirms this in secondary legislation.

production and trade in goods and services, and the WTO boasts a unique level of legal regulation (juridification) of international relations including sanctioning mechanisms. Therefore the policy area of external trade provides a fascinating backdrop due to its complexity and status.

First, let us address the basic delegation arrangements. The Commission (in the form of Directorate General 1 (DG I), often with input from other DGs) draws up a negotiating-outline proposal; the Council (usually in the form of foreign ministers) adapts and accepts this proposal - in a joint decision on the basis of Qualified Majority Voting (QMV) - giving the Commission its negotiating 'mandate'. The Commission then takes this mandate to Geneva (or wherever the summit or mini-ministerial is being held) and negotiates on the behalf of the Council. The Council may also offer supplementary directives to the Commission throughout the negotiating process (Woolcock 2000: 376-382). While this delegation is broad, the Council may control the Commission in a number of ways. Perhaps most importantly, all final agreements have to be approved by the Council (again, in most cases, formally by QMV). In this way, the Commission would presumably not risk making agreements it believed would later be rejected by the Council.<sup>16</sup> In addition, the Commission must regularly inform and consult with a committee proxy of the Council, the Committee 133. At its senior level, the Committee 133 is made up of senior civil servants from member states and the Director General of DG Trade. The deputy level of Committee 133 meets more regularly (three times a month), and deals with the more technical and less controversial issues. The deputies come from members' permanent representatives in Brussels (Ahearn 2002; Meunier 2005: 34-35). Formally, however, Committee 133 has only advisory power. If the Commission desire, it could bypass the Committee and take matters to the Council by means of The Permanent Representatives Committee (COREPER) (Murphy 2000: 99).

Ostensibly, it seems to be a clear and formal arrangement whereby the Council is a collective principal voting by qualified majority to the DG Trade agent with Committee 133 functioning as police-patrol oversight. In practice, however, there are a number of complicating details. First, while technically decisions in the Council regarding external trade are made by QMV, votes are rarely taken and unanimity is strived for - particularly for sensitive issues such as agriculture.<sup>17</sup> Indeed, individual member states can threaten a veto, and have done so, citing vital national interests. Furthermore, in practice Committee 133 has a decision-influencing role as much as an oversight function, as its opinions are rarely overturned by the Council and even at times 'treated as if they were official decisions of the Council' (Murphy 2000: 100). Indeed, it would seem most accurate to consider Committee 133 as both oversight and proxy principal for any decisions not substantial enough to be taken to the Council.

The picture becomes even a bit more complicated when we include the European Parliament (EP). According to current statutes, the EP is largely excluded from trade policy. It does not consult on, nor approve the trade mandate and is excluded from key consultations. It is however kept informed, and can send observers to major events (like the opening of a new trade round) (Woolcock 2000: 377ff). Also, in cases

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<sup>16</sup> Although such a rejection of a Commission-negotiated agreement has taken place at least twice; in 1993 over the Blair House Accord and in 1997 regarding trade deals with Mexico and Jordan (Meunier 2005: 183).

<sup>17</sup> Decisions regarding trade in cultural services must also be made unanimously.

where co-decision procedure applies, the EP must give its assent to agreements by simple majority (ibid., 379).<sup>18</sup> Therefore the EP must be taken into consideration by the agent – at least in areas of co-decision – and if Lisbon is ratified, the EP will have to consent to trade negotiation results in general (Woolcock 2008: 1). Even without Lisbon or in areas outside co-decision, the EP does have sanctioning powers over the agent. With a two thirds majority the EP can censure the Commission and impact its political survival. Therefore, in cases where the EP preference is salient (approaching or beyond a two thirds majority), the Commission could be at risk for removal and can be expected to fall in line with the Parliament.

What is the best way to map this relationship within a PA model? If the EP and the Council had equal control over the Commission (in terms of making or remaking the delegation contract) it would be a clear multiple principal arrangement. However, in a strict sense because the EP has no creative control over the delegation contract (for example a trade negotiation mandate), it cannot be seen as the Commission's principal. Nonetheless, in those cases where the EP exhibits a preference strong enough to result in a censure for the Commission if ignored, it must be considered as a second principal or a powerful member of the collective principal.<sup>19</sup> The central analytical difference between multiple and collective principals is that the former must direct the agent cohesively, whereas multiple principals can place diverging demands on an agent – even conflicting demands. As the latter could conceivably be the case – there is no reason that the EP could not advocate a policy the Council opposes – multiple principal seems the better designation. At the very least, the Commission's general accountability to the EP must be considered when mapping its agency.

## Multiple agents and agent preferences

Just as the principal constellation demands more complex modeling, so does the agent half of the relationship. The Commission is no more a unified single entity than the Council. Its 46 DGs pursue individual policy driven by different considerations and competence lines are not always clearly delineated. For example in trade policy, policy-making in the Commission has been described as 'fragmented', encumbered by 'internal rivalry within and between directorates and Commissioners' and exhibiting 'difficulty in reaching agreed positions' (Murphy 2000: 102). DG Trade has the formal agency and takes the lead, but depending on the issue areas, DGs Agriculture and Rural Development (DG AGRI), DG Health and Consumers, DG Environment and DG Development, it can argue competence and seek to influence policy. In particular DG AGRI plays a significant role in any WTO negotiations pertaining to agriculture, and as agriculture is often the key to concessions in other areas, this gives DG AGRI a powerful role in general. Therefore, although DG Trade

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<sup>18</sup> 'The 1992 Treaty of Maastricht introduced the 'co-decision' procedure, which puts the Parliament on an equal footing with the Council when legislating on a whole series of important issues including the free movement of workers, the internal market, education, research, the environment, trans-European networks, health, culture, consumer protection, etc. The European Parliament has the power to throw out proposed legislation in these fields if an absolute majority of members of Parliament vote against the Council's 'common position' (<<http://europa.eu>>).

<sup>19</sup> See also Pollack (2006: 192-193); he determines that while in general the EP cannot be considered a second principal, at the least the Commission's 'dual accountability' to the member states and the Parliament must be included in the picture.

formally is the sole agent in WTO negotiations, competing DGs can be expected to influence DG Trade's agency, either by strengthening its hand when there are agreements or by weakening its hand when inner-Commission preferences diverge.

What can we assume to be DG Trade's preferences? As outlined above, PA theory assumes an inherent 'conflict of interests' between principal and agent. For example policy agendas of bureaucrats *can* be quite at odds with the preferences of the elected officials' (Author's emphasis, Kewiet and McCubbins 2001: 24). The argument that EU bureaucrats are more pro-European and integration forwarding than their member-state principals is both widely supported and intuitively obvious (See e.g. Pollack 2003: 35; Franchino 2007: 140-141, 150). But this is only one policy fault line. In an area such as external trade, where the Commission delegated substantive policy issues outside the realms of the integration/ sovereignty cleavage, a clear and stable conflict of interests is intuitively unclear, insufficiently supported, and contested in the literature (See Franchino 2007: 138-139, 179, 182). In the context of trade policy, Meunier (2007) gives the following general 'determination' of the Commission's preferences:

[B]ureaucratic competition between the various directorates [...] will of the Commissioner to imprint his person touch and leave a legacy, the defense of the interests of the Member State that nominated the commissioner [...] Commissions efforts to expand its competences and reinforce its power vis-à-vis the other European institutions and the goal to preserve popular support for European integration.

(Meunier 2007: 908)

However, these general parameters clearly leave many open questions. Can we assume that the Commission as an entity has particular preferences distinct from the sum of member-state preferences in terms of tariff levels or harvest methods? If so, is it the individual Commissioner of that particular policy area or the college of Commissioners that is pivotal?<sup>20</sup> In a situation such as EU membership in the WTO, where the Commission represents its member states, which 'master' should we assume the Commission is more interested in serving, the EU or the WTO? Paying greater attention to these questions adds greatly to the robustness of PA analyses in the EU context.

For the moment, however, the following basic assumptions about DG Trade's preferences will guide the discussion: the Commission is assumed to be a) competency forwarding, i.e. integrationist; b) mildly in favor of market-liberalisation or at least not knee-jerk protectionist; c) interested in being a good negotiator at the WTO level (both because its reputation and competence are at stake, and because it is itself representative of a liberal, legal-economic order). Therefore, regarding the last point of DG Trade's 'masters' it will be assumed here that DG Trade wishes to strengthen foster WTO progress wherever it is not in direct conflict with vital community interests and the Commission's own political survival.

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<sup>20</sup> Question also left unanswered by Franchino (2007).

## Institutions of preference aggregation and the WTO

Let us recall that at a higher level of abstraction, Franchino's (2007) recent study found empirical support for the hypotheses that greater preference conflict within the Council will lead to greater delegation of powers to the Commission – when Council decisions are made by the majority.

As stated above, questions of autonomy have fallen out of favor in stricter PA work. This is less so the case with qualitative analyses in the EU context. Dealing with Community trade policy in particular, one of the most comprehensive studies is delivered by Sophie Meunier (2005), who examines EU external trade agreements in particular using a looser PA-compatible analysis. Her focus is the impact 'the institutional mechanisms through which member states transfer their sovereignty' have on international trade agreements – 'given exogenous member states' preferences' (Meunier 2005: 179). Her proposition is that the EU institutions, in particular the decision-making rules, have an effect on preference aggregation so that a 'collective bargaining position distinct from the mean of the member state preferences' results (*ibid.*). She identifies four scenarios of the strategic effect of EU structures on trade negotiations. Meunier builds on the variables of voting-rules/delegation (unanimous equals limited delegation; majority equals greater delegation) and negotiating context. She defines two contexts, conservative and reformist. In the conservative context the EU is on the defensive, being challenged away from its status quo. In a reformist context, the EU, or at least some of its member states, is reformistseeking to alter the status quo. In conservative negotiations and unanimous decision-making Meunier presumes no autonomy for the Commission and an agenda is set by the most conservative state. In conservative negotiations and majority voting she presumes some bargaining latitude for the Commission and agenda-setting power for the median states. In reformist negotiations – in which the EU wants a? change from status quo – the dynamics are similar; under unanimous decision-making the most conservative member draws the lines, often stopping any reformist agenda. When a majority can launch a reformist action, the median states set the agenda and extremes are attenuated (*ibid.*, 180-181). In sum, majority decision-making structures weaken the position of extreme preferences and favor median positions. While unanimity does not strengthen extreme positions, it also does not favor the median. In fact, overall in the EU context, unanimity benefits conservative states most as they gain from the improved bargaining power of the Community while retaining the option to veto. States with mid-range preferences, especially if they are small, benefit from majority-rule. Larger states with more extreme preferences can lose from pooling sovereignty, especially if they are reformist as they can be trumped both by conservative preferences under unanimous decision-making and the median in majority voting (*ibid.*, 182).

Meunier's study therefore contributes important insights into the influence of the institutional mechanisms through which member states (ms) preferences are aggregated. Critically though, it focuses exclusively on the formal mechanisms (voting rules and formal delegation), ignoring informal methods of influence by fully equating voting rules with Commission autonomy. Commission autonomy or agency as such, its extent and alternative sources, is then largely disregarded.

Equally under-examined is the intervening impact of non-EU-institutions, i.e. the WTO level, on the Commission's autonomy and influence. Michèle Knodt's (2004)



institutional analysis of EU membership in the WTO points to exactly such a strengthening of the Commission's position through WTO membership.<sup>21</sup> For example, the Commission's success in Nice in obtaining (exclusive) competency over the new trade issues (services and intellectual property) after having failed to do so in Amsterdam cannot be adequately explained by a change in voting structure or the (exogenous) economic preferences of the member states. While the conditions for the inner-EU institutions did not change between 1997 and 2000/2001, there were notable differences at the WTO level. First, there was the pressure of a new WTO trade round looming (as was not the case in 1997). Second, the Commission could argue its position more strongly (As Pascal Lamy<sup>22</sup> did with his memorable phrase, 'united we stand, divided we fall') having had four years of WTO experience since the Amsterdam negotiations (*ibid.*, 64-68). An accurate model of Commission autonomy must therefore account for the impact of WTO membership as well as member state preferences (and in some cases EP preferences) and the institutions of their aggregation.

## **Modeling Commission agency in international trade policy**

A number of conditions have been determined above that impact the PA relationship in EU trade policy and WTO negotiations, regarding Commission/DG Trade autonomy, agency, or influence.

Greater heterogeneity in member state preferences or conflict within the Council should increase Commission autonomy. This effect, however, is mediated by the method of aggregation (voting rules); where QMV applies the Commission's position as strengthened, with consensus voting (requiring unanimity) the effects of preference heterogeneity are decreased although not completely negated. The Commission's accountability to the EP will come into play in cases of salient Parliament positions; in these cases the Commission can be expected to comply with the EP position as far as possible. Inner-Commission divisions can weaken DG Trade's position vis-à-vis the Council, while inner-Commission consensus would strengthen the Commission's (DG Trade's) position. Finally, WTO-level institutions impact Commission autonomy; compliance or negotiation pressure from the WTO level can be utilised by the Commission to strengthen its internal position and/or push policy in its preferred direction.

Where member state preferences are closely aligned (with no blocking minority exception), the Commission will have little autonomy. In particular, if the EP voices a strong preference concurrent to that of the states, the Commission will pursue the desired course even if it violates its own strong preferences and/or WTO regulations.

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<sup>21</sup> Knodt (2004: 67ff); see also Billiet (2006).

<sup>22</sup> French politician and former European Commissioner for Trade. Now Director-General for the WTO.

## PA plus: aggregation is more than addition

On the theoretical level it is not clear that the effects of preference heterogeneity among a collective or multiple principals would function differently in terms of an agent's agenda-setting autonomy. If an agent's autonomy results from the ability to construct its preferred win-set from among a range of (static) principal preferences, and both multiple and collective principals cannot manage coordinated agent-control, the picture should look similar for multiple and collective principals. However, the mechanics of collective principal preference aggregation deserve a more careful consideration. Thinking in terms of static or predetermined win-sets is to imagine collective principals whose preferences are collected and pooled by an agent like mail-in bids in a silent auction. In the case of ms/Council/Committee 133 preference aggregation where the principals negotiate a joint position together, often in stages over time, a static concept that holds individual principal preferences as static may overlook additional avenues of agent influence.

Three sources for an autonomous Commission impact on EU positions can be commonly found in the literature; 'agenda setting, agency slack and norm repackaging' (Meunier 2007: 908, cites e.g. Elgström 2000; Finnemore and Sikkink 1998). Under the category of agency slack are all of the informal mechanisms through which the Commission or DG Trade can push policy away from the preferences of (some) member states. Of particular importance and most often cited in this regard is asymmetrical information. With its privileged position as a link between member states, and as the international representative of the EU (e.g. in the WTO), DG Trade is privy to information (and expertise) unavailable to Council members. DG Trade can strategically withhold or release information to influence decisions. As of today there has been little systematic research on possibilities for and occurrence of agency slack in EU trade policy.<sup>23</sup>

Agenda setting and norm repackaging overlap in practice. It could be said they represent two different theoretical approaches to the same phenomenon (agenda setting: rationalist, norm repackaging: constructivist). Agenda setting in literal terms includes the ability to make initial proposals as well as include and exclude options or positions from the (original) agenda. Norm repackaging refers specifically to 'framing and repackaging the goals of the MS into a coherent single EU position and, in the process, tweaking their preferences at the margin' (Meunier 2007: 909) – arguably this framing and repackaging is part of or an extension of setting the agenda. There is vast support in the literature that agenda-setting brings influence, and that the agenda-setting position may be used to frame issues (ibid). Similarly, research suggests that the chair of decision-making bodies has power to shape outcomes through its privileged access to the resources of asymmetric information and procedural control (Tallberg 2008: 696).

All this indicates that we should envision the collective principal preference aggregation process as dynamic and interactive, shaped and framed, rather than as a static pooling. One reasonable outcome of such a dynamic is the further attenuation of extreme preferences, particularly when the preferences are difficult to defend. This is to say, a collective principal design may foster a certain level of deliberation in the aggregation of preferences.

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<sup>23</sup> This is in part because, as mentioned above, identifying this presents a great research challenge.

Policy making in practice should also foster a more solution-oriented process. The fact that the more bureaucratic Committee 133 plays a large role in the process, in place of the more political Council, should not be overlooked. The 'working philosophy' of the Committee 133 has been characterised as having a 'concentration on collective problem-solving' as well as being 'pragmatic' and 'flexible' (Murphy 2000: 101). In addition there is the factor of informal contact in shaping policy. 'The committee's [133] work is facilitated by much informal contact between MS representatives and various parts of the Commission' (ibid., 99). Analyses of comitology in the EU have indicated that Committees are more than bargaining fora – characterised instead, or at least in addition, by deliberation, persuasion, and collective preference formation (Joerges and Neyer 1997). This could all further strengthen the Commission's role as agenda setter or preference bundler. It is therefore reasonable to assume that the particular attention must be paid to the Council and Committee 133 process of negotiating a joint position and that the institutional design carries impact beyond what can be captured by voting rules.

The general conclusions of the analysis lend themselves to visual representation (as an illustrative estimation only). In Figures 3, 4, 5 and 6 we see a collective principal representation of six principals (or six different groups of like-minded states). X shall be the conservative position, Y progressive; and a blocking minority of two principals is used for the illustration. Figure 3 represents the possibilities of the agent (e.g. DG Trade) to pool the various positions into a collective position. Given a blocking minority of two principals, the collective position cannot fall beyond the preference boundaries of the second most conservative principal.<sup>24</sup>

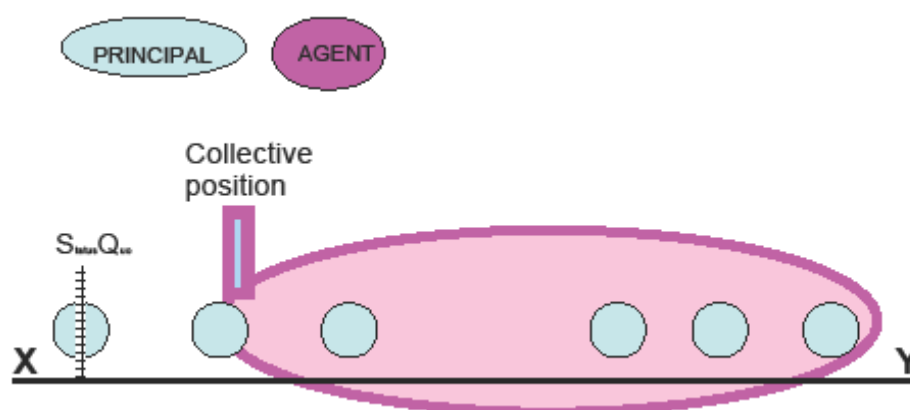


Figure 3

If however we grant some sway to the agent – allowing for 'norm repackaging' and influence not only to pool static positions, but also to shift outlying positions, we see a different collective position resulting from the same initial principal constellation (Figure 4).

<sup>24</sup> The pink circles representing the pooling of a majority of principals' preferences can also be considered a 'win-set'.

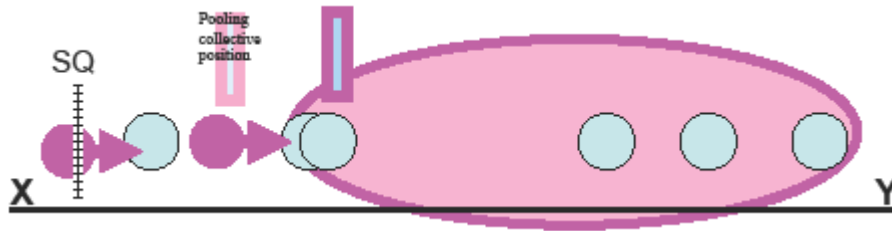


Figure 4

Further it has been argued that the WTO often serves to invalidate an extreme conservative status quo (for example protectionist). In doing so, the WTO level reinforces the ability of the Commission to pull extreme or blocking states toward a more central position as illustrated in Figure 5.

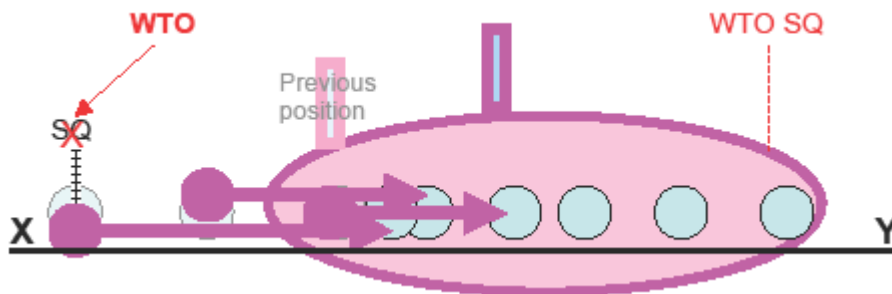


Figure 5

However, such a realignment is only possible if there is divergence among the principals' preferences, with at least a notable number being in favor of a more liberal common position. If principals are closely aligned, the impact of a status quo challenge by the WTO will have little effect on the common position (Figure 6).



Figure 6

Overall it is not the contention here that WTO membership and preference heterogeneity leads to a run-away Commission. The main determinant of EU trade policy continues to be member state preferences. The Commission, however, has a significant ability to 'tweak' EU trade policy in various degrees. The capacity of the Commission to reframe is augmented by the particular dynamics of its collective principal – an institutional arrangement that fosters consensus and can assert a kind of peer-pressure push toward the center – and policy making in practice, including

most importantly the Commission's informational advantages over its principals<sup>25</sup>. The degree of 'tweaking' possible is inversely proportional to strength and rigidity of the preferences of one or more member states. In effect, as all controversial issues in practice require consensus, the Commission's influence is nullified where defense of preferences become zealous. Nonetheless, the extent and specific avenues of the Commission's influence are of importance, since consistent fine-tuning constitutes a certain level of shaping – and a certain degree of flexibility in member state preferences should be the rule, zealousness the exception.

## **Aligned preferences and a powerless Commission An illustrative case**

The capacity of the Commission to shape policy has been theoretically outlined. According to the theory outlined above, there are also important instances in which the Commission could only relay member state positions with negligible room for influence – even given WTO pressure. The case of EU noncompliance with a WTO ruling<sup>26</sup> related to growth hormones in beef serves as a perfect illustration of the exception that proves the rule.<sup>27</sup>

The beef hormone dispute predates the establishment of the WTO after the Uruguay round. In the 1980s, after public protest and pressure from the European Parliament and consumer organisations, the Commission restricted and later prohibited the use of certain growth hormones – with huge impact on US and Canadian beef exporters (See also Ahearn et al. 2008; Mildner and Schmucker 2008; Neyersnd Ehling 2008). Under the new dispute rules of the WTO, the US and Canada were able to bring the matter before a WTO – Dispute Settlement Body (DSB) panel (1996) after having submitted the matter to Codex Alimentarius Commission (CAC) for consideration (1995). The CAC had determined (supported by available scientific evidence) that most of the hormones prohibited by the EU posed no health risks when reasonably administered and therefore the CAC established an acceptable maximum concentration level for these hormones. In 1997 the WTO panel decided that an EU ban on beef with the WTO/CAC approved level of growth hormones was illegitimate unless the EU could provide evidence of health risk – this decision was upheld a year later by the Appellate Body. The EU, however, maintained and even extended its ban on 'questionable' beef.<sup>28</sup> The General Affairs Council argued that consumer protection must come first, i.e. also before international agreements such as the Sanitary and

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<sup>25</sup> This point deserves further development, in particular in relation to the Commission's informational advantage resulting from its role as the negotiator at the WTO level. The extent to which the Commission can and does use the two-level game (Putnam 1988) to its advantage has potentially significant impact on its influence over trade policy.

<sup>26</sup> Indeed there has also been a second WTO ruling (in 2008) on EU vs USA/Canada regarding beef hormones. As, however, the arguments, internal EU dynamics, and ruling remain basically unchanged, this analysis deals with the original case.

<sup>27</sup> Naturally this initial empirical glance is only enough to attest to the feasibility of some of the ideas presented above. An in-depth empirical examination greater than the scope of this paper is necessary to adequately test the propositions arrived at from a modeling of the DG Trade agent as outlined above.

<sup>28</sup> The Commission was given until 13 May 1999 to lift its ban. Beginning in June 1999 the EU extended the embargo to all US beef, citing tests showing that a notable percent (29 per cent) of the US beef that was supposed to be hormone-free contained traces of the prohibited hormones (Neyer and Ehling 2008, Agence Europe, 21 April 1999).

Phytosanitary (SPS) Agreement. The Commission concurred, explaining and developing the EU's position in its 'Communication on the 'precautionary principle' in early 2000.<sup>29</sup>

According to the Commission's position on the precautionary principle, in areas where there are 'reasonable grounds for concern that the potentially dangerous effects on the *environment, human, animal or plant health*' and 'scientific evaluation does not allow the risk to be determined with sufficient certainty', '[t]he Commission considers that the Community, like other WTO members, has the right to establish the level of protection – particularly of the environment, human, animal and plant health, – that it deems appropriate' (ibid).<sup>30</sup>

Given the EU's inability to provide biological evidence contrary to the CAC's findings and its disregard of the SPS Agreement in assessing risk, the WTO's DSB decided that the US and Canada were eligible for retaliatory measures to the amount of \$116 million and \$11 million respectively (Ahearn et al. 2008; Neyer and Ehling 2008).<sup>31</sup> The Commission (DG Trade) accepted the ruling and the retaliatory measures rather than yielding.

Indeed, following the logic of principal preference heterogeneity and agent autonomy outlined above, DG Trade, assuming it would prefer to comply with WTO rulings, had no leeway to lift the embargo on US and Canadian beef.

First, on the level of the member states, preferences among most relevant players can be expected to be largely aligned. As EU beef producers across the board had stopped using the growth hormones after the initial prohibition in the 1980s, they could only gain from a ban on beef in North America. We can therefore expect that no state had to wrangle with a strong producer lobby in favor of hormone-beef and fight for this position in the Council.<sup>32</sup> This alone would have limited DG Trade's leeway in lifting the ban. But to further restrict DG Trade, the intervening conditions of conflict among agents and a second principal came into play.

While DG Trade may have initially wanted a WTO-compliant solution, DGs for environment or health and consumer protection were certainly aligned with the lobbies (European consumer as well as powerful farm lobbies) and public opinion behind the ban. This has weakened a pro-trade positioned DG Trade vis-à-vis the Council/member states.

Moreover, the beef hormone case is one in which the European Parliament must be considered a second principal (second to collective principal Council). Roughly at the same time as the beef hormone case was going to a WTO panel, the Commission was under great scrutiny from the EP and public opinion due to its complicity in the

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<sup>29</sup> Com (2000)1, adopted 2 February 2000. This reference I don't understand

<sup>30</sup> Italics in original, press release: <[http://ec.europa.eu/environment/docum/20001\\_en.htm](http://ec.europa.eu/environment/docum/20001_en.htm)>.

<sup>31</sup> In the 2008 WTO case the EU brought evidence that one of the six banned hormones caused cancer and harmed genes, for the other five it still lacked evidence and sought to implement the precautionary principle.

<sup>32</sup> Consumer interests (in terms of price) are notoriously diffuse and much less powerful than producer lobbies. In this case they would have been in any case trumped by health concerns of consumers and the EU farm lobbies who stood to gain market share from a continued ban.

spread of BSE in Europe by keeping the threats under wraps. The EP threatened to censure the Commission if they did not make major reforms to their structures and food stuffs policies. It was clear that in the new beef dispute the Commission would have to take a strong position on consumer safety in the international debate. What is more, in a unanimous vote in May 1999 the EP demanded that the Commission maintain its embargo on hormone-beef. The precautionary principle was also confirmed by the EP in an overwhelming 502 to two vote. It is therefore obvious that the Commission (in the form of DG Trade) had clear orders from the EP on the matter of this WTO DSB case, orders that could well have led to a censure if ignored (See Neyer and Ehling 2008). This case then illustrates the (extreme) incompetence of DG Trade. Not only was the preferences of the collective principal (Council) closely aligned (against WTO regulations), but also a second powerful principal in the form of the EP took the same position. Furthermore, if DG Trade had wanted to take a more liberal SPS or CAC position, it would have faced resistance within the Commission from other DGs. The fact that the Commission's strong position on the precautionary principle not is in accordance with the preference of the DG Trade, but rather is a reaction to the strong positions of the Council, EP, and European public opinion, is indicated by the timing- the Commission took its position months after the EP votes, Council statements, and even the WTO retaliatory measures verdict.

## Conclusions

The aim of this paper has been to give a richer understanding of the dynamics of trade policy delegation in the EU and the impact of the resulting mechanisms on policy. There have been two lines of argumentation of arguments, one theoretical and one practical.

In terms of theory it has been argued that in a policy area as multi-leveled and complex as trade, the delegation needs to be carefully and accurately modeled. Specifically this means a) factoring for the Commission's accountability to the European Parliament as well as the Council and b) considering the possibility of multiple agents and the effects of inner-Commission conflict.

In terms of practice, it has been claimed that careful consideration should be given to the impact of the collective principal in the form of Council/Committee 133. First there is the expected impact of preference aggregation (and preference diversity) on agent autonomy and influence. Further, it has been argued that the specific institutions of this aggregation (included but not limited to voting rules) can be expected to influence the outcome. Furthermore, it can also be expected that the Commission in their leading position has some ability to steer and shape the process – and that the Commission's ability to do so is strengthened by its privileged position in the WTO vis-à-vis member states. Policy-making in practice, when we account for asymmetrical information in favor of the Commission and the role of informal contacts and bureaucracy, can also be expected to increase the influence of Commission/DG Trade.

In sum, the Commission's influence as discussed and illustrated above is maximised when the member state's preferences vary and is limited by particularly salient preferences – to a greater extent the wider they are shared. Furthermore, the paper argues that the institutions of this delegation bias EU trade policy against extreme

and/or parochial preferences in general. Because extreme preferences are attenuated in inner-EU position-building and pressure from the WTO (and as a result, the Commission and similarly-minded member states) serve to further weaken the conservative positions, exceptional/non-compliant positions will be difficult to maintain. Therefore, due to its institutional structures EU trade policy is biased toward a rule-conformed (e.g. WTO-compliant) liberalism of collective (European) preferences. However, in instances of a salient widely-shared preference among member states the policy bias should be member-state preference first, rule-conform second, regardless of WTO pressure or DG Trade preferences to the contrary.<sup>33</sup>

What is clear is that a closer look at EU trade policy in a delegation theory perspective can offer not only needed insights to EU's policy making, while also offering a contribution to the theoretical toolbox. The PA approach can also provide an interesting and fruitful exploration of the prospects of democracy in the EU and international governance.

## Implications – normative considerations

In general this contribution has focused on a (rather technical) theory-based outline of trade policy delegation in the EU without much attention given to the relevance of these institutions to European democracy in a international context.<sup>34</sup>

Central to the debate on democracy in Europe is the conflict between national sovereignty and national democracy on the one hand and international cooperation and transnational fairness on the other. This debate is partly a new version of the conflict between bureaucratic power and (national) democratic control.

The tension between democracy and bureaucracy and the hazards of bureaucracy has been addressed by scholars at least since Montesquieu warned of the despotism of a bureaucratic state in the 18<sup>th</sup> century.<sup>35</sup> In the 20<sup>th</sup> century Weber endorsed the bureaucracy's compatibility with the rational-legal form of authority and even deemed it 'formally the most rational known means of exercising authority' (Weber (1968: 223). He also noted the inevitable conflict between democracy and bureaucracy<sup>36</sup> and the potential power imbalance in favor of an 'expert' bureaucrat at the head of an administrative apparatus, managing the 'dilettante' politician (Weber 1998: 232). The conflict between the advantages of relying on the expertise and rational efficiency of the bureaucracy, and the necessity of maintaining (democratic) political control was not resolved by Weber and has continued to draw the attention of scholars.

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<sup>33</sup> This is not to say that DG Trade always has a strong pro WTO or free-trade bias. But even if this were the case it would not have an impact given an aligned preferences to the contrary in the Council.

<sup>34</sup> An adequately in-depth discussion on democracy in Europe exceeds the scope of this contribution. Numerous and various papers on the subject that have resulted from RECON collaboration can be found at: <<http://www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html>>.

<sup>35</sup> Montesquieu, *The Spirit of the Laws*, see Huber and Shipan (2002: 17). Huber and Shipan (2002) provide a good literature review on the topic of bureaucratization from classical thinkers onward.

<sup>36</sup> Weber (1948/1998:226): 'Thereby, democracy inevitably comes into conflict with the bureaucratic tendencies which, by its fight against notable rule, democracy has produced.' See also Huber and Shipan (2002: 17).



Scholars of public administration such as Woodrow Wilson, who came to the forefront in the late 19<sup>th</sup> century, saw bureaucracy as a path to rational, unbiased policy, wholly consistent with the ideals of democracy. The argument is that civil servants and agencies, being neutral, qualified, and dedicated to public service, will produce coherent policy and well-functioning government when insulated from political 'meddling' (Epstein and O'Halloran 1999: 21; Wilson 1887). The importance of bureaucratic policy experts continue to be expounded, although contemporary scholars generally hold a greater degree of circumscription. Scholars cite the innovation of bureaucratic policy making (e.g., Hecl 1974; Sacks 1980), or like Moe and Caldwell (1994) argue that bureaucrats can make more coherent policy (Huben and Shipan 2002: 21; also e.g. Huntington 1971, cited in Epstein and O'Halloran 1999: 21). Politicians should serve their constituents and leave detailed regulation to 'policy experts in bureaucracy' (Epstein and O'Halloran 1994: 21, paraphrasing Huntington 1971). The advantages in terms of long-term planning and coherence of policy being set by bureaucrats rather than politicians (who by necessity and definition are more focused on short-term goals of reelection and (often) the concerns of particular constituents), are intuitively reasonable. The benefits to be drawn from dedicated policy experts as opposed to the lay politician are similarly intuitive. Such arguments run parallel to discussions of 'output legitimacy' of governance (Scharpf 1999).

In the context of the EU, while never advocating the complete takeover of bureaucratic rule or an administrative state, proponents have long pointed to the centrality of efficiency and utility in the community rationale (See e.g. Eriksen (1999). Indeed, central to the thinking of the leading scholars of EU politics and scholarship such as Jean Monnet, Walter Hallstein and Ernest Haas was the implicit assumption that independent and enterprising behavior by EU agents is normatively desirable (Pollack 2003: 408) – that bureaucratic power, at least in the EU context, was in general a positive force. Giandomenico Majone's (1996) 'regulatory EU state' revives Wilsonian arguments about insulating policy from democratic pressure to achieve efficient, competent, and credible policy (Wilson 1887; Majone 1994, 1996). Majone (1996: 3) notes that governments may 'lack the knowledge and the flexibility necessary for successful discretionary policy'. Further, not only does delegation serve for more efficient policy making, it also helps redress the credibility problem of elected politicians which is perhaps particularly sensitive in an international context such as that of EU. The credibility problem refers to the lack of assurance of long-term consistent commitment to decisions by all parties. By delegating regulatory powers to independent institutions, as Majone (1996: 4) argues, 'governments can commit themselves to regulatory strategies that would not be credible otherwise'. Since decisions will be implemented or enforced by an independent agent, each party can trust that the others' decisions will (be forced to) comply. However, although Majone clearly advocates delegating policy making power to non-majoritarian, i.e. not directly elected or accountable agents or agencies, he acknowledges the resulting questions of accountability and legitimacy. Although in his view independence (from direct political control) is a necessary criterion for informed and credible policy making, the agents or agencies can and should remain indirectly accountable through control instruments such as 'clear and narrowly defined objectives; accountability by results; strict procedural requirements' (Majone 1996: 5). The legitimacy dilemma, on the other hand, is solved by sectioning off particular, appropriate policy areas. He argues:

[D]elegation is legitimate in the case of efficiency issues, that is, where the task is to find a solution capable of improving the conditions of all, or almost all, individuals and groups in society. On the other hand, redistributive policies, which aim to improve the conditions of one group in society at the expense of another, should not be delegated to independent experts

(Majone 1996: 5)

If Majone's and the founder's support for delegation seems to rely on output legitimacy, there is a newer strain of EU scholarship that may justify delegation by what has been labeled 'throughput legitimacy'. Throughput legitimacy 'concerns how decisions are made and where the deliberative quality of the decision-making process is seen as enhancing legitimacy' (Langdal and Sydow 2007: 8). In this perspective the deliberative supranational view of bureaucratic policy making and implementation through comitology procedures. Joerges and Neyer (1997a) highlights the possibility of bureaucratic policy making through solution-orientated deliberation (See Eriksen (1998; Joerges and Neyer 1997a).

The benefits of bureaucracy are nevertheless highly contested. The 1960s and 70s saw a strong wave of anti-bureaucratisation work as scholars in the United States accused legislators of having handed over the execution of public policy to unelected bureaucrats - debates which appeared shortly afterward in Europe.<sup>37</sup> Bureaucratic power was labeled 'elitist, undemocratic, and biased' (Epstein and O'Halloran 1994: 21). And delegation of power to unelected agents creates further distance between the people and the sphere of policy making (Offe 1972; O'Connor 1978; see also Huban and Shipan 2002; Epstein and O'Halloran 1999). Contrary to the thinkers mentioned above, these scholars see bureaucratic policy as having less capacity for innovation than its democratic alternative and they question the idea of bureaucratic neutrality (Hall 1986; Knot and Miller 1987: 190). Theodore Lowi's (1969) much cited critique of bureaucratic power further identified a new 'interest-group liberalism' resulting from the administrative state - Lowi's thesis was that agencies reacted to pressure from organised interest groups seeking policy in their favor. The result is policy made to serve organised private interests rather than the public good (See Epstein and O'Halloran 1999: 22; Huban and Shipan 2002: 22).

While an inherently pro-bureaucratic-power view dominated early EU scholarship, in more recent decades the resulting tensions in terms of democratic legitimacy has been widely voiced. It is argued that the increasing policy power of EU agents has led to a growing 'democratic deficit'. EU organs appear far removed from Europe's citizens in terms of both transparency and accountability. Only the relatively weak Parliament is directly elected, whereas the powerful agenda-setting and regulating Commission is made up of unelected technocrats.<sup>38</sup> The Council of Ministers is only indirectly elected and often deliberates where the deliberation process is kept off-public. What is more, proponents of the no demos thesis<sup>39</sup> find that even elections cannot contribute to EU's

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<sup>37</sup> E.g. Lowi (1969). This summary draws from the more comprehensive review in Epstein and O'Halloran (1999) and Huban and Shipan (2002). Some of the authors in this camp cited by Huban and Shipan and/or Epstein and O'Halloran: Offe (1972), O'Connor (1978), Russel (1967), Wright (1978), Aranson, Gellhorn, and Robinson (1982).

<sup>38</sup> See, e.g. Moravcsik's summary of the democratic deficit arguments, which he views critically (Moravcsik 2002: 604-605).

<sup>39</sup> For the no demos thesis see Grimm (1995); For a critical view, see Weiler (1995).

legitimacy because Europe lacks the sense of social cohesion of a *demos* – in terms of common language, common history, common cultural habits and sensibilities' (Weiler: 1995).

The democratic critique of the EU is fed not only by the non-democratic structures of policy making (lack of input legitimacy), but also by the perceived outcome bias toward economic liberalising policy. While negative integration (the eliminating of market barriers) has greatly progressed, positive integration (most importantly social welfare policies) lags behind; critics have seen in this the reality or risk of 'social dumping' or a 'race to the bottom' (See also Scharpf 1999; Pollack 2003: 408; Moravcsik 2002).<sup>40</sup>

In discussing the democratic implications we must not ignore the distinction that separates the EU from traditional forums of democracy vs. bureaucracy dilemmas. EU bureaucracy is not making policy for a state based on democratic rule, rather it is coordinating policy among democratic states. In the transnational and EU context (national) democratic rule has the central structural fault of parochialism (Joerges and Neyer 1997a; also Eriksen and Fossum 2007 a: 27). When viewed from a transnational perspective, this has important consequences for the bureaucracy-democracy legitimacy discussion. This parochialism results from the fact that decisions in national democracies are made by, and for the benefit of, 'its' people alone, while many of these decisions have repercussions for people beyond a state's borders (Joerges and Neyer 1997 a: 293).

It is argued here that the EU's trade policy institutions bias policy in favor of the supranational (Commission) and the majority, and then away from the parochial. As a result Europe's national democracies are weakened. However, national democracies are neither wholly nor irreversibly disempowered since decisions are generally made by consensus and individual countries retain a right to veto. In this relation there is a strong supranational element with a certain flexible level of national democratic control (in the form of the national executive in particular). Thus the delegation arrangements go a long way toward correcting the structural failure of selfish democratic rule within the EU without blankly overwriting national democratic sovereignty. More specifically, this analysis leads to a two sided conclusion regarding democracy in Europe's trade policy. On the one hand, the policy that comes out of the institutional structures outlined above is insulated and removed from control and direct sanction by democratic voters in the nation states. Any Commission influence over policy (*vis-à-vis* the member states) moves the policy further away from direct control by the voters, and perhaps from the voters' preferences as well – to the extent that these are represented by their elected leaders in the Council. On the other hand, by biasing policy against parochial preferences, which in trade policy generally means powerful producer preferences, the result may be a policy that is more in line with the interests of most of Europe's citizens, or even most citizens globally. This conclusion is strengthened when we consider the potential for the European Parliament and competing DGs (like Development, Environment, or Health and Consumers) to influence policymaking on behalf of the generally underrepresented consumers.

The EU trade policy delegation arrangement seems to strike a somewhat elastic balance that strengthens the majority and the supranational level without completely

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<sup>40</sup> See Vogel (1995) for an opposing view to the inevitability of a race to the bottom.

disempowering individual states – in a sense, it balances decisions ‘by’ the (national) people with decisions ‘for’ the collective people. This balance, however, is well-removed from direct participation and oversight of the individual voter in Europe, a fact that remains difficult to reconcile with most notions of democracy and therefore remains a challenge for European democracy.

## **Further questions**

Naturally, a more in-depth empirical examination is required to adequately test the propositions arrived from a modeling of the DG Trade agent as outlined above. To consider the effects of delegating trade competency to the EU, the project necessitates qualitative, process-tracing case-study analysis preferably in combination with a quantitative overview. Recent research also indicates that more attention needs to be given to the role of business on the European level (See Shaffer 2003; Dür 2008). To the extent that business interacts directly with the Commission (as opposed to through national governments) and may have a role in shaping policy at the supranational level, it should also be accounted for in the model of delegation. Perhaps most importantly, in this contribution emphasis has been placed on formal delegation structures, while more empirical attention should be given to the extent of the Commission’s ‘unofficial’ advantages such as knowledge, access, and expertise and how all of this impacts its influence over trade policy.

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