The Delegation of Exclusive Trade Competence in EU

---Domestic Interests, Regional Competence and International Institutions

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List of Abbreviations:

ACP	African Caribbean and Pacific
ASEAN	The Association of Southeast Asian Nations
ASP	Application Service Provider
BDI	Bundesverband der deutschen Industrie
CCP	Common Commercial Policy
CDU	Christian Democratic Union
CFSP	Common Foreign and Security Policy
COREPER	Committee of Permanent Representatives
DBP	Deutsche Bundespost
DG	Directorate General
DSB	Dispute Settlement Body
DGT	Direction Général de Télécommunications
DT	Deutsch Telecom
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
ECT	Treaty Establishing the European Community
EFTA	European Free Trade Area
EMU	Economic and Monetary Union
EP	European Parliament
EPA	Economic Partnership Agreement
ESF	European Service Forum
ETNO	European Telecommunications Network Operators' Association
EU	European Union
EURATOM	European Atomic Energy Community
FATF	Financial Action Task Force
FAO	Food and Agriculture Organization
FDI	Foreign Direct Investment
FLG	Financial Leaders’ Group
GAC	General Affairs Council
GATS	General Agreement on Trade in Services
GATT	General Agreement of Tariffs and Trade
GBT	Global Basis Telecommunications
GDP	Gross domestic product

GSP	Generalized System of Preferences
HI	Historical Institutionalism
IFSL	International Financial Services London
IGC	Intergovernmental Conference
IMF	International Monetary Fund
INTA	Committee on International Trade
IP	Intellectual Property
IPE	International Political Economy
IR	International Relations
ITU	International Telecommunication Union
LI	Liberal Inter-governmentalism
MFN	Most Favored Nation
NAFTA	North American Free Trade Area
NATO	North Atlantic Treaty Organization
NCPI	New Commercial Policy Instrument
NGO	Non Governmental Organization
PA	Principal-Agent
PTT	Post, Telephone and Telegraph
OECD	Organization of Economic Cooperation and Development
QMV	Qualified Majority Voting
RI	Rational Institutionalism
SEA	Single European Act
TBR	Trade Barrier Regulation
TBT	Technical Barriers to Trade
TEC	Revised Treaty of Rome (Treaty of European Community)
TEU	Treaty on European Union
TNC	Transnational Corporation
TR	Treaty of Rome
TRIMS	Trade Related Investment Measures
TRIPS	Trade Related Intellectual Property Rights
UK	United Kingdom
UNICE	Union of Industrial and Employers' Confederations of Europe
US	United States
WHO	World Health Organization
WTO	World Trade Organization
UNCTAD	United Nations Conference on Trade and Development

CHAPTER 1

Introduction

Trade Competence in "New Trade Issues"

1.1 Introduction

From the late 1980s, international trade has been transformed profoundly by the rising of the new trade issues.[1] This mainly refers to the category of services and intellectual property right which were traditionally separated from trade in goods and usually heavily regulated by domestic regulations. The new world trade agenda gradually transformed the focus of policies from "at the border"(e.g. tariffs and quotas) to "inside the state" (e.g. regulations, laws, standards). It has become a trend to bring the service trade into the international trade negotiations and to persuade the national governments to withdraw the national constraints on the service factors. This development has given rise to the founding of the General Agreements on Trade in Services (GATS) which forms together with GATT the cornerstone of the current world trade regime WTO (Messerlin & Sauvant 1990; Drake and Nicolaïdis 1992).

On the European side, there was an increasing share of the new trade issues in the EC[2] economy since the early 1980s. Besides, the Single Market project was launched in 1986 with its great ambitions to reach the free movement of goods, services, persons and

[1] The new trade issues include mainly service trade, trade in international property right and trade in investment.

[2] There are different references to the European integration. This study uses the notion of EC to refer to the European Community before the Treaty of Maastricht (also known as the Treaty on European Union (TEU)). The notion European Union (EU) is used to refer to the Community after TEU.

capital in the whole European Community.[3] This project has urged the further integration of a growing list of service markets within EC (Schmidt 2004). It is under this context that an obvious political struggle over trade competence has been witnessed within EC throughout the last decade. The European Commission and the member states have debated continuously about the external trade competence in the Community.

Looking back into history, trade policy has been viewed as one of the most integrated policy areas in EU. The European Community has gained exclusive trade competence from Treaty of Rome which delegated full authority from the member states to the Commission to negotiate on behalf of the member states in bilateral, regional or multi-lateral trade negotiations. The Commission's exclusive competence in external trade policies is interpreted as the one of the most significant features in the understanding of European integration (Wallace 2000). This exclusive competence, however, didn't contain a clear definition by nature. It was initially applied to tariff rates, anti-dumping and subsidies, which were the main stakes in early multilateral trade negotiations under GATT. Since the later phase of Tokyo Round (1973-9), the new trade issues started to gain importance and were latterly incorporated into the trade agenda in Uruguay Round (1986-94).

The question arises as to ask whether the European Community's exclusive competence also extends to services, intellectual property right or even investment. The ambiguity in Rome Treaty pushed the Community to redefine trade competences and the degree of delegation from the member states concerning the new trade issues. In particular, it stirred up a political debate over the boundary between "exclusive" and "shared" competence (Meunier and Nicolaïdis 1999; Meunier 2000).

[3] On the single market project of the EU more generally, see Sandholtz and Zysman (1992), Moravcsik (1991), Armstrong and Bulmer (1998), or Wallace and Young (2000).

1.1.1 The analytical puzzle

This competence debate, starting from the beginning of the Uruguay Round of trade negotiations, has shown a heated inter-institutional conflict concerning the scope and institutional structure of competence delegation within EU. After several rounds of political bargaining, this competence debate was partly settled by the Nice Treaty, and then completely by the latest Lisbon Treaty.[4] In Nice treaty, exclusive competence in most services was delegated to the Commission, with notable exceptions in audio-visual or educational services (commission 2000b; Rollo and Holmes 2001). The delegation in Lisbon Treaty is more complete, as the Commission acquires exclusive competence in all key areas including trade in services, trade in IPR and trade-related investments (Woolwock 2008). The successful delegation of exclusive competence to the Commission thus constitutes a main puzzle of this study: **why is further delegation of exclusive competence in new trade issues to the Commission possible?**

Looking into the development of the whole competence debate, it is not difficult to find support for a reverse logic. When the competence issue was firstly pervasive at the end of Uruguay Round, most of the member states showed strong reluctance to the further pooling of competence of new trade issues to the Commission (Meunier and Nicolaïdis 1999).[5] Questioning the exclusiveness of Article 113 in Rome treaty, most member states refused the Commission's proposal of exclusive trade competence in the new trade

[4] Lisbon Treaty comes into force in December 2009, based on a revised version of the failed Constitutional Treaty. The text relating to Common Commercial Policy in Constitutional Treaty remains almost unchanged in Lisbon Treaty. Thus this study only analyzes the 2003 IGC to Constitutional Treaty to show the changes. For a chronological review of the competence debate, please see the third chapter of the dissertation.

[5] The countries that opposed the expansion of trade competence consist of a majority in EU: Germany, France, UK, Denmark, Netherlands, Greece, Spain, Portugal. The countries which supported the Commission's proposal were the less influential states including Italy, Belgium and Ireland. About the details of the elaboration and analysis of the competence debate, see Meunier and Nicolaïdis (1999), Meunier (2005).

issues, which showed a serious tension between the national sovereignty and the supranational delegation of competence.[6] This political tension was firstly diluted by the 1994 ECJ ruling which supported the positions of the member states and restrained the automatic extension of competence from trade in goods to new trade issues. This legal set-back of the Commission has thus been interpreted by some observers as the clawing back of delegated sovereignty of the member states from the Community as a response to the overstretched supranational role of the EU institutions, because of different reasons (Nicolaïdis and Meunier 2002). It is argued that this competence debate showed the trend of taking back of lost national sovereignty in the European integration process. It underpins the claim that the process of integration is a dualism between supranational European law and intergovernmental European policy making (Weiler 1991).

But the latter phase of the competence debate showed some surprising development. Instead of taking back any competence they had previously delegated, member states have gradually agreed to increase the scope of competence delegation in EC's common trade policy. After the verdict of ECJ in 1994, this whole competence debate has undergone several rounds of political bargaining (the 1996 IGC leading to Amsterdam Summit, 2000 IGC to Nice Summit, and the 2003-04 IGC on Constitutional Treaty) throughout the whole 90s and the beginning of the new century. A major compromise of this debate was reached by the agreement of Nice Treaty (2003). Although with some exclusion clauses, the Commission has been endowed with exclusive competence by the Nice Treaty.[7] The final deal was done by the latest Lisbon Treaty which gives the Commission full competence in all WTO trade issues (Figure 1-1).[8]

[6] The 1958 Treaty of Rome formally transferred the competence to negotiate and conclude international agreements on trade from the individual member states to the collective entity.
[7] The exclusion clauses mainly refer to the culture and audiovisual industry which reflected by and large the influence of France, see Meunier and Nicolaïdis 2001.
[8] Lisbon Treaty has terminated the existence of mixed agreement and empowered exclusive competence to the Community, with some exceptions of unanimity rule on audio-visual and cultural service industries, etc..

Figure 1-1: The EU's competence in external trade negotiations

	GATT	**GATS**	**TRIPS**
Legal status within EU 1995	Exclusive competence	Shared competence	**Shared competence**
Legal Status within EU 2009	**Exclusive competence**	**Exclusive competence**	**Exclusive competence**

The successful delegation of trade competence in EC's institutional set-up is puzzling because of two reasons. First, the outcome of the new competence distribution reveals a new political equilibrium within EU. The initial proposal of the Commission for exclusive competence in new trade issues came across strong rejection from most of the national governments including all of the three big ones in the beginning.[9] But with the development of the competence debate, it is interesting to notice the changing positions of the national governments. The final deal was really surprising to the earlier observers who had claimed in the beginning that the member states were ready to take back their lost sovereignty from the Community. The changing mechanism of domestic politics and the interaction between EU institutions and member states as well as between member states which might have influenced their relative positions remain as a black box. The real incentives to reach that new political equilibrium need to be identified.

Second, the competence of new trade issues is more complex than tariff reduction or

[9] The reactions from the member states were, of course, diverse in the beginning. But it is noticeable that all the traditionally influential powers including Germany, France and Britain were on the opposing side, regardless of their comparative advantage in the service industries.

quota restrictions. It is closely intertwined with the domestic regulations and laws which are often referred as the “behind-the-border” factors hindering the liberalization of international trade. Considering the lagging process of market integration in services factors after the Single European Act, it is reasonable to question the Commission’s logic from the beginning. So even in the most integrated field of trade policies in the EU, there is always difficulty in reaching successful policy coordination in multi-level political interaction in EU policy. There is no reason to infer optimistically that it would be easy for the member states to further turn over its sovereignty to the supranational institutions in EU. But why did this happen?

Under what conditions would member states like to coordinate with each other on more sovereignty-sensitive issues and agree to surrender the sovereign prerogatives to a supranational institution, and thus deepen the integration process in the new trade issues (Rosamond 2000, 151)? This question is salient because it helps to clarify the conditions under which principals delegate their trade policy powers to agents, and what determinates the nature and scope of delegation to the agent. The significance of understanding this policy coordination/negotiation process is thus not limited in the special new issue areas of trade. It also tries to seek the explanation of high-level cooperation of economic issues on a regional level under the evolving context of the international political economy. Put in a bigger theoretical context, it helps to understand one of the most fundamental puzzles in IR study: to explain the reasons and conditions of international cooperation between sovereign states (Keohane 1984; Krasner 1983).

1.1.2 Current explanations

This question is worth asking because national cooperation should be treated as an exception instead of regular phenomena in international politics, let alone the delegation

of nation sovereignty in very sensitive matters (Keohane 1984, 12).[10] The current approach usually looks into the competence debate by focusing on the cut-off between the supranational commission and the intergovernmental council of ministers. The commission and member states are thus perceived to be rational actors pursuing their national interest as a kind of ideological goal linked to the defense of the delegation of sovereignty (Meunier and Nicolaïdis 1999; Young 2000). Explaining the 1994 ECJ Ruling and the 1997 Amsterdam Treaty, Meunier and Nicolaïdis observed a temporary set-back of the integrationist project and declared a victory for the member states to take back their lost sovereignty. They attribute this set-back to the ideological battle over European integration in the 1990s. Although on the interest front, greater competitiveness call for more liberal trade policies which could be best pursued with more exclusive competence, since its collective position cannot be held up by the most conservative member state (Meunier 2000). But member states were weighing between the trade preference and the ideological preferences to reach their national position on the trade competence (Meunier and Nicolaïdis 1999).

The focus of analysis in competence delegation is clearly on the state level: the member states have preferences over trade liberalization in the new trade issues, and they also have preferences to the sovereignty delegation. Maravcsik and Nicolaïdis (1999) likewise use similar economic pluralism approach to explain the failing of reform in the CCP at Amsterdam treaty. The liberal intergovernmental approach takes the role of the external institutions as given. It also treats the role of institutions as minimum, maintaining the supremacy of national states as lobbying channels. There are some scholars trying to fix that gap. The development of international institutions is seen as

[10] By Keohane, cooperation is "mutual adjustment rather than to view it simply reflecting a situation in which common interests outweigh conflicting ones." But this doesn't mean to put the European integration into the IR field. The understanding of EU as a sub-field of IR or CP is still contentious among scholars. About the debates, see Sandholtz et al (1998), Wessels (1997), Caporaso (1999), Schapf (1997), Hix (1998), etc.

the causal factor leading to mixed competence (Knodt 2004; Billiet 2006). Some analysis focuses on the different voting mechanisms and bargaining power of EC in its external presence (Hayes 1993; Johnson 1998; Meunier 2005). Only a few works examine the role of the institutional framework and its influence of domestic preferences.

Besides, the proactive role of the Commission in this debate also casts some doubt on the ignorance of supranational actors asserted by LI theory (Moravcsik 1992, 1994). Others refer to the sovereignty "complex" and transaction costs, and draw on the principal-agent literature to explain this puzzle. They have often concentrated on the collective action problem and oversight procedures, thus arguing that the principals actually maintain their competence by strict oversight procedures (Pollack 1999, 2003). This approach focuses on the difference preferences between the principals and agents, and thus leads some authors to look for periods of principals' abdication and their reassertion of power and for the pervasiveness of conflict concerning trade authority. It hypothesizes the sovereignty complex and doesn't help much to understand the concentration of more exclusive competence in the institutional setup. But some empirical research shows that the PA framework is more suited to explain international negotiations in regulatory policies, and less suited to explain developments in distributive policies such as trade (Damro 2007).[11]The theoretical evolvement is in lack of concrete empirical supports.

According to Young, the problem of trade competence in EU institutions actually touches one core problem: whether the member states must participate in international negotiations through EU or they can choose to participate unilaterally. If the exclusive competence stays in EU the members cannot pursue unilateral policies. But if it is on the member states, they can then choose whether or not to cooperate at the European level in order to influence international negotiations (Young 2000). Particularly to the new trade

[11] Damro compared the difference of delegation in trade and competition policy, see: Damro (2007).

issues, the interface of trade policy and domestic policy is necessarily controversial (Holmes 2006). The nature of the sovereignty pooling rather than day to day policy making, reveals the core of the problem that member states have a choice to cooperate on more integration or to act unilaterally. Back into the history, there are some crucial history-making decisions about extending integration and day-to-day decision making within certain policy areas (Hix 1998; Peterson 1995; Wallace 2000). But when trade agreement is extending beyond trade itself into what were once thought of as core areas of states' regulatory sovereignty (Young and Peterson 2006), it is more complicated for the member states to take clear preference stand to more competence delegation.

Another approach checks the judicial practice of competence delegation over time, based on the interpretation of the treaty and ECJ's adjudication of the disputes (Weiler 1991; Young 2000; Leal-Arcas 2007). Following this trace, the extension of EU competence has occurred along two dimensions. The first is through the gradual broadening of the scope of CCP to encompass policy areas not specified by Rome Treaty. The second followed the doctrine of "*interno, externo*" (ECJ case 22/70). According to this doctrine, the EU has external competence where it enjoys the internal powers. It is thus the lawyers (Bourgeois 1995; Cremona 2000; Emiliou 1996; Leal-Arcas 2007) and the Commission (1985, 1995, 1996) that show how the EC's exclusive competence expanded over time as a result of judicial interpretation.

Despite different theoretical perspectives, the reasons of more competence delegation have remained unexplored. It is important to look into it because "external trade constitutes an important test for the ongoing institutional debate over the distribution of power between the center and the states" (Meunier and Nicolaïdis 1999, 478). Also, put in a greater theoretical background, the new trade competence debate approaches the "most fundamental puzzle" to those who want to understand European integration

(Moravcsik 1998). The extension of trade competence to the new trade issues has obviously reached a new equilibrium. In the literature, the rent-seeking theory put the economic interests of market factors at the core to the change of a certain institutional setting or regulation (Stigler 1972; Peltzman 1976). It could be also attributed to the active role of the supranational institutions (Schmidt 1998). It could be some interesting interaction between different actors at different levels, which has not been pursued well in the literature. The mechanism and process behind the re-adjusting of this new equilibrium point is thus theoretically interesting.

1.2 Evolution of theoretical perspectives

In the literature, this competence puzzle refers to the core of the European integration theory. The classical integration theories focus on the explanation of the integration process. It is argued by neo-functionalism that the integration process would occur automatically, through a spread-over process and the influence of supranational institutions (Haas 1961). The liberal governmental perspective challenges that view and emphasizes the preferences of member states (Moravcsik 1993b, 1997, 1998). Besides, there is also focus on the domestic constraints (Koenig and Brauninger 2001; Hug and Koenig 2002), the institutional structures (Garrett and Tsebelis 1996; Pierson 1996; Pollack 1997), as well as the ideas and norms behind the integration process (Christiansen et al. 1999; Risse 2000). A brief overview of different theoretical perspectives of the European integration is illustrated as follow.

1.2.1 Neo-functionalism and supranational institutions

The first type of explanation examines the role of the supranational institutions in the competence delegation. It emphasizes the role of the Commission in pushing the process of European integration forward. This perspective is first explained by Haas in his prominent research of European integration. Hass holds that nation states are forced to

enter relationship with others to gain the economic benefits which are no longer confined within state borders. This leads to the development of the supranational institutions that can operate independently after establishment (Haas 1961). Another core argument is that the supranational institutions will expand authority and competence to areas other than economics through a spillover process, whereas national governments will inevitably lose power (Haas 1958, 1961). The role of the supranational institutions is thus very important in forging visions and setting goals for further integration. They have played decisive roles in constructing the EU and are the central forces for further integration (Sandholz and Zysman 1989).

The supranational institutions could thus pursue a political process of problem solving and policy forming. While the problems could be solved by the supranational institutions, the role of the national states is then relegated. Some scholars argue that as policy responsibilities increase over time, supranational institutions will attempt to deepen European integration (Armstrong and Bulmer 1998). Because only by deepening the integration process could the supranational institutions gain more power. So the EU decision making is embedded in the processes that are provoked, sustained and directed by the pro-integration activities of supranational institutions. The actions of the national states are of secondary importance. The EU institutions are convinced that they have better capacity than national states with regard to the transnational problems.

The emphasis of the supranational institutions finds some support in the early stage of the competence debate. It might argue that the acquired exclusive competence in trade in goods creates pressure to extend this exclusive competence to the area of new trade issues. It is the Commission that first raised this competence issue and wanted to extend the trade competence from traditional trade in goods to service and other new trade issues. But the ECJ 1994 Ruling favored obviously the member states and breached from

its traditional support to the Commission. This is also the moment when the division of competences between the EU and the Member States was politicized. Nevertheless, despite the initiative of the Commission, there is no support for automatic spill-over of competence in the beginning of the competence debate.

Another spillover argument could be that the Commission finally succeeds in gaining exclusive competence because of increased competences over the new trade issues internally. Since the 1986 Single European Act, the Commission had gradually acquired internal competence over the service sectors throughout the 1990s. But the directive aiming to harmonize the enforcement of intellectual property rights in the EC was not agreed by the Council of Ministers until 29 April 2004 (Directive 2004/48/EC). The Lisbon Treaty also precludes clearly the relation between the internal and external competence in the WTO trade matters. There is thus no overlap between the internal and external competence.

It is thus doubtful to argue that the competence delegation is more influenced by the interests of supranational institutions than the single member states. The only support is the proactive role of the Commission throughout the competence debate. But the ruling of another supranational institution -the ECJ- has posed contra argument for the role of supranational institutions. It poses some realistic questions about the real influence and function of the supranational institutions. The black box of the national calculations and the role of the EU institutions remains a myth. It is necessary to clarify how exactly the supranational institutions matter in shaping and deciding the further integration topics, and how the EU institutions interact and bargain with the member states regarding to the further integration of EU.

1.2.2 Liberal Intergovernmental governance, state centric perspective

Based on the state-centric assumption, the LI perspective contributes to a second type of the explanation, by focusing on the convergence of the societal interests among big countries in the Community (Keohane and Nye 1989; Moravcsik 1992). Following the inter-governmental approach, the inter-state bargaining process is the research focus. The integration is only possible when there is preference convergence between the member states (Hoffmann 1966, 1982). Following this perspective, nation states are presumed to be the only theoretically relevant actors. International organizations are created to service the purposes of their member states and their actions are fully explained by the interests, relative bargaining powers and bargaining strategies of the governments (Hoffmann 1982; Garrett 1992, 1995; Moravcsik 1998). The liberal explanation of European integration thus draws more emphasis on the increasing interdependence among European countries and some influence of the EU institutions.[12] It argues that transaction costs, incomplete contracts, and large numbers plague multilateral negotiations (Yarbrough and Yarbrough 1992). A centralized agent with high level of competence delegation could thus alleviate the collective problem and thus increase the efficiency of the policies.

This liberal intergovernmental perspective emphasizes the preferences of the big nation states (Germany, France, UK) in the integration process (Moravcsik 1993). It argues that the broad lines of European integration since 1955 could be integrated as a co-function of three factors: the pattern of commercial advantage, the relative bargaining power of important government, and the incentives to enhance the credibility of interstate commitments (Moravcsik 1998, 3). The co-function of this three factors accounts for the major breakthroughs in the process of European integration. It is primarily the pursuit of commercial interests of powerful economic producers and secondarily the

[12] Liberal theory here refers to the liberal inter-governmentalism theory which is mainly advocated by Moravcsik.

macroeconomic preferences of ruling governmental coalitions that pushed the national leaders to make decisions about further integration process. Economic interests have the most explicit role: they are an important input into national preference formation, which forms the basis for intergovernmental bargaining (Moravcsik 1993, 1998). Here national leaders aggregate the interests of the domestic constituencies, as well as their own interest and then articulate national preference towards European integration (Moravcsik 1991, 1993a b, 1997, 1998, 1999).

The policy making is thus driven solely by the interests and actions of the members of the council of ministers who represent the goals of each of the member state. In inter-governmentalist accounts, maximizing actors' own interest surmounts collective action problems. It argues that the national institutions dominate and structure political debates in general and policy processes in particular, resulting in national interests, and shaping all goals pursued at the supranational level. After the aggregation of domestic preferences in the national level, they are then brought to the bargaining table in Brussels, where agreements reflect the relative power of each member state, while supranational institutions exert little or no causal influence. The asymmetrical interdependence of member states indicates different level of willingness in terms of integration. Those who gained the most economically from integration compromised the most on the margin to realize it, whereas those who gained the least or with the highest adaptation cost intended to impose conditions. Thus the deepening of the integration process is based on the bargaining and agreement among nation states (Moravcsik 1993b).

The bargaining process is a result of the interaction between the national preferences and the relative bargaining power. In order to secure the substantive bargains, governments delegated and pooled sovereignty in international institutions for the purpose of committing one another to cooperate. The delegation of sovereignty to the supranational

level is here explained as efforts to constrain and control one another, or to enhance the credibility of commitments. This argument lies at the heart of the theories of international regimes, which views international institutions as devices to manipulate information in order to promote compliance with common rules (Krasner 1983). The reason of sovereignty delegation is to avoid defection rather than the convergence of ideological conceptions (Moravcsik 1998, 9). This liberal explanation, centering on the interest of the member states and the functional role of the EC institutions, finds its accordance in the elaboration and application of the principal-agent theory to the European integration (Pollack 1997, 2003).

With respect to the competence debate, however, LI does not explain the opposing positions of member states. It was also noted by Moravcsik that both France and UK opposed exclusive community competence over trade in services, although "on purely substantive terms both countries ought to have favored such a move, given their sectoral competitiveness" (Moravcsik and Nicolaidis 1999, 65). Besides, it also fails to explain why the Commission has such a persistent interest even if it was denied both by the legal procedure and the intergovernmental political procedure in the beginning. It ignores the impact of the external factors and the preferences of the Commission, while focusing mainly on the convergence of preferences among big member states.

This liberal approach illustrating the strategic environment and different level games in EU integration, however, assumes national preferences rather than explaining them. By assuming the convergence of the domestic interest, it fails to indicate what kind of interest it is, because the interpretation of interest could be quite different to the export-competition and import-competition groups. Trade liberalization and protection in domestic market could form some heterogeneity of the constituency interest (Frieden and Rogowski, 1996). This simplification of domestic interest overrides the micro-level of

economic interest of some particular industries and the accumulation process of these interests through a domestic structure. It is for this reason that recent reviews call for observers to break into the domestic level and check the national preference formation and domestic politics (Mansfield and Milner 1999; Milner, 1997).

1.3.3 Two-level games approach

The third theoretical approach focuses on the application of game theory to EU integration process (Putnam 1988; Tsebelis 1990; Scharpf 1997). Common policy-making within the "Staatenverbund" of the EU not only affected governments of member states, but furthermore the European integration process is "enlarging the scope of the relevant unit of policy-making" (Kohler-Koch 2000, 22). This enlarged scope was first acknowledged in theory by Putnam in the late 1980s and early 1990s, when he attempted to pin it down by using the concept of "two-level games" (Putnam 1988). According to this concept, domestic groups pursue "their interests by pressuring the government to adopt favorable policies, and politicians are seeking power by constructing coalitions among those groups" (Putnam 1988, 430). So the actors have to bargain simultaneously on two levels: on the international level with foreign governments, and on the domestic level with its relevant domestic constituencies. On the international level, national governments try to "maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments" (Putnam 1988, 430).

This approach provides opportunities for political manipulations between the two levels, under the cover of international pressure, national government representatives can take a more risky position than when handling at the national level (Hayes-Renshaw and Wallace 1997, 23). Some authors have modeled the multi-level interaction between the EU and the international level (see among others Patterson 1997). They concentrate on

changes in the institutional set-up within countries or within the power relations of the actors at the European level. Tsebelis (1990) focused on the analysis of a whole network of nested games, in order to better understand the actor's negotiating position. Schapf (1997) created an actor-centered game theoretical insitutionalism, by arguing that the policy outcomes are the result of constellations of bounded rational actors, whose preferences and bargaining power are to a great extent shaped by institutionalized rules.

This approach, however, is too restricted to grasp the complexity of European governance. Many articles have followed this approach and focused their attention on the policy-making across the levels (Marks 1993; Knodt 1998; Hooghe and Marks 2001). But they don't give convincing explanation on the shifts of equilibrium between different levels, for example, how and why is more exclusive trade competence transferred to the Community level. It describes well the very nature of the European multi-level system, which comprises supranational institutions, member states, sub-national and private actors. But it lacks a clear narrative to explain how the institutional balance is reached among different levels.

1.3.4 New institutionalism

In response to the traditional dichotomy between SI (lacking micro foundations) and LI (no role of institutions), the institutional approach of European integration tries to strike a balance and has gained prominence since the 1990s. It is argued that the organizations arising from certain institutions develop their own interests and try to establish rules that favor an expansion of their own interests and power. The institutions set the rules of the game and determine political, economic and legal outcomes in a crucial manner (Peterson 2001). As an intervening variable, they influence the political discourses, set the political agenda, provide information and set the division of power in different political bodies (Aspinwall and Schneider 2000; Pollack 1997; Garrett and Tsebelis 1996;

Bulmer 1998; Pierson 1996). Two most essential questions are focused by this approach: how institutions originate and change, and how the relationship between institutions and the individual behavior of political actors' interacts (Hall and Taylor 1996).

This "new institutional turn" (Aspinwall and Schneider 2000) includes three strands of institutionalism, namely rational choice, historical and sociological institutionalism. In Rationalist institutionalism, individuals have exogenous preferences and involve in a strategic game. The institutions function like the rule of the game and could directly influence the final outcome. This has led to the modeling of political decision making process on the basis of institutional rules (Moser 1997; Tsebelis and Garrett 2000). The Principal-Agent analysis is another strand. By making use of PA analysis, Pollack constructs a methodological toolbox and operationalizes this approach (see Pollack 1997, 2000). In its application to EU, for example, the member states delegate power to the Commission for the main purpose of functional reasons (Pollack 1997). The agent follows the mandate of the principals and is restricted by the oversight procedures of the principals from shirking, as is shown in the trade policy making of EU. Agency autonomy is likely to vary across issue-areas and over time, as a function of the preferences of the member states, the distribution of information between principals and agents, and the decision rules governing the application of sanctions or the adoption of new legislation (Pollack 1997; Tsebelis and Garrett 2001).

In contrast, historical institutionalism focuses on the effects of institutions over time, as established institutions become subject to increasing returns or lock in effects. That historical process is characterized by the asymmetrical distribution of information and influence policies in a manner not intended by the creators of the institutions. The Agent thus exploits institutional opportunities to pursuer its own interests (Koelbe 1995). Furthermore, HI calls the assumption of exogenous preferences of RI into question

(Bulmer 1994). It argues that the preferences could evolve as a result from the institutional environment (Thelen and Steinmo 1992, 8). When the exogeneity of preferences is relaxed by HI, there is then need to examine the interplay between structure and agency, and the evolution of actors preferences (Koelbe 1995, 242). Sociological institutionalism is the last strand and defines institutions broadly to include informal norms as well as formal rules. It stresses the social constructing effect of the institutions and its impact on the actors' identity and preferences (Aspinwall and Schneider 2000). Those norms are diffused and legitimized among actors in both domestic and international politics.

The new institutionalism has restructured the theoretical debate of European integration. Now it is possible to acknowledge the primacy of the Member States without having to designate the supranational institutions as irrelevant. Or, reversely, it is possible to stress the role of supranational institutions without having to indicate the subordinate role of the member states. All these three stands of institutionalisms have the problem to show clearly how structure really matters and how the structures really affect the behavior of actors. Institutions will have their own preferences and will exert influence through various sub-, trans- and supranational channels in order to have these preferences reflected in policy outcomes. As noted by Hix, however, "there is no single institutionalist explanation to the EU" (1998, 48). There is thus call for the combination of different approaches to gain a complete picture of the reality (Schmidt 1999, 3). It is seen that a combined approach of RI and HI is adopted to check the preferences of different actors (Woll 2004; Hooghe, 2001, etc.).

This approach also cannot effectively explain the competence debate. The most striking point is the Commission's persistence in its preference shirking. The rational institutionalism agrees that the principals are in firm control of the delegated powers

(Pollack, 1997). The Commission, however, has nonetheless succeeded in exerting bureaucratic drift, even though there was formidable barriers on the political front by 1992 IGC and on the legal front by ECJ 1/94 ruling. This is very odd because the Member States are supposed to keep a close eye on the Commission when the issues at stake are very sensitive to them. They should have controlled the Commission's scope for drifting from the preferences of the Member States by different oversight procedures. This controversy is not well answered by the new institutionalism.

1.3 Basic argument, different variables and key definitions

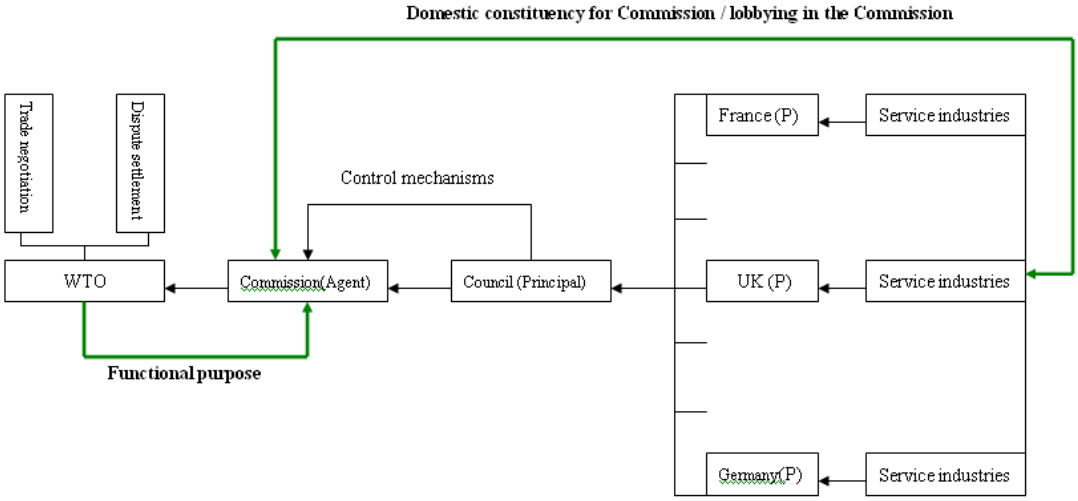
Each of the above theoretical approaches has its own strengths. But none of them can effectively explain the development of the trade competence since the 1990s. The reason, as argued in this study, is that these theories do not sufficiently take into account the external context and domestic preferences. The change of external context favors the Commission's institutional role and leads to the pursuing of more exclusive competence. The evolution of domestic preferences changes the domestic political debate with respect to transfer of sovereignty. This study adopts the PA framework as the starting point and adds the influence of the institutional framework of the international organization and the evolution of domestic preferences to the whole picture. It is argued that the strong, highly legalized institutional framework of WTO favors the Commission's pursue of more exclusive competence, while it is the evolution of domestically related preferences that help to make the real change happen.

1.3.1 Basic argument

This study argues that two factors are mainly responsible for the delegation of exclusive competence to the Community. First, the increasing embeddedness of EU in international trade regime raises the functional need for more exclusive competence. A more comprehensive and institutionalized international trade regime exerts pressure both on

the Commission and the national government. The incorporation of new trade issues into trade agenda (GATS, TRIPS, TRIMS), as well as the streamlined Dispute Settlement Body (DSB) increase the embeddedness of EU in the international trade regime. There is then more functional need for exclusive competence from the Commission to guarantee coherent performance at the international level. Second, because of the evolution of trade preferences of the domestic related industries, the Commission seized the support of the related industries from the domestic constituency, thus more leverage to ask exclusive competence from member states. The Commission as agent could exploit the developments from international institutions and domestic constituencies to get more power from the principals (Figure 1-2).

Figure 1-2: External trade representation in EU



First, the more embeddedness of EU in the international trade regime, the more inclined the Commission to acquire exclusive competence in related trade issues. For the sake of reduced transaction costs and a credible representation with sufficient authority, the Commission deprives its preferences from its embeddedness in international trade regime. Both the incorporation of new trade issues into the international trade agenda

and the strengthening of an implementable DSB have pushed the Commission to ask for more centralization of authority in trade issues. Since the IGC to Maastricht, the Commission had consistently pursued its own preferences for more exclusive competence. The Commission's activeness is attributed to the fact that the international trade regime had evolved substantially both in terms of its content and its dispute settlement body. The position of the Commission was strengthened by the institutional change vis-à-vis the member states.

Specifically, the change from GATT to WTO was a fundamental change to the international trade regime. It has undergone a transformation from a "power-based", diplomatic approach within a loose organizational structure (technically speaking, GATT was only a provisional treaty) to a "rules-based" system that is strongly institutionalized: the WTO (on power-based and rules-based systems, see Jackson 1998). It is this strengthening of institutionalization that increased the EU's embeddedness in international trade regime. The increasing embeddedness has thus enabled the Commission to gain more leeway vis-à-vis the Member States, which led to its persistence of the shirking of preferences.

That tendency of more authority reflects more a functional need than pure ideological considerations, which underlines the core predictions of Neo-functionalism (Haas 1961). But different to the automatic spreading-out effect of Neo-functionalism, this argument focuses more on the exogenous preferences of the Commission. It is the external change of institutions that has led to the preferences of more competence of the Commission. The embeddedness of EU in international institutions remained relatively unexplored in the literature of EU external commercial policies (an exception, see Billiet 2006).

Hypothesis 1: The more embeddedness of EU in the international trade regime, the more

inclined the Commission to acquire exclusive competence in related trade issues, and the more pressure for functional need in external trade competence to the member states.

Second, the evolution of preferences of the domestic actors responds to the internal and external change of institutions, which lead them to circumvent the national government and choose the Commission for business lobbying. This development was used by the Commission to gain direct support from domestic constituencies for its claim of exclusive competence. The traditional state-controlled monopolies in service industries, for example, have gone through a tremendous preference evolution in the 1990s. This evolution happens at two levels. First, the internal regulatory integration leads to the evolution of the business actors' preferences towards more European-wide solutions and thus liberalization oriented preferences. There is a "reversed lobbying process" after the middle 1990s in which the Commission selects the domestic actors to take part in the trade policy making on the community level. Second, when business operators are expanding operations on a global base, its activities will be circumscribed by the international regime governing the individual sector. The calculation of a global market leads to liberalization preferences, which is based on the calculation of new factors, such as potential of scale economies, reduced unit costs, or competition in a global market (Chase 2003). The once protective-oriented service monopolies thus turn to be more liberalization-oriented and would like to achieve more European-like regulatory system in global markets. A more centralized EC institutional framework with exclusive competence in its external representation is better for that purpose.

Based on the model from Tsebelis and Meunier, exclusive competence in the Commission helps to override the protective pressures from some member towards more trade liberalization, especially in areas where EU takes offensive for more liberalization (Meunier 2005, 8-9). With more flexibility, autonomy and authority (Nicolaïdis 1998),

the Commission is better prepared to achieve more liberalization or regulatory reform in the new trade issues. Thus, *ceteris paribus*, a service firm that desires more market access from its international operations is more likely to support the exclusive competence in the EC, as the Commission possesses institutional advantage in international negotiations. The evolution to liberalization-oriented preferences leads to the changes of lobby-scenarios. Besides the traditional lobbying through the national government, the domestic service providers are getting more used to lobbying on the Community level. This development is well explored by the Commission to persuade the member states for more exclusive competence.

Hypothesis 2: the more preferences towards liberalization and market access the domestic operators pursue in global markets, the more lobbying it is to be seen on the community level, thus the more exclusive competence in the Commission.

This study brings these two explaining variables together and tries to give a complete picture of the redistribution of exclusive competences to the Community. It is argued that the Commission as an agent exploits well the developments from international institutions and domestic constituencies to get more power from the principals. The changed international institution leads the Commission to pursue more competence from the member states. The evolution of the domestic preferences leads to their support on the Community level for exclusive competence. It is the combination of these two factors that the Commission's *de facto* competence have been cemented in the Treaty and given a more permanent character, becoming *de jure* competence. Following the development of the explaining variables, the exclusive competence in new trade issues is achieved after different rounds of state-community level of bargaining.

In contrast to the fixed priori of economic interests, this study argues that interest

evolves in the interaction process with other factors in the process. Starting from economic gains and preferences formation of basic market actors, this dissertation tries to depict a process of multi-level interaction and the preference formation at different stages. Trade preferences are thus not treated as fixed priori, and they could be quite ambiguous in the beginning of the interaction process and then get influenced by the political context (Woll 2004). Contrary to the common view of fixed preferences in the IPE literature, this work regards preference formation as a process which could be targeted and explained at different stages of the political interaction (Hall 2004).

Trade politics related to trade competence in the regional level is more complex than a simple linear-causal relationship. The embeddedness of EU in international institutions increases the functional need for the Commission for more exclusive competence. The preferences of domestic operators undergo an evolution process where different variables could exert influence on the formation of preferences in the interaction. This means the perception of economic gains and better market position is something that could be modified by other factors in the strategic setting. This is for example the case in which the interaction process is characterized by a particular set of domestic or international institutional rules. Institutional constraints and domestic economic incentives stay in the core of the argument.

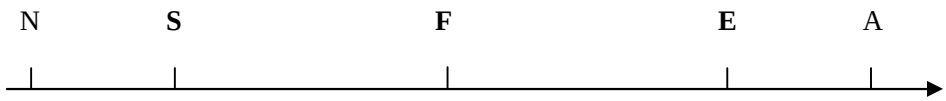
1.3.2 The main dependent variable

This study centers on one main dependent variable in the institutional set-up of EC's external economic politics. This dependent variable relates to the main puzzle of this competence debate, namely the concentration of more exclusive competence in the EC's institutional set-up of external economic policies.

There is clear variation of this dependent variable in the development of the whole

competence issue since Uruguay Round. At the end of the Uruguay Round, there was a *de facto* co-existence of national and community competence in the related new trade issues. Most of the member states were opposing to extend EC's exclusive competence from trade in goods to new trade sectors. The 1994 ECJ verdict showed a *de jure* confirmation of the existence of the shared competence. The 1997 Amsterdam treaty tried to solve this problem with a "fast-track" design of competence distribution. The Commission gets *ad hoc* competence in the new trade issues each time it enters trade negotiations, while lacking a real institutional change. Though this fast-track is purposed for the sake of practical efficiency in on-going service trade negotiations, it was *per se* still the combination of national and exclusive competence. One step forward was then made in the Nice Treaty where the Commission got exclusive competence in most of the service issues, with limited exceptions. A substantial deal was finally made in Lisbon Treaty, where the Commission is granted exclusive competence in all WTO trade matters including trade in services, intellectual property rights and even trade related investment measures.

Figure 1-3: Different levels of competence within EU



N—National competence
S—Shared competence
F—Fast-track competence
E—EC exclusive competence
A—Absolute competence

These variations of trade competence in practice indicate three different kind of institutional set-up for trade policies (Figure 1-3). One extreme case is the absolute

competence of trade policies in the national level, as was the case of trade in goods before the CCP in EC or the trade in services before Uruguay Round. The other extreme is the pure competence of EC institutions which function like in a sovereign state. It possesses the complete power and authority to design trade policies and redistribute trade-effects in the whole region. This is currently not the case in the EC. The competence debate mainly reflects the variation in the middle of these two extremes, from a combination of national and EC competence to an "exclusive" EC competence, with the fast-track competence in the middle. The evolution is reflected by four rounds of political interactions within EU: the 1994 ECJ ruling, the 1996 IGC to Amsterdam Treaty, the 2000 IGC to Nice Treaty and the 2003-2004 IGC to Constitutional Treaty (2007 IGC of Lisbon Treaty).

1.3.3 Independent Variables and measurement

Two explaining variables are attributed to the concentration of exclusive competence in new trade issues in EU. The first one is the embeddedness of EU in the international trade regime. The incorporation of new trade issues into trade agenda (GATS, TRIPS, TRIMS), as well as the streamlined Dispute Settlement Body (DSB) increase the embeddedness of EU in the international trade regime. The second one is the preferences of domestic service industries for more liberalization and market access in global market. It has undergone an evolution process and turns to support the exclusive competence in the Commission.

International trade regime refers to GATT and WTO which incorporates guiding ideas, norms and rules and functions as the most important platform for international trade negotiation. The development of international trade regime from GATT to WTO has increased the embeddedness of EU. This variable is measurable by two indicators. First, the content of the international trade agenda is enlarged. By adding a number of new

agreements in areas of services (GATS) and intellectual property (TRIPS), WTO enlarges its issue-coverage tremendously. This has reversely increased the embeddedness of EU in the international trade regime. Even most of the new issues are not covered by the EU Treaty, these issues are now tackled in WTO. For example, the GATS negotiations from 1995 to 1997 and the Doha Round put direct pressure on the Commission for exclusive competence in the new trade issues.

The second indicator is the level of institutionalization of dispute settlement procedures. With the founding of WTO, the legal dispute system was transformed from a non-binding arbitration in GATT to a more court-like system of Dispute Settlement Body. The new DSB requires more professionalism and expertise which favors the Commission. Facing this change, the EU's New Commercial Policy Instrument (NCPI) was replaced with the Trade Barrier Regulation (TBR). Under TBR, the Community enterprises and economic interest representatives are given the ability to circumvent the national state and to lodge formal complaints and to request that the Commission investigate. The Commission is gaining some *de facto* power through direct contacts with domestic business actors and through its only right of representation in DSB. This power can be analyzed through the Commission's role in WTO legal disputes concerning the new trade issues.

The evolution of trade preferences of the business operations in the domestic level constitutes the second independent variable of this research. Three steps are needed to analyze this independent variable. First, it is necessary to specify the economic preferences at stake. There are three variations concerning this trade preference: no preferences, protection-oriented preferences and liberalization oriented preferences. Second, the organizational form of these preferences will be examined, in order to see if there is obvious change of organizational power. It is argued that the more sectoral forms

of association, the more likely to get organized and pursue their special preferences for the service industries. Third, how these preferences are meditated through political institutions. The focus is on the interaction between the European service industries and the institutional set-up of the Community, especially the European Commission.

1.4 Analytical process, the cases and the roadmap of the dissertation

1.4.1 The Analytical Process

This dissertation adopts the Principal-Agent model as the starting point and cut the analytical process in the middle of principal-agent interaction. It is during this interaction that further transferring of trade competence into new trade issues is realized through different Treaty revisions. Key actors in that interaction process are at dual: the Commission and the Member states. The most direct observation of this interaction is to analyze their preferences positions in different rounds of IGC which leads to Treaty revisions. Four rounds of political interaction are analyzed in this study: the ECJ 1/94 Ruling, the 1996 IGC to Amsterdam Treaty, the 2000 IGC to Nice Treaty and the 2003 IGC to Constitutional Treaty (Lisbon Treaty).

This study adds two more levels to the conventional Principal-Agent analysis: the international environment and the domestic constituencies. The Commission endogenizes its preferences for more exclusive competence from the constraints of international trade regimes. As the Agent, the Commission explores the development in international trade regime as “window of opportunity” to push the member states to delegate more power. The member states, however, take the “sovereignty concern” as the default point and refused the transfer of further competence in those sensitive issues. The Community’s institutional embeddedness in the international level, however, exerts

continuous pressure on the member states for functional purposes. Because of the historical path and the institutional advantage of the Commission, the Member states have to face increasing pressures for exclusive representation from the international level.

At the same time, the preferences of the domestic service providers respond to the changes both at the regional and the international level. This means that a learning process takes place in different levels of institutional interaction. Both the regional regulatory traditions and international institutional setting are a learning process for firms who learn to adjust and re-adjust their perception of interests and preferences in the interaction process. Through the learning process in the political interaction, the preferences of the service providers evolved from national protection to more liberalization in the global market. This political interaction is a round-up process by nature, as the business actors were "dragged" into the interaction process by the initiatives of the European Commission. This "reversed lobbying process" helps the Commission to gain further leeway vis-à-vis the member states. The Commission as an agent thus explores well the international embeddedness and the domestic evolution of trade preferences to push the member states to delegate more power to the Community.

The key arguments are presented based on a Principal-Agent framework and the approach of rational historical institutionalism. Following the four rounds of political interactions, the Community's international embeddedness and the evolution of the domestic preferences are analyzed. The analysis helps to understand the preferences of the Commission, as well as that of the member states. It is the changed international embeddedness that leads to the Commission's persistent pursuit of "preference shirking". It is the evolution of the domestic preferences and the "reversed lobbying" that result in further bargaining power on the side of the Commission, pushing the member states to

transfer more power to the Community.

There are several focuses in this research. The first is to analyze the orientations of the Commission's preferences. The preference of the Commission is partly derived from its own institutional identity as an agent, and partly deprived from the functional role in international trade regime. The second is to identify the preferences of the domestic service providers and the interaction process between these preferences and political institutions. This interaction makes the business operators adjust and re-adjust their trade preferences and choose the Community level for lobbying. Also, by distinguishing the difference of shared and exclusive competence in the institutional setting, this study tries to erect some causal relationship between the domestic-level preferences and the Community-level institutional settings of trade competence, which stays unexplored by the current studies. The last focus is on the community-state level, where a modified principal-agent framework will be applied to analyze the actual delegation between the member states and the Community in exclusive competence related to the specific trade issues.

There are some aspects that this study doesn't intend to draw attention on. First, it is not aimed to specify the different variables in the domestic political interaction process that determine the positions of the national government, due to the complexity of domestic games.[13] Second, no detailed bargaining process between member states and EU institutions will be introduced in this study. During different IGCs, most of the national positions with respect to trade competence are relatively stable before and during the real political bargaining.[14] Thus the detailed negotiation process will not be the focus of this study. It is the bargaining result that is directly analyzed through the changes of the

[13] Scholars like Milner, Frieden assumed the correlation between domestic preferences and the political outcome.

[14] Only the UK's position underwent some changes in 1996 IGC. But it didn't reverse its position at the end of the political bargaining.

Treaty texts.

1.4.2 The cases

As described above, four rounds of political bargaining are analyzed in this dissertation. The preferences of the Commission and that of the member states are analyzed for each round of bargaining. Besides, in order to illustrate the evolution of domestic preferences, this study chooses trade in services as the case study. Service is the most prominent part among the "new trade issues", as it provides the basis for liberalization in other issues such as intellectual property and investment. Most of the member states' concern of the new trade issues is foremost on the sensitivity of the service sectors. It is also the most debated part in real trade negotiations and is seen as the determining factor to the success of the on-going Doha Round (Leal-Arcas 2008). Thus this study will not cover the intellectual property right and investment for case study, as the analysis in services suffices to explain the mechanism of delegation and control in terms of exclusive competence in the "new trade issues".

But services itself also comprises a large variety of different sectors from telecommunication services over financial services to individual services such as hair dressing. The two most important service sectors in WTO talks are telecommunications and financial services. Due to the length of this dissertation, this study chooses telecommunications to represent the European service sector and to do the analysis of the domestic service providers. Financial services industries, in contrast, are viewed as the most powerful corporate lobby group on trade policy. It has the most influential lobby groups at both the national and European levels with groups such as International Financial Services London (IFSL) and the financial Leaders' Group (FLG) (Van de Hoven 2002, 20). In contrast, telecommunications services represent a weak case to illustrate the evolution of domestic preferences. From the methodological aspect,

choosing a weak case is better than a strong case.

Besides, the telecommunication sector is the facilitator of other service activities. It is a typical service sector that underwent dramatic changes in the 1990s. The EU has undertaken a dramatic regulatory reform in terms of telecommunications since the late 1980s. There was also sector-specific GATS negotiation on telecommunications from 1995 to 1997 which changed completely the telecommunication regime. It is by far the most developed regime within WTO's GATS negotiations. The WTO Basic Telecommunications Agreement was gradually modeled on the EU's approach, which was in turn driven further by the WTO negotiations (Holmes and Young 2002).[15]There is obvious preference evolution of the former national monopolies in telecommunications in the 1990s, responding to the institutional changes both at the regional and the international level.

1.4.3 The Roadmap of the dissertation

After the attempt to clarify the aim and methodology of this dissertation, its concrete structure will be introduced. There are eight chapters in this dissertation. Following the introductory chapter, chapter two gives a detailed elaboration of the theoretical framework. Based on the Principal-Agent perspective, the preferences of three actors concerning the competence debate are analyzed: the Commission, the Member states and the domestic business actors. After that, two independent variables are introduced to understand the interaction between the principal and the agent. The Community's increasing international embeddedness and the evolution of domestic preferences lead to the institutional advantage of the Commission vis-à-vis the member states. It is this

[15] In particular, the GATS approach incorporated the EU's competition-led philosophy. Governments were allowed to preserve state monopolies, as they had initially been able to do under the EU regime, but they had to ensure that dominant firms did not abuse their position in markets supposedly open to competition.

advantage that finally pushes the member states to delegate more power to the Community.

Chapter three gives a detailed introduction about the history of trade competence within European Union. In order to explain the nature of trade competence, this chapter analyzed the original text of Art. 113 in Rome Treaty. After the explanation of the two-level delegation nature of the trade competence, a comparison between shared and exclusive competence is made. The analysis is aimed to bridge the gap between domestic preferences and the community's institutional setting. It was then followed by a brief narration about the trade competence debate. Starting from the end of Uruguay Round, the Commission had persistently pursued exclusive competence in the new trade issues. A slow process of change towards exclusive competence is reflected in treaty revisions.

Chapter four brings the "new trade issues" into attention. Choosing services as the most prominent type of the new trade issues, this part introduces the nature of service trade, its special characteristic compared with trade in goods, as well as the barriers to service trade. Telecommunication services are then used as typical case for service sector in European Union. It gives an example of the dramatic evolution of service sector's preferences in the last decade. This sector is used as the case study in the following chapters.

The theoretical approach is then applied in chapter five, six and seven. Four rounds of political interactions are analyzed to find the empirical support of the theoretical framework. Chapter five analyzes the ECJ 1/94 Ruling. The preferences of different actors before the Ruling were introduced. The Commission deprived its preferences directly from the changes in international trade regime. To the member states, the changes were at that time only something in paper. They didn't feel real functional

pressure by that institutional change. Thus most of them chose to stick firmly to their default point of "sovereignty concern" and refused any further transfer of competence. Also, the domestic service providers didn't have clear-cut preferences in terms of trade. Most of them were responding reluctantly to changes at the regional and international level, learning hard to grasp what was going on. Under this environment, the ECJ 1/94 Ruling denied the Commission's proposal for exclusive competence in the new trade issues.

The 1996 IGC to Amsterdam Treaty is analyzed in chapter six. Compared with the time of ECJ 1/94 ruling. The two independent variables began to show their influence. First, the GATS negotiations were initiated after Uruguay Round from 1995 to 1997, in order to tackle real problems in telecommunication and service trade. This external environment has given the member states direct functional pressure to guarantee the efficiency of its negotiating position. Although a majority of them still opposed to exclusive competence in new trade issues, the final text of Amsterdam Treaty adopts the European version of "fast-track competence". This move was obviously a reaction under the pressure from on-going international negotiations. Second, the domestic service providers began to wake up after the middle 1990s. Most of them were starting to form liberalization-oriented preferences. This development, however, was not strong enough to influence the political bargaining between the Commission and the member states.

The real break-through in Nice Treaty and Lisbon Treaty was analyzed in chapter 7. By the time of 2000 IGC, the commission has gained more leeway against the member states. Besides the *de facto* preference in the legal procedure of WTO, the domestic service providers have completed the preference evolution process and developed clear-cut preferences for trade liberalization. This was also partly in response to the "reversed lobbing process" initiated by the Commission. Thus the "sovereignty camp" of

the member states became the minority, which led to the Treaty revisions of exclusive competence (with some exceptions) to the Community. The Commission explored well these developments and successfully pushed the member states to transfer more power. This trend was further consolidated as the Doha Round was started in 2001. The functional pressure from the international regime was magnified in the most complicated multi-lateral round where the EU wanted to take a leading role. The Commission was then granted exclusive competence in all WTO trade issues in the 2004 Constitutional Treaty (2009 Lisbon Treaty).

Finally, the concluding chapter summarizes the main findings in this research. It reiterates the argument that there is need to add the multi-polity nature to the Principal-Agent framework. This analysis shows a “permanent-agent” nature of the Commission which enjoys significant degree of “preference shirking”. It explores well its institutional advantages to seek its own preferences and attracts domestic support to “push” the member states to delegate more power. This contributes to a modification of the PA framework in its application to European integration. Also, the limits of this research and the prospect for future research are included in this chapter.

CHAPTER 2

Explaining the Puzzle

An Institutional Framework for Analysis

2.1 Defining the actors: the Commission, member states and domestic actors

In the level of EU, there are two sets of players related to trade competence delegation: the member states and the European Commission. The member states are regarded as the principals who decide to delegate trade authority or not. The Commission represents the community in its external trade policies, taking part in international or bilateral trade negotiations. There is a wide range of research in terms of the influence of the two players in trade policy (Billiet 2006; De Bièvre and Dür, 2005; Nicolaïdis, 1999; Woll, 2006; Young, 2002). In most of the research, the principal-agent framework (Pollack 1997, 1999, 2003) is used as the starting point of analysis, but the conclusions are quite diverse. Some authors stress Member States' dominance (Aggarwal and Fogarty 2004, 226; De Bièvre and Dür, 2005; Meunier 2005), while others emphasize the relative autonomy of the European Commission (Coleman and Tangermann, 1999; Woll, 2006), or the importance of domestic interests (van den Hoven 2002).

It is misleading to emphasize the dominant role of one actor in the interaction process. Despite the differences, the Council-Commission interaction is central in the competence delegation process. The expansion of trade competence happens at treaty amendments through the intergovernmental negotiations. In order to understand the dynamic behind further competence transfer, it is necessary to analyze the preference evolution of the

different actors. The principals' willingness to delegate more trade competence matters a lot. However, the role played by the supranational institutions in the European integration process has to be taken into account. Also, it is necessary to break the national box and look at the domestic factors (Milner 1997). With the transfer of trade competence from the domestic level to the community level, the domestic actors related to new trade will be directly influenced by the policy outcomes under the new institutional setting.

2.1.1 The commission: an independent actor or a simple agent of the member states?

a. Theoretical background

The difference between LI and Supra-nationalism on the role of the European Commission is enormous. In the LI state-centric perspective, the Commission is a mere international institution cementing the existing intergovernmental bargains (Moravcsik, 1993, 507). It is the member states that play the dominant role in the decision-making process, explaining this with the existence of numerous committees of national and communitarian experts. The supra-nationalism, however, emphasizes the role of the supranational institutions by arguing a "top-down" or "spillover" process (Haas 1961; Sandholtz and Sweet 1998). The supranational institutions gain their own prominence after they are established by the national states. Thus in terms of trade policies, the Commission continues to expand authority and competence through a spillover process, whereas national governments will inevitably lose power.

In the last decade, the PA framework is adopted to bridge the gap between the two approaches (Pollack 1997, 1999, 2003). With the central term "delegation and control", it demonstrates the tension between autonomy of supranational institutions and how principals control the agents through oversight procedures. Although agents are

contracted to perform the preferences of the principals, they may at the same time behave opportunistically and perform preferences shirking. The preference shirking will occur and lead to potential costs when the preferences of the principals and of the agents do not coincide. This means the agents are independent actors with their own preferences to a certain extent. A general example is that the Commission is widely accepted to have more liberalization-oriented trade policies than the member states.

This study argues that the Commission functions more than a simple agent. It not only represents the European community in international trade negotiations, it also has an important function in coordinating the behavior of actors, in providing negotiation structures in which the collective outcomes are pareto-superior to a situation without policy coordination (Hosli 1995). It has a certain level of decisional autonomy at the negotiating table almost equal to that of the member states. Thus some authors define it even as the sixteenth member state (Hayes-Renshaw and Wallace 1997). In terms of trade competence, it is argued that the preference of the Commission is not only to expand the scope of the community competence to new policy issues, but also to increase its own influence within it (Pollack 1994; Cram 2001). Its preference can be derived from the analysis of three aspects: the representative of the European Community in international trade negotiations, the role as the motor of integration and liberalization process and its own utility maximizing consideration.

b. As the representative of the EU community in international negotiations

There are a large variety of studies concentrating on the role of different EU institutions and their interaction in international trade negotiations (Billiet 2006; De Bièvre and Dür 2005; Nicolaïdis 1999; Vahl 1997; Woll 2006; Young 2002; Schöppenthau, 1999). However, only a few studies emphasize the relative autonomy of the European

Commission (Coleman and Tangermann 1999; Woll 2006; Zimmermann 2007). First, the Commission can take advantage of the voting rules and play the "divide and conquer" strategy among the member states in the state of mandate initiation (Schöppenthau 1999, 170). Second, the Commission may have information advantages that result from its engagement in the negotiations with third countries (Johnson 1998, 59; Zimmermann, 2007, 160), or be favored by the institutional setting of the WTO dispute settlement procedure (Billiet, 2006). Finally, the Commission may make use of cognitive framing, for example, stressing focus point or common interests rather than conflicting ones, to engineer consensus among Member States (Elsig 2002; Woll 2006).

The Commission regards itself as the only representative of the Community that has legitimacy to advocate the interests of the EC. But the interest of the EC is far more than the accumulation of member states' preferences. The Commission's function is to find a compromise solution between its original proposal and what is feasible to reach agreement in the council (Armstrong and Bulmer 1998, 74). It is thus important to keep a neutral position towards member states, in order to avoid blocking minority coalitions from disadvantaged countries (Eichener 2000, 167). The Commission can also provide a focal point at which the preferences of actors converge (Elsig 2002). Thus its role is very much like a broker and a producer of consensus (Wessels 1997). Also during the negotiation process, the Commission has to make sure that the member states are on board. Take the Doha round for example, the Commission is given a certain room of maneuver, but based compromise that the member states are to be informed during the negotiation process. Besides the role of the sole representative of the community, it also functions as the mediator between the different preferences of the member states from the beginning to the end.

The Commission's level of competence thus matters in its external representation.

Exclusive competence increase the authority and autonomy, force third countries to deal with EC exclusively, contribute to the Community identity and thus strengthen the negotiation power vis-à-vis member states on internal matters (Bill 2006). In contrast, under shared competence, it would be very difficult to coordinate the internal positions and reach a consensus of interests, as the member states are free to exert their influence. The conflicting voices would thus impair the Commission's unity of action and thus negotiating power vis-à-vis the rest of the world. Thus for the sake of efficiency and credibility, it is natural for the Commission to seek more and more exclusive competence in the new trade issues, including services, intellectual property rights and investment measures (Billiet, 2006; Woll, 2006).

c. As liberalization-oriented political actor

In external trade negotiations, the Commission is deemed more liberalization-oriented than the member states (Meunier 2005). The preferences for liberalization come from its role in internal market. After the transition period of CCP in Rome Treaty, the Commission had worked together with the ECJ to dismantle barriers to intra- EC trade and other kinds of transnational exchange (negative integration). At the same time, EC regulatory frameworks (positive integration) were adopted to replace the different national regulatory system (Schapf 1996). In the internal market, the commission has pursued an active strategy of using its powers to introduce controversial policies such as the liberalization of national monopolies (Schimdt 1998). Filgstein (2002) also argues that the Commission has played a most active role since 1986 from the perspective of institutionalizing European market and governance structures through positive integration.

There is also clear tendency of the Commission to defend a rather liberal external trade

policy. This tendency comes along with the internal integration process. With the completion of the internal market, the member states gradually lost their ability to use national policy tools for protection, as more and more legislative instruments are concentrated to the Commission to enforce market integration (Schmidt 1998). Besides, the Commission can also exploit the institutional rules to provoke liberalization policies in the international level (Hanson 1998, 56). National protection over its own sensitive factors can easily be outvoted by other countries with more liberalization preferences. The Commission, as a mediator, takes advantage of this institutional setting and develops its own liberalization-oriented preferences.

The Commission's preferences of liberalization can be consolidated by its agenda-setting power. Its command of technical expertise enables it to develop trade policy proposal, although it has no veto power facing the member states. This agenda-setting power helps the Commission to use the role right of initiative to influence policy outputs and makes it a dedicated advocate for trade liberalization in the international arena. What's more, the Commission has the ability to explore the different positions among the member states and bind them together with its own proposal, to avoid a collective action problem (Pollack 1997; Schmidt 1998; Garrett and Tsebelis 1996). This complicated structure enables the Commission to build coalitions to support its proposal, as is witnessed in the last trade negotiations (Meunier 2005). The Commission can to a large extent, manipulate the agenda and negotiating positions of national government representative.

It is necessary to note that the Commission's supranational initiatives are not always aimed at reducing trade barriers, even though the Commission is more liberal than many of the member states. The Commission's liberalization preference does not come from nowhere. It is the seeking of a pan-European policy solution that makes it also embrace liberalization in its external representation. Thus the liberalization is not *a priori*

preference to the commission, it only happens to be a pan-European solution which increases the Commission's monopoly power in policy making. Some observers noted that the liberalization objectives of the EU often appear like an exercise in international regulation rather than the complete abandonment of all trade barriers (Cremona 2000). Most of the protectionism only has a national base and makes it difficult to find support on the community level. Thus the Commission has explored this development and uses liberalization to attract pan European business interests (Woll 2006, 2008).

d. As rational bureaucracy

In the literature, it is believed that the general interest of the Commission is to strengthen and deepen the European integration process. This assumption can lead to the desire of the commission to get more power, which can be achieved by more integration or the transfer of competence to the supranational level (Cram 2001, 772), and thus to act independently from the principals (Pollack 1997). Supranational institutions start defending their own preferences once they are settled, trying to maximize their power. Cram (1994) even thinks that the Commission acts as a purposeful opportunist that aims to use every window of opportunity to expand its policy domains and to create new ones.

Several features contribute to the bureaucratic nature of the Commission: continuity, expertise and informational asymmetry. First, the Commission as supranational institution has continuous task to monitor the compliance of contractual terms and to advocate for internal integration with legislative and executive functions (Doleys 2000, 541). This permanent nature of the Commission enables it to develop its own long-term preferences vis-à-vis the changes of the member states (Ostrom 1995, 97). Second, the organization of the Commission enables it to create and manage know-how. This is not only by the authorization by Article 213 of TEU to gather information from member

states (Puntscher- Riekmann 1998), it also develop its own expertise in many issue areas where the Community has internal or external competence. It has acted as the repository of Member States' knowledge and expertise and developed clear preference for entrepreneurial leadership. For example, it is argued that the Commission has put forward the Single Market Act by presenting them as technical matters and thus pulling them away from political bargaining (i.g, the Delors Committee; Featherstone and Dyson 1999).Third, the permanent self-identity and its expertise have given the Commission a favored position of more bureaucracy power, as it enjoys an informational asymmetry vis-à-vis the principals.[16] This informational asymmetry is two fold. The commission can for example use its knowledge strategically when it wishes to reach certain goals at different levels of action. It can also take advantage of the informational asymmetry by its *de facto* representation in international institutions. All this can make the commission the lead of information and action and develop its own preferences.

In terms of external trade, the Commission explores its bureaucratic nature and wants to increase its authority to a maximum. That is why it had from the beginning asked for exclusive competence in all trade issues under WTO. It had taken advantage of its expertise and informational asymmetry to push the member states delegate more power to it. At the same time, it began to initiate a well-organized dialogue with the civil society to gain advantage according to its own interests (see Bogdandy and Makatsch 2000). Besides, it can produce knowledge by referring to international epistemic communities, which could be used in the competition with member states. The analysis of the expanded European multi-level system has shown that the Commission is not only able to play the role of a moderator and engine of integration (Nugent 1995) but also acts as a "self-motivated autonomous actor"(Smyrl 1998, Billiet 2006).

[16] In contrast, it is argued by Moravcsik (1999) that this informational asymmetry is difficult to trace.

2.1.2 The member states and preferences

a. The “default point” of sovereignty concern

Some other authors stress that the dominance of member states in EU’s external trade politics (Aggarwal and Fogarty 2004, 226; De Bièvre and Dür 2005; Pollack 2003). In this strand of analysis, focus is usually on the oversight sight procedures to control the Commission from “preference shirking”. It is argued that the member states have firm control of the trade policy making from the beginning: they appoint the Commissioner responsible for trade matters for the Commission; they control the agent by the special 133 Committee throughout trade negotiations; and they have to ratify all agreements reached. This control is practiced by the European Council made up of permanent national representatives in Brussels. They are the “gate keeper” of the national interest on the community level. Thus, some studies point to the limited role of the Commission in international trade negotiations. Whether in the Tokyo Round (Taylor 1983, 142) or more recently during the Seattle ministerial meeting of the WTO (Elsig 2002), it seems that Member States have been able to reign in the Commission when they wished to do so.

The dominant role of the member states is rooted in its “principal” status. With regard to the trade competence in the new trade issues, the member states’ primary preference is the concern of sovereignty, as they are domestically sensitive issues. Thus they have a natural “default position” of sovereignty concern and are not willing to delegate their competence in these new trade issues. If the competence of the Community expands to the new trade issues, the member states will have to cede their voice at least in the negotiation stage and let the commission to act on their behalf. If there is not enough argument to convince them, they will stick to their “default position” and will not cede

their control of the new trade issues in international negotiations.

There was an obvious cautiousness and distrust against the Commission on its exclusive competence in new trade issues. Even in the trade in goods where trade competence is permanently transferred to the Community, there is still dispute if the EU really has a common collective interest and can speak on behalf of the member states in one voice (Meunier 2005). The necessity to maintain a common position during negotiations has very concrete implications on the ways in which the member states can weight against stances of the European Commission. Opposition either has to be voiced early in order to affect the mandate or be based on compelling and clearly defined member state interests, as was the case with France's position in agriculture and audio-visual services.

But the factors influencing the member states' attitude towards their "default sovereign point" are hard to define. As is noticed by some scholars, the notion of national preferences has long been treated as a black box and not explored (Moravcsik, 1997; Conceicao-Heldt 2002). There was lack of clear definition of national preferences. Meunier and Nicolaïdis (1999) attributed the combination of economic interests and ideological concerns to the final position of the member states concerning the transfer of exclusive competence in the new trade issues. This explanation, however, doesn't dig deep into the "black box" and find some determining factors to the national position on trade issues.

b. Structure of the member states' preferences

In the literature, there are several indicators to define the structure of the government's preferences (Conceicao-Heldt 2002, 40). The first one is the time-horizons of decision-makes based on the short term electoral consequences of their policies (Pierson

1996, 147). The decision makers care primarily about how to stay in power and increase their party power. Optimal solutions in a certain policy field are only secondary to them (Conceicao-Heldt 2002, 41).[17] The political salience of one issue belongs to the second indicator. A certain issue could be politicized when it is highly salient to the public, and the government would be very cautious on that issue to avoid domestic opposition. Trade competence, in the beginning, belongs to the "sovereignty concern" of the national government and has high political salience, especially when it concerns the domestically sensitive regulations and standards. Considering these two factors, the decision makers will not easily give up their sovereignty concern in new trade issues. It is thus normal to maintain the status quo and claim national control on the new trade issues in the very beginning.

One source of change comes from the third indicator, namely the preferences of interests groups and influence. As indicated by the works by Milner (1997), the government's policy position falls into the lobbying efforts of the interests groups. The interest groups try to influence the position of the government by lobbying efforts and thus by distributing interests within certain economic sector. Because the structure of competence has direct influence on the domestic service sectors, it is reasonable to infer that the domestic interests intend to express their own voice. As indicated in the part below, the evolution of the business preferences is a decisive factor to convince the national government to give up their "sovereignty concern" and transfer more competence to the supranational level.

2.1.3 The domestic actors: interests groups and influences

There is a variety of approaches studying the business lobbying in EU (Bennett 1997;

[17] There are good studies of how the division of district and the provocation of pork policies are use by the politician to attract voters, see. Pierson (2000, 479), Huber (2000).

Mazey and Richardson 1993; Van Schendelen 1994; Greenwood 1998). It is generally presumed that the interest groups within a certain factor could exert influence on the preference of the public actor (Milner 1997). Some authors focused on the patterns of interest group intermediation that developed around the European policy-making process (Mazey and Richardson 1993; Wallace and Young 1997), others have examined the collective action problems of interest groups (i.g. Aspinwall and Greenwood 1998; Greenwood 2002). Also, in response to the democracy deficit, some authors focus their study on the involvement of society actors to the contribution of democratic governing of EU (Warleigh 2001), or the comparison of EU and US lobbying difference (Woll, 2006). The most recent research approach, however, focuses on the institutional and political conditions of interest representation (Woll 2006; Wessels 2000; Eising 2004).

The institutional structure matters how the interests groups choose their lobbying methods. As mentioned by Scharpf (1988), the joint decision-making in EU shelters policy-makers from interest group pressure. Based on this work, Grande (1996) demonstrates that the distance of policy-makers from interest groups enables decision-makers to select only those proposals that fit into their public programs and to avoid a stalemate over a specific directive. Woll (2004, 2006, 2008) demonstrates how the service interests choose the community level lobbying as a response to the Community's enlarging competence. The shared authority system within EU thus puts the Commission on the advantageous position, as it can deliberately choose the societal interests that are close to their own (Van den Hoven 2002). The interests groups would like to contribute constructive proposals, as they would otherwise be excluded from the process.

There is a different logic of lobbying between the national and the community level. On the national level, according to Moravcsik (1993, 484-505), the activity of groups is

determined by their functional utility measures. Groups with much to gain will put pressure on governments, while less affected groups will remain passive. And losers tend to generate more political pressure than winners. If the adjustments costs to the supranational legislation are too high, they must be compensated. Thus the outcome of national lobbying is always striking the balance point between different interests groups. But on the community level, this has changed because of the institutional setting. If the Community enjoys *de facto* competence both in internal and external fronts, the business actors will put more resources on the community level to do their lobbying. Because with the shift of competence from national level to the community level, they have to re-adjust their preference and strategies in order to cope with the new situation (Woll 2004).

Thus in terms of trade policy, there is an obvious trend that the EU policy making process favors the most active companies. For example, if the Commission needs to initiate a draft concerning the telecommunication services, it needs first to consult the DG Information Society, DG Competition and other relevant branches such as DG Enterprise. Throughout this process, DG Trade consults with business representatives. If the business wants to affect the draft of the Commission, it needs to keep in direct contact with DG trade. The liberal orientation of the Commission enables it to choose deliberately those businesses that have close preferences with its own. Thus it is the business with liberalization preferences or pan-European preferences that are favored by the Commission (Woll 2004, Van den Hoven 2002). Outright opposition could only be expressed through the channel of the member states, which review the initial offer, grant a mandate and jointly negotiate.

At the same time, individual groups do not reduce their political resources on the national level. To a great extent, their lobbying practice reflects the multi-polity nature of

EU. On the community level, they respond to the preferences of the Commission and usually come up with pan-European preferences (Woll 2006). Within each member state, they can try to lobby their governments to affect the consensus between member states and the Commission during all phases of the policy cycle, which is especially true for protectionist preferences. The multi-polity nature of the EU enables the domestic lobbying interests circumvent the member states and seek the back door on the community level. This is especially true to service industries which are directly influenced by the shared competence between different levels. After more internal competence concentrated on the Community level, the link between the domestic interests and the Commission to initiate instruments of commercial defense is more obvious. This trend has strengthened the role of the commission vis-à-vis the member states and helped to dilute the member states' "sovereignty concern".

2.2 A Principal-Agent framework, principals and agents

In this part, an institutionalism approach based on the PA framework is constituted to explain why exclusive competence in new trade issues is further delegated to the Commission. In the above session, the main actors are defined concerning the further delegation of trade competence. It is argued that the Commission is, to a certain extent, not just the agent of the member states. It also has clear-cut preferences as the representative of the community, as the liberalization promoter, and as a rational maximizer bureaucracy. This, however, doesn't deny the application of PA as a good starting point for analysis. It is very useful to understand the core mechanism of competence delegation within EU under the PA framework. Some revisions will be made to enrich the its application to the delegation of trade competence by bringing the external environment and the domestic preference evolution into analysis.

2.2.1 Principals delegate power to agent

Pollack (1997, 1999, 2003) belongs to one of the pioneers in applying the principal-agent theory to analyze European integration. This theory begins by asking why and under what conditions the principals (member states) might delegate powers to the agents (supranational institutions)(Pollack 2000, 8). Political principals delegate authority to the agent for a list of practical reasons on a contractual basis (i.g. Epstein and O'Halloran 1999, 29–33; Kassim and Menon 2003, 123–4; Thatcher and Stone sweet 2002, 4). To make it brief, principals might delegate power to an agent in order to: reduce workload and enhance efficiency in decision-making, to overcome information asymmetries and rely on experts, to avoid taking blame for unpopular policies(Thatcher and Sweet 2002, 4; Tallberg 2002, 26-27), to produce policy stability and avoid "policy cycling", to monitor member state compliance with international treaty obligations, to solve problems of incomplete contracting, to adopt regulations that are too complex to be debated in detail by the principals, and for agenda setting (Pollack 1997, 105-106).

Generally speaking, it is for the functional purposes that the principals would like to establish some institutions (Pollack 1997, 102). With respect to European Union, there are at least three main functions for which principals might choose to delegate authority (Pollack 1997, 103). First, agents are able to monitor member states' compliance with treaty obligations. By getting the delegated authority from the member states, for example, the Commission plays a central role in charge of monitoring the compliance of the member states to the Community treaties. Besides the role of monitoring compliance of member states, the Commission is also delegated authority to take charge of various pieces of secondary legislation in order to monitor the implementation of specific EC programs in the member states (Pollack 1997, 105).

Another reason for delegation is to solve the problem of “incomplete contracting”. As it is practically impossible to list detailed and precise obligations of all the parties throughout the life of the contract, it is important to have a separate agent to work as a trustful doorkeeper and mediator. In the EU, this is the case of the ECJ which has been delegated legal authority to interpret the rather vague treaty language through its case laws. For example, by the judicial rulings of a series of cases with respect to the scope of CCP, the ECJ played a central role in interpreting the demarcation of competences within EC. Similarly, the Commission witnessed an increasing number of issues falling under the exclusive competence of the CCP to which it enjoys not only day-to-day decision making power but also exclusive representation authority in its external economic relationship.

There is little discord that the Commission plays a crucial role in setting down policy-making in a lot of important issue areas. Having the agenda-setting authority, the Commission has the “exclusive right of initiative” to make legislations from competition policy to agriculture and the regulations in internal market (Pollack 1997, 106). Based on its expertise in those issue areas, the Commission “has the advantage to the member states of providing a series of relatively unbiased and well-informed policy proposals to the Council, which would otherwise have to rely on the rather unevenly distributed resources of the member states themselves’(Pollack 1997, 106). This is especially the case with respect to the CCP to which the Commission seeks a more general interpretation and wanted exclusive competence in those new issue areas.

To sum up, the primary task of delegation within EU includes “monitoring, interpreting, and elaborating incomplete contracts, credible regulation, and agenda setting” (Pollack 1997, 106). These functional purposes explain in the historical step why the member states had given up part of their sovereign powers and delegate them to the supranational

agent. As to the delegation of trade authority from the member states to the commission, it reflects mainly the member states' functional concern of efficiency and credibility in international trade negotiations.

2.2.2 The shirking of Agent and the control of the principals.

However, after the initial delegation, agents have a tendency to pursue interests other than those specified by the principals. As indicated by Pierson, the institutions in existence at any point in time may reflect the "unintended consequences" of earlier historical decisions made by actors with imperfect information and short time horizons (Pierson 1996). It is to expect that the preferences of the agents may diverge from that of their principals. Based on its advantage of asymmetric information or technical expertise, the agents are expected to behave opportunistically and pursue their own interest subject only to the constraints imposed by their relationship with the principals.

When there is no effective control from the principals, or when there are multiple principals with different preferences, it is easy for the agent to exploit the different positions and develop the preferences of its own. Delegation in this sense is risky as it may lead to bureaucratic drift (Shipan 1998). This pursuing of its own preferences is identified in the literature as "bureaucratic drifting" or "shirking of preferences" or "agent cost" (Pollack 1997, 1999), defined as "independent action by an agent that is undesired by the principal" (Hawkins et al., 2006, 8). Because of the limited political resources, the principals, thus, provide agents with the authority to engage in certain activities at their own discretion by the nature of delegation. The risk of bureaucratic drift is treated as the central problem of the PA analysis.

In any PA relationship, the principal seems to be at a permanent disadvantage because of the asymmetry of information between the agents and the principals. The agents usually

have more information and expertise than its principals in a certain issue area where it is delegated authority (Pollack 1997, p108). Also, the structural reasons could also lead to the different interpretation of preferences and strategies and the agent might have its own alignments of interests (Hawkins et al., 2006, 8). For example, the Commission is able to base its decision on a wider horizon, while the national governments have to calculate the short-term effects of the electoral constraints (Pierson, 1996). In the study of comitology, it is widely agreed that the commission pursue policies based on the logic of bureaucratic entity. And in this case, if the agent is willing and strong enough to pursue its own preferences, it has good chance to succeed.

But the principals can set up "mechanism of control" to minimize the agent costs. By adopting various administrative and oversight procedures to limit the scope of agency activity and the possibility of agency shirking, they can limit this agency loss to some degree. Administrative procedures provide *ex ante* measures such as the scope of agency activity, the legal instruments available to the agency, and the procedures it must follow (Pollack 1998, 220); while oversight procedures provide *ex post* measures to monitor agent behaviors and to influence agency behavior through the application of positive and negative sanctions (Pollack 1997, 108-09). Besides, there are also sanctioning instruments like "control over budgets, control over appointments, overriding of agency behavior through new legislation and revision of the agency's mandate" (Pollack 1998, 220–1).

Effective control mechanism can help reduce the shirking of agent. As Weingast and Moran (1983) point out, the more effective the control mechanisms employed by the principal, the less overt sanctioning we should see, since agents rationally anticipate the preferences of the principals-and the sanctions likely to be applied by them-and incorporate these preferences into their behavior. But in reality, because different control

mechanisms available to principals are associated with different costs, it may lead to different extent of principals' control over their agents. For example, the creation of the committee (comitology) is the common form of control in legislative and executive mandates (Elsig 2002, 72). Franchino(2000, 2005) attributes two most important factors to the efficiency of principal control: the level of conflict and uncertainty. In the study of competition policy, Schmidt (1998) concluded that the principals can regain control over the agent at any time, and putting the claim of agent's steady expansion of authority during European integration into question.

As analyzed in the preferences of the Commission, the Commission can take advantage of the internal difference among the member states and the institutional rule to seek its own preferences. Also, other observers have indicated that in the trade policy making-process, agency autonomy is likely to vary across issue-areas and over time. It is a function of the preferences of the member states, the distribution of information between principals and agents, and the decision rules governing the application of sanctions or the adoption of new legislation (Pollack 1997; Tesbelis and Garrett 2000).

2.2.3 Delegation and control in external trade competence

The application of PA to EU's external trade is a classic case to follow. According to the Art. 131 of Rome treaty, the Commission is empowered with exclusive competence to represent the community in international trade negotiations. Nevertheless, there are various control mechanisms when man follows the different stages of the trade policy-making. Three stages are distinguished by Woolcock (2005): the setting of objectives, the conduct of negotiations and the adoption of results.

First, the Commission has the sole right to set the negotiation objectives under the name of negotiation mandate. However, it needs to consult intensively with the senior national

trade officials representing their governments on the Article 133 Committee (Johnson 1998). The member states can use this special Committee to exert tight control on the Commission's negotiation objectives and to "ensure that it is on the right track" (Shaffer 2003, 79). There is intensive interaction between the Commission and the special 133 committee before the final proposal is handed to the Committee of Permanent Representatives (COREPER) and eventually the Council. This process pushes the commission to think over the backlash of the member states over its head and thus anticipate the preferences of them (Meunier 2000, 111). Base on the Commission's proposal, the negotiation objectives are then decided by the General Affairs Council of foreign ministers on a QMV rule, though there is research that unanimity rule applies in practice (Meunier, 2005).

The second control mechanism occurs during the negotiation process. Although the Commission is the only legitimate actor at the negotiation table, there is need for consultation with the member states from the beginning to the end. The special 133 Committee closely follows negotiations and the EU negotiation team meets daily with member state representatives. The Commission, furthermore, tries to keep the External Economic Relations Committee of the European Parliament informed, even though the Parliament has no speaking rights during negotiations. There is sometimes serious conflict between the Commission's negotiation position and that of the member states, as was witnessed by the backlash of France on agricultural issues near the end of Uruguay Round. Last, when the final trade agreement is reached by the Commission, it is then required to be adopted by the General Affairs Council either by qualified majority voting, although in practice consensus decisions are the norm (Woolcock 2000, 384).

Similar procedures are also seen in the Commission's representation in WTO's dispute settlement procedures. The Commission needs to consult with the special 133 Committee

in order to initiate a case in WTO. Formal procedure requires issue proposals to be transferred to COREPER and subsequently to the Council, should all other instances fail to resolve the dispute. When facing a complaint, the Commission represents the Community and takes full responsibility in the legal procedure. But in practice, the Commission has clear preferences as “neither committee members nor the Commission wish to transfer decision-making authority on trade matters from themselves, who are trade experts, to the Council, which consists of foreign affairs ministers” (Shaffer 2003, 80). There is always the need to reach consensus between the member states and the Commission in the external trade issues. The Commission cannot negotiate effectively if the member states don’t support its objectives. The interlocking of member state control and Commission competence are thus the two important dimensions of trade policy-making that domestic interest groups should take into account if they wish to lobby effectively.

The above procedure applies to trade matters where the Commission has exclusive competence. In the new trade issues of shared competence before Nice Treaty, trade authority is delegated on an *ad hoc* basis to the Community. The setting of objectives and the ratification of the negotiation results are subject to a unanimous vote by the Council. During the negotiation stage, the Commission remains as the sole representative and negotiator but the control of the member states is much stronger than under the exclusive competence. On sensitive issues such as service trade liberalization, trading partners have jokingly remarked that the Commission negotiates more with the member states than with the rest of the world (Woll 2004, 227).

Facing that situation, the Commission has thus begun the “preferences shirking” and wanted to push the member states to delegate exclusive competence on the new trade issues by the end of Uruguay Round. The commission had challenged the principals’

willingness and brought the case to ECJ to ask for more delegation of competence in the new trade issues. It concerns mainly about its efficiency and credibility in international trade negotiations. If there is continuous confusion in the clarity of authority and autonomy of the commission, the trading partners would like to perceive that the agent doesn't have the support of the principal. This was the case when after the Heysel Conference of 1990, the US representative no longer believed the credible role of the Commission, because France rejected the proposals made by the Agriculture Commissioner to the American counterpart (Vahl 1997, 116). It is because of this credibility concern that the competence issue matters most to the Commission.

Delegation in the highly integrated trade policy is a delicate matter, with clear distribution of competence and tight control mechanism of the member states (De Bièvre and Dür 2005). The multi-polity nature of EU has made the competence delegation in the new trade issues more complicated, as the Commission has behaved with clear "preference shirking" from its principals and had finally succeeded to get what it wanted. The conventional PA framework thus has difficulty in explaining why the member states can not use effective control mechanism to stop the Commission's persistence of "preference shirking". Based on this PA framework, two variables are added to help explain the agent's success of "preference shirking". It turns now to the main argument of this dissertation.

2.3 Extending the PA framework by international institutions and domestic preferences evolution

2.3.1 political economy framework revisited

a. The revision to the conventional IPE model

The application of PA to European integration gives a vivid picture of why the member states delegate and how they get control of their delegated power. This picture, however, simplifies the multi-polity nature of EU and ignores the supranational nature of the European institutions. In EU, the delegation of power from the member states has more or less the nature of "permanent delegation" which amplifies significantly the power of the supranational institutions. The supranational agents can thus explore this institutional bias and act more than the conventional "preference shirking". They can take advantage of the international embeddedness and the domestic preferences to develop their own stable preferences and bargain with the member states to strengthen their power. The member states have to adapt to the changes and gradually concede their sovereignty to the community level. On the "permanently delegated power", they still have considerable control. But due to the constraints from historical paths and the wide application of QMV rule, their level of control is decreasing while the autonomy of the supranational institutions is increasing.

The Commission thus can explore the developments from international political economy and bargain with the member states. In the IPE literature, the focus on the interaction between different levels of trade policy making is not something new (e.g. Rodrik 1994, Frieden 1996). Rodrik has attributed four components to a political-economical model of trade policy. The first component is to target a description of individual preferences over the domain of policy choices which might be considered

by the policy makers.[18] The second component is to identify the accumulation process of these preferences, where the interaction between lobbying groups, political parties and institutions is to be seen. The political interaction process constitutes the third component which characterizes the preferences of the policy makers facing the heterogeneity of different domestic preferences. Finally, it is necessary to specify the specific institutional setting in which these political interactions take place. In most cases, the domestic institutions play an intervening or mediating role.

In the EU case, however, the international level needs to be added to the analysis. It is the Commission that represents the member states in international trade negotiations and trade disputes (Meunier 2005). Its embeddedness in the international level thus has considerable impact on the distribution of power between the member states and the Commission (Frieden and Martin 2000; Billiet 2006). As the traditional institutional set-up has difficulty to cope with the new development, the Commission gains argument to get more competence responding to the external changes. After Uruguay Round, there was an obvious strengthening of the international trade framework which led to increasing embeddedness of the Community in international trade affairs. The Commission as the representative of the Community, explores well this development and uses it as an argument against the member states, in order to get more power from them.

In the domestic level, there is also need of revision. The mainstream IPE framework tends to treats implicitly the individual interests as exogenously given. The four components are based on the assumption that the preferences of individuals are fixed throughout the whole analytical process. This assumption could be risky because it ignores the factor of time and learning in the interaction process (Woll 2004). Given a

[18] The assumption is that trade policy preferences are accumulated based on the division of production factors or sectors. The Heckscher-Ohlin model bases its analysis on the division between labor and capital, while Ricardo-Viner model on the division between different production sectors.

certain interaction process, the interests or preferences of business actors could be influenced or even changed by other actors or institutional constraints. The European service industries, for instance, have gone through a dramatic process of preference evolution in the 1990s, because of the institutional changes both in the international level and the Community level. The institutions exert influence on the evolution of the actors' preferences and influence their lobbying efforts. After that, the institutions can explore those domestic preferences for their own purpose.

The development in the domestic level puts new constraints on the PA framework. The business actors' preferences evolves significantly as the result of the interaction process with the endogenous institutional setting (Bulmer 1998). The changes or constraints within certain institutional settings could to a great extent redefine their political preferences and even change their perception of economic interests (Frieden and Martin 2000), which leads the corporate sectors to calculate tactics of various political considerations (Woll 2004). The PA framework is thus enriched by the evolution of domestic preferences. The principals also need to acknowledge the impact and importance of historical processes which are characterized by path-dependence and endogenizing effects of actors' interests (Pierson 1996, 131; Hall and Taylor 1996).

The co-function of international embeddedness and domestic interests on the regional delegation of competence is not well explored in the current literature. Facing the changes in international political economy, the Commission deprives its preferences from its increasing embeddedness in international trade regime, for the sake of reduced transaction costs and a credible representation with sufficient authority. This preference was first refused by the member states, as witnessed in the 1994 ECJ ruling. But gradually, the domestic preferences began to evolve as a response to the changes in the international and regional institutions. They have developed clear-cut preferences to

support liberalization on the international level and thus gone to the Community level to conduct business lobbying. They are in favor of the community method which needs exclusive competence in external trade matters. The Commission explores well these two factors and uses it as argument in the interaction with the member states. It has thus broken the constraints in the PA framework and pushed the Principals to delegate more power (more or less permanently).

b. The firms' preferences for exclusive competence

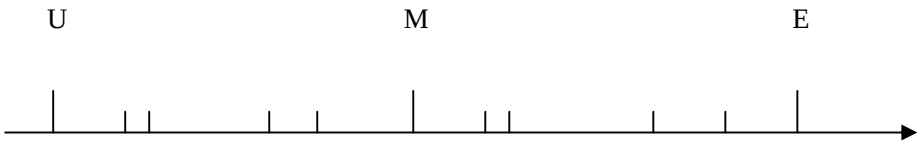
The link between the preferences of domestic actors and the exclusive competence of the Commission can be inferred. As the political set-up of trade competence constitutes the institutional environment of trade policies, the domestic actors have the incentive to gear up the positive changes to them. In shared competence, the unanimity requirement makes sure that the European Commission is tightly constrained in making proposals (De Bièvre and Dür 2005). Interest groups, consequently, may concentrate their lobbying effort on their national governments and push them to block trade agreements that run counter to their interests. Thus the shared competence is mostly favored by protectionism interests. On the contrary, exclusive competence is helpful to reach the lowest dominator in EU's trade policies and thus contributing to the further liberalization of the trade issue.

Based on the current literature of rational institutionalism (Meunier 2005; Garrett and Tsebelis 1996; Helpman and Persson 2001; Persson and Tbellini 2000), two arguments are raised as the analytical points to correlate with the preferences of domestic actors. First, most European service providers had to face the external regulation changes and developed clear-cut preferences towards liberalization or European based regulatory system after 1996.[19] They then favor lobbying in the community level because the

[19] Most of them, however, don't want to give up their national market.

Commission has a *de facto* advantage in external representation vis-à-vis the member states. This leads them indirectly to support the exclusive competence of the Commission. Second, the exclusive competence of the Commission has the prospect to bring more liberalization in service factors. The common position under qualified majority usually thus falls around the proposal originally made by the Commission (Meunier 2005, 56). [20] It is then easier for the community to be more liberalization-orientated compared with under the shared competence, given that the positions of the members for a common agenda range from maintaining the status quo to different level of liberalization (Figure 2-1).[21]

Figure 2-1: Trade preferences under different voting mechanisms



1 Individual country's ideal point

U Common position under unanimity

M Common position under QM

E The most liberalization measures

Example: agriculture subsidies

See. Meunier (2005, 55), Garrett and Tsebelis (1996)

Before the mid-1990s, he domestic service providers took national protection as a default point and had no clear preferences for trade. In this case, the national regulation and

[20] Because under unanimous rule, the position of the most protectionist state could be the lowest denominator with a veto, see Meunier (2005, 56)

[21] I adopt the spatial model used by Meunier (2005), in order to show that unanimity (ex ante or ex post) amplifies the most conservative voice, while majority mitigates the extremes.

competence is of the best purpose. But as they developed new preferences towards a global market, while at the same time not giving up their role in the domestic market, it is the exclusive competence at the community level that serves them the best. When the institutional setting turns to exclusive competence, there is obvious strengthening of its capability of taking offensives which could lead to more degree of liberalization in the potential negotiating outcome, while not damaging its defensive capabilities.[22] Thus the shift from shared competence to exclusive competence could indicate the increased chance of liberalization in a global market of related sectors in the international negotiations, while not impairing its defending capability.

This also coincides with the EC problem-solving tendency to tackle more EC-level problems and avoid protecting narrow protection interests of a certain state (Van den Hoven 2002; Woll 2008). If the domestic service actors are more nationally protection-oriented, they are more inclined to main the status-quo, because it is then easier to exert their lobbying power on the national government for a veto to block any further liberalization. The Commission, however, favors pan-European preferences and can take on board those actors that support its orientation. Also, the incentives of the market actors may change because of the anticipated distributional effects and the likely opportunities to reorganize production after the regional trade integration (Chase 2003, 33). The domestic actors thus calculate to expand or extract their economic operations and reallocate assets to adjust to the new trading environment.[23] They would develop in

[22] Exclusive competence doesn't mean the commission is then more liberalization-oriented than protection-oriented, it only indicates that besides its capability of maintaining its defending initiative, it gains more capability in taking offensives, say for more liberalization. These two sides of the coin don't contradict each other, just like the fact that under exclusive competence of CCP in goods, EC have successfully reduced its average tariff in most manufactured goods by 80% percent, while simultaneously keeping a strong fortress for its protectionism in agricultural products.

[23] The calculation is mainly done based on the consideration of two factors, the potential to gain scale-economies and the potential of establishing production-sharing network. After the distributional effects of the internal integration process, if the market actors have achieved or anticipate a larger scale economy in the regional market, they have (will have) more liberalization preferences in their political demands. And if the market actors have deepened or anticipate to deepen their production sharing in the regional market, they have (or will have) more liberalization preferences in their political demands.

general liberalization-oriented preferences in the global market. This is then reversely used by the Commission against the member states, as it has more leeway when it argues for more exclusive competence.

2.3.2 Pressures from international level, international embeddedness

a. International regimes and domestic change

The interaction between international institutions and domestic preferences belongs to one of the core areas of international political economy. In the literature, however, how EU institutions function in an expanded multi-level system is not well explored, as existing theories ignore to a large extent the external context (Billiet 2006, 900). The current research focused exclusively on the delegation of trade authority and thus on the formal organization of the decision-making process in the realm of trade (e.g. Meunier and Nicolaïdis 1999). Only a few studies go deep into the institutional changes and the international embeddedness of EU, arguing that the changes take place in the organization of politics, established routines and guiding principles because of the international embeddedness (Knodt 2004, 716). Increasing embeddedness of the EU within an international context has direct impact on the formal organization of the European decision-making process (Knodt 2004, Billiet 2006).

This study argues that the institutional framework of the international organization can influence the scope of the Commission's discretion. This argument goes in line with the theoretical indication of IPE which emphasizes the influence of international economy on the preferences of socio-economic and political actors, as well as on the domestic institutions (Frieden and Martin 2000). This is especially the case when the current institutional set-up has difficulty in coping with new policy developments, and thus makes a previously feasible policy difficult to sustain. As to the Commission, the

strongly institutionalized setting of the WTO reinforces the powers of the Commission both internally – vis-à-vis the Member States – as well as internationally (Billiet, 2006, 900), and thus lead it to seek its own preferences.

The result of that institutionalization is the vanishing of state boundary as well as the functional role of the nation state, as political competences are shifted across various levels according to more functional purposes (Kohler-Koch 2000, 22). It is also argued that the interaction beyond national borders together with the functional differentiation of society are leading to a functionally (instead of territorially) defined construction of political space and the drawing of new functional boundaries (Kohler-Koch 1998). This development leads to the involvement of sub-national actors in the complex system of the European decision-making process (Jachtenfuchs and Kohler-Koch 1996; Knodt 1998; Hooghe and Marks 2001). There are two consequences of the changed form of sovereignty: it enlarges the territorial scope for political action "beyond the nation-state" and it incorporates the member states into a complex multi-level system of decision-making. In the case of EU, the international sphere should be included in the interactive multi-level European system.

b. Changes of international trade regime：from GATT to WTO

According to Max Weber, political institutions are sets of social regulations incorporated in practices and rules that define appropriate behavior (Knodt 2004). This broad explanation emphasizes the shared concepts of legitimacy, the routines and different pattern of interaction. The changes of institutions thus can be witnessed by the changes of routines, ideas and binding rules. Three aspects are useful to operationalize the changes of institutions. First, if there is reorganization or rewriting of institutional forms, rules, roles, standards and decision-making procedures, the institution should have

changes. Second, if there is re-interpretation of principles and doctrines, frames of understanding and justification, it usually indicates the institutional change. Third, institutional changes also see the change of allocation of resources, or concepts of legitimate order (March and Olsen 1998, 943-4; knodt 2004, 770).

The transformation from GATT to WTO witnessed a clear institutionalization process within the international context for EU decision-making. This process can be observed from two aspects. First, there were changes of organizational forms, as "new trade issues" are incorporated into the WTO system. Second, this institutionalization process is well represented in the strengthening of legal dispute system. The international trade regime has thus developed from a "power-based", diplomatic approach within a loose organizational structure to a 'rules-based' and strongly institutionalized system (Jackson 1998). The WTO contains more coherent commitments, more effective administrative and organizational capacity as well as a more effective dispute settlement than GATT (Billiet 2006).

--*The enlargement of the content*

The first major shift from the GATT to the WTO was the issues that are being dealt with. It was in the Uruguay Round negotiations (1986–94) that the new trade issues was included into the agenda and seriously dealt with (Drake and Nicolaïdis 1992). The agreements reached on these issues are annexed to the Marrakesh agreement establishing the WTO and are binding on all WTO members. The WTO added a number of new agreements to the old GATT. Most important were the areas of services (GATS) intellectual property (TRIPS) and trade related investment measures (TRIPS) which were not covered by the EU treaty.

The enlargement of the topic issues in WTO was a significant change. Taking services for example, there are a number of principles that can be applied to domestic regulations to minimize their effects on trade. These principles can be categorized into two broad groups: first, there are the General obligations which must be respected by all Members in services sectors covered by GATS, regardless of the existence of specific commitments (unconditional obligations).[24] For example, the MFN rule allows a WTO member to implement any rules it wishes, but requires that while it may discriminate against foreigners it must treat them all the same. If one has special licensing rules for foreign suppliers, they must be the same for all foreign countries. Second, there are commitments concerning market access and national treatment in specifically designated sectors. Such commitments are laid down in individual country schedules whose scope may vary widely between Members.

Some commentators argue that the GATS is a paper tiger rather than the hidden dragon that some anti-globalization campaigners claim (Holmes and Stevens 2005), because it applies only to the sectors that each WTO member state chose to schedule for liberalization, the so-called "positive list" approach. Besides, there was ambiguity and flexibility in the definition of the commitments, which may have been politically vital at the time. It is nevertheless the first multilateral agreement to address trade in services and has great symbolic meaning. The inclusion of the new trade issues into the multilateral system is already a significant development in international trade regime. As witnessed by the sector specific negotiations from 1995 to 1997, as well the "build-in agenda" negotiation in 2000, the inclusion of new trade issues in WTO is a substantial change and helps to increase the *de facto* power of the European Community vis-à-vis the member states. It also directly led to he Commission's "shirking of preferences" and exerted pressure on the Community level for institutional change.

[24] So only governmental services and core segments of air transport are excluded

--*Changes of DSB system*

The institutionalization process from GATT to WTO is well represented in the strengthening of legal dispute system. The new DSB system has moved from non-binding arbitration in the GATT (Hudec 1993) to a more court-like system of mediation between the disputing parties in the WTO. WTO has incorporated 'the most highly legalized' procedure in the existing international organizations (Billiet 2006, 901). It provides for a panel and an appeal procedure (the judges being independent experts in the field rather than diplomats from the Member States' missions), there are strict timeframes for the different stages of the procedure, and – most importantly – dispute settlement reports are adopted unless there is a consensus against doing so (negative consensus). This change has granted an "unprecedented degree of power to a legal tribunal" to enforce the obligations under the WTO Agreement (Hudec 1998).

First, it has strengthened the legal procedure of establishing a panel. In the GATT procedure, there was consensus requirement for the creation of panels and for the adoption of panel reports which enabled individual parties to prevent a decision from being taken. In the new DSB system, the defendant can no longer block the establishment of a panel and thus no longer control the case-load. For the disputes in the new trade issues, for example, disputes are largely solved before the DSB procedure has officially ended (Knodt 2004, 710). The consultation process within WTO has strengthened the Commission's role as a negotiator. To carry out the solutions, the Commission needs a broad "mandate", and at the same time has to be assured of member state compliance according to the mandate. For the sake of efficiency, the Commission takes full responsibility in the strengthened legal procedure, despite the internal dispute about trade competence (Billiet 2006).

Second, the new DSB procedure shows patterns of high complexity in terms of legal practice. The new legal procedure entails more professionalism and shows a highly technical nature involving complex scientific fact-finding and assessments. The introduction of an appellate review mechanism and a permanent Appellate Body composed of highly-qualified lawyers were greeted as particularly important contributions towards the rule of law in trade matters (Petersmann 1996). This strengthening of the legal procedures created a process similar to the independence of the legal system in the domestic arena, as administrative resources are required to ensure a quick and professional management of dispute settlement. This development has again strengthened the role of the Commission in the legal procedure, as the member states cannot afford the detailed technical expertise required (Billier 2006, 710). Also, for a lot of cases, there is need for external consultants. The budget for this kind of external consultation is provided by the Commission. Thus, the Commission also exercises a co-ordination and financing function for required expertise. This kind of co-ordination and management function has become especially important because of the rigid and tight schedule of the dispute settlement procedure within the WTO.

This institutional change has echoed an immediate response from both the Commission and the member states, driven by their own interests. Both signed the new WTO agreements and became members. But the member states didn't agree with the Commission's exclusive competence in services and intellectual property. The Commission finally brought the legal complaint to the ECJ which ruled a "shared competence" for the new trade issues between the Commission and the member states. The court acknowledged the difficulties of negotiating together within the WTO and made clear that the Commission should represent the EU but that member states and the Commission should co-operate in preparing and carrying out the negotiations. The co-operation procedure was established in a "Code of Conduct" in 1995.

c. The internal indication of external changes:

The changes of international trade regime have put the Commission at a stronger position against the member states. For example, the Commission can follow its "historical path" and continue to represent the member states in the new trade issues, despite the internal dispute on the shared competence. Also, the actions of the Commission in the framework of the WTO's dispute settlement mechanism have repercussions internally (vis-à-vis the Member States) as well as externally (with regard to other WTO members) (Billiet 2006, 913).

First of all, in the new auspice of WTO, the Commission can take advantage of the historical paths and continue to represent the member states to negotiate the new trade issues. Good representation in historical cases leads to an acknowledgement that the Commission is doing a good job and that it is beneficial for the member states to be represented by the Commission. Also, its international negotiation partners have been used to treat the Commission as the sole representative of the community. This "lock-in" effect has given the Commission the first argument to pursue more formal transfer of competence from the member states. As witnessed in the sector specific negotiations from 1995 to 1997 and the Doha Round negotiations, it is the Commission that was representing the Member states and conducting daily negotiations. Although there was the dispute for exclusive or shared competence, the member states have adopted very practical "code of conducts" in order to guarantee the Commission's credibility in trade negotiations.

Also, the changed legal dispute system of WTO puts the Commission in a stronger position because of its internal decision-making process. According to Art 133, the

"Community method" of decision-making applies and the Commission has a monopoly on the initiative in legal disputes. Under this procedure, it is the Commission that has to decide whether or not to initiate proceedings in WTO. There is also a strict timetable for the procedure which favors the positions of the initiative, i.e. the Commission.[25] Even for the issues of "shared competence", the member states still have an incentive to defend their interests through the Community because of the greater negotiating power. The real cases have also indicated that for nearly all the WTO complaints from the EU since 1995, none of them was initiated by the member states. That means that the Commission is in a rather strong position since the Member States are dependent on the Commission for obtaining their national objectives. This same also applies to the new sanctions mechanism in the WTO, as the EC action is more serious and credible than that of the single member state. Facing the institutional changes in the international level, the Commission shows its superiority in resource capacities.

Third, the new legal procedure has strengthened the direct linkage between enterprises or industry associations and the Commission, and putting the member states at a less important role. With the founding of WTO, the new Trade Barrier Regulation (TBR) of EU has replaced the New Commercial Policy Instrument (NCPI). The new regulation explicitly refers to the auspice of WTO as the reference point for the EC's new approach to its external trade policies (Knodt 2004, 711). TBR is aimed at identifying and removing barriers to EC exports to third countries. It gives Community enterprises and economic interest representatives the ability to lodge formal complaints and to request that the Commission investigate third-country practices when they feel affected by a third-country infringement of multilateral trade rules.

[25] This decision holds unless a Member State asks to refer it to the Council within ten days. If the Council has not made a ruling after 30 days, the Commission's decision applies.

Thus the founding of the WTO in 1995 opened a window of opportunity for the establishment of the TBR (Hellmann 2004) which strengthened the direct linkage between enterprises or industry associations and the Commission. The representatives of the EC industry or enterprise can bring up factual and legal evidence of damage by the practice of a trading partner and request the Commission to take up their case. The Commission then examines the complaint to assess its validity and the prospects for its delegation to the international dispute settlement. Member states' representatives are de facto only involved through the Article 133 Committee. The Commission is gaining some power through direct contacts with individual firms or their associations (Cottier 1998, 359). This direct linkage between the industry and commission has in practice opened the backdoor of the national interests lobbying.

d. Commission’s preference in increasing international embeddedness: edge for more authority, autonomy and power

Facing the changes at the international level, the Commission had got the direct motive to drift its preferences and proposed to extend its exclusive competence to the new trade issues. It had taken the initiative and brought the competence debate to the fore. It had explicitly expressed its preferences of overstretching its exclusive competence to the areas of GATS and TRIPS dimensions of the WTO by the end of Uruguay Round. There is no doubt that the Commission had played an active role and presents itself as a driving force in the competence debate from the very beginning. It is the strongly institutionalized trade regime that led to the Commission’s preferences for exclusive competence in the new trade issues.

There is a historical path in EU’s institutional embeddedness in international trade regime. Since the application of CCP in Rome Treaty, the Commission has played an

active role and presented itself as a driving force in international negotiations. By participating in GATT negotiations, the Commission has shown its high level of flexibility and the talent for improvisation in trade in goods. This provides a good argument for more efficiency and effectiveness in the negotiations. Because of this, the Commission would like to expand its exclusive competence in to the GATS and TRIPS dimensions of WTO. It is the functional need for a coherent performance at the international level that provides a strong argument on the part of the Commission. As the sole representative of the Community and a rational bureaucratic maximizer, high level of authority with full competence increases the Commission's bargaining credit and room of maneuver, and thus easier to reach a final agreement closer to its priority.

The Commission had formed its clear preference at the final adoption stage of Uruguay round. It wanted the final agreement adopted as a single package by EU, under the reasoning that all the issues were negotiated as a whole (Woolcock 2005). Facing the lack of clarity on the competence in services and intellectual property, the Commission then went to ECJ for legal support. The ECJ 01/94 opinion ruled a shared competence in the new trade issues and the need for "close cooperation" in preparing and carrying out the negotiations. This has resulted in the 1995 "code of Conduct" for on-going sector-specific GATS negotiations. But to the Commission, the 1995 "code of Conduct" lacks real adjustment to the institutional change in the WTO level. Nevertheless, that "code of Conduct" indicates the member states' understanding of the real functional purpose of the Commission in WTO. This understanding is then followed by the Commission's clear preferences in treaty revisions. In the two IGCs leading to Amsterdam Treaty and Nice Treaty, the Commission had put high priority to the competence issue. For example, in 1996 IGC, it had once noted that trade competence was the only goal it wanted from the negotiation (Elsig, 2002).

The Commission has explored the WTO as a window of opportunity and drifted the preferences towards more exclusive competence, while *de facto* acquiring these competences in the DSB procedure. The Commission benefits a lot from its technical knowledge and legal expertise in WTO. Also, its institutional position makes it a monopoly over the co-ordination of the collection and use of information and lead to the role of entrepreneurship (Featherstone and Dyson 1999). Thus the member states, despite their own preferences, are sometimes overtaken by events on the ground, caused by their reliance on the Commission in the dispute settlement system (Billiet 2006, 913). The Commission is more than a simple agent who finishes the delegated tasks of the principals. It works as the prime and ultimate technical specialist, not just because of its in-house expertise, but also because of its central position as mediator and coordinator. It is in this sense that the Commission functions more like a permanent agent which enjoys great room of maneuver.

But the permanent delegation nature doesn't imply the minimum role if the member states. The international factor is not the only determining factor in getting exclusive competence for the Community. Other factors, like the preferences of the member states and the domestic business actors are not superfluous. The legislative history of Art. 133 since the 1990s shows clearly that it is the member states as principals that are in the first place, delegating tasks and power to the Commission. The strong position of the Commission doesn't change completely the picture of PA delegation and control. On the side of the member states, the evolution of domestic preferences also matters a lot. As argued in the next section, it is the evolution of domestic preferences that the Commission relies on and finally succeeded in getting more competence from the member states.

2.3.3 The evolution of domestic preferences

The impact of economic interests on the EU's trade preference has often been underestimated in the existing literature (Dür 2008). Furthermore, there is lack of research to measure the influence of economic interests on the institutional changes concerning trade policy making. Some existing researches focus more on the role of domestic preferences in trade policy making. To some, societal actors are important or even dominant in determining European trade preferences, by lobbying either Member States or the European Commission (De Bièvre and Dür 2005; Dür 2008; van den Hoven, 2002, Dür and De Bièvre 2007; Gerlach 2006). Others, by contrast, argue that both member states and the European Commission are largely autonomous from societal actors (Hocking and McGuire, 2002; Young 2002; Woll 2007; Zimmermann 2008).

Despite those differences, the focus on domestic preferences follows more or less the same institutionalist or rationalist approach. It is natural to take preferences as given and ask how preferences shape institutional choices or how institutions affect the aggregation of preferences (Young 2004). There is lack of checking the origins of preferences or the evolution of them (rare exceptions are Niemann 2004 and Woll 2004). It is until recent years that some scholars are beginning to adopt the HI point of view into the preference formation and provide some different picture (Gerlach 2006; Woll 2004, 2008).

This research follows this new trend and argues that the preferences of domestic actors evolve during the interaction process. Following this logic, those societal actors have evolved clear preferences to the institutional set-up of the trade politics, namely the exclusive or shared competence. On the one hand, the current analysis has argued that trade competence in the community level could help insulate the policy makers from

protectionist interests. The more insulated the public actors with more exclusive competence, the easier it is to liberalize the issue area (Meunier 2005, 8).[26] On the other hand, the community's position is constituent with the demands of broad business associations and sectoral groups across a large number of issues. It is now necessary to analyze how the domestic preferences concerning the new trade issues evolve during the competence debate.

a. The baseline of analysis—economic interests as starting point

The rationality for maximization of economic interests of market actors is treated as the baseline of trade politics. The market actors behave rationally and want to maximize their profits and thus go to political lobbying for a favorable policy. They tend to pursue rent seeking through trade protection in the domestic market. They can get political support to set high tariff for market entry or more subsidies to guarantee their own profit (Magee, Brock and Young 1989). This explains why there is always incentive for exiting market actors to develop protection preferences and get them through the decision-making process. The interaction process between business and government seems to be a win-win situation. The companies have electoral resources to support the government while the government provides the favorable regulations for the firms to protect their interests (Dür 2008).

Taking the maximization of economic interests as exogenously given, the political preferences and behaviors of business actors are thus expectable in the political arena (Stigler 1972; Peltzman 1976). Moravcsik argues that "socially differentiated individuals define their material and ideational interests independently of politics and then advance those interests through political exchange and collective action" (Moravcsik 1997, 517).

[26] For a critique see Bailey, Goldstein and Weingast (1997).

Starting from this presumption, various studies constitute different models such as the Stolper-Samuelson or the Ricardo-Viner model for the explanation of trade preferences by the intensity of owners of factors (Frieden 1999). It is thus the demand side of self-interested socio-economic actors that constitute the cornerstone of the analysis. The government needs to weigh the benefits of policies to special interests against the costs of these policies to the general public, before it comes to the final policy outcome.

However, that domestic source is only part of the picture. Several other factors are also important in the literature. First, the heterogeneity of the domestic interests and the intensity of those preferences matter. When it comes to great differentiation in terms of the preferences, it is the intensity of preferences that matter. Frieden argues that the more specific the asset, the greater the actor's incentive to defend its value in its current use (Frieden 1991). Second, the "diffuse effect" might be safeguarded at the expense of the specific interests (Hayes-Renshaw and Wallace 1996). This tendency might be particularly strong with respect to foreign economic policy (Hayes 1993; Johnson 1998; Woolcock 2000). Third, the consideration of scale economy under imperfectly competitive market could also determine the business actors' trade preferences (Milner and Yoffie 1989; Chase 2005). It is claimed that firms with more room for scale economy facing an enlarged market will favor liberalization. Besides, there are also other approaches arguing that higher degree of internationalization and externality will impair the sectoral preferences for protection (Milner 1988).

But as indicated above, treating economic interests as *a priori* given ignores the issue of temporality and the evolution of interests in a learning process. In reality, the socio-economic and political actors are willing to trade off policy dimensions (Frieden and Martin 2000). This gives the hint that the preferences of the business operators could evolve in the interaction process. This is especially the case in European service

industries which have undergone a dramatic evolution of preferences in the 1990s. Facing the change of preferences, the historical institutionalism helps to add a useful revision to the rationalist approach.

b. The problems of economic interests, a HI point of view:

In the perspective of HI, this rational assumption ignores the factor of time and learning in the lobbying process. Actors are not perfectly informed about certain institutional consequences at the beginning. It is not common that a firm came up to the political exchange with a set of firmly believed interests and preferences and then enforce these interests by the tactics of lobbying (Woll 2008). The political process functioning as the strategic context also matters how business interests are channeled to public officials and thus let the firms pre-determinate if a certain set of interests is worth pursuing in that context. This is much in line with a broader interpretation of the influence of institutions by HI. Institutions have the capacity to shape the goals and the preferences of actors and "structure political situations and leaver their own imprint on political outcomes" (Thelen and Steinmo 1992, 9).

Thus the preferences of the firms are affected by the lock-in effects of certain institutions and have to follow certain path dependence in the interaction process. This interaction process has learning effect on the interests and preference of the business actors. The corporate sectors get more informed about the institutional constraints during the interaction process. The institutional constraints could to a great extent redefine their political preferences and even change their perception of economic interests. In other words, the content of political demands may evolve over the process of political interactions. It is thus incomplete to treat economic interests as a constant and stable input because the demands of firms may evolve by itself either by learning or simply as a

reaction to the strategic environment (Woll 2004, 2008).

The rational institutionalism's priori of economic interests is thus heavily criticized by the literature of historical institutionalism (Thelen and Steinmo, 1992; Thelen 1999; Pierson and Skocpol 2002). As is argued by Hall, the institutional factors such as "the formal rules, compliance procedures and standard operating procedures that structure the relationship between individuals in various units of the polity and economy" have strong influences on the policy formation (Hall 1986, 19). Pierson argues about the impact and importance of historical processes which influence policies in a manner not intended by the creators of the institutions. Subsequent actors have to operate within the self-reproducing institutional scripts in the historical processes which produce outcomes hardly predictable from the outset (Pierson 1996, 131). To put it simply, preferences are treated by RI as exogenous and by HI as endogenous. This study adopts a HI point of view and argues that the business actors' preferences are endogenous to the whole process of integration (Aspinwall and Schneider 2000, 21).

Business preferences are thus not the mono-causal reaction to one particular indicator (Woll 2006). They are the result of an interaction process with different variables and constraints weighing on them at different points in time (Woll 2004). The institutional changes and constraints at the international and community level constitute important variables to understand the evolution of preferences in the service industries. It is important to look at the interaction process which constitutes some exogenous effect on the business actors. This indicates a two-way-rounded interaction. On the one side, firms can affect their government by lobbying or make compromises through the rent seeking process. On the other side, the content of the demand of the specific economic interests or preferences could be directly influenced or even changed by that interaction process.

c. Preferences could change---toward a modified explanation:

It is thus argued that businesses do not necessarily have firmly established preferences on trade policy choices. In the case of absence of such kind of clear trade preferences, they take part in a learning process and develop preferences characterized by some institutional constraints. At this early point in time, the policy stances of firms divide according to their regulatory experience and are affected by the international regime. It is observed in the telecommunication case that most national operators are quite reluctant about the prospect of liberalization in the beginning.

It is then in the interaction process that the preferences evolve. This is a learning process in nature where the business operations learn to re-adjust their perception of interests and preferences. It is shaped by the interactions of a firm with its relevant political actors, characterized by institutional rules. It is noted by Woll that trade policy making is characterized by a symbiosis between firms and governments: while firms can provide information relevant to the negotiation of a sector, governments have the power to shape policy outcomes by negotiating or blocking specific propositions (Woll 2004, 2006). Firms then start behaving in a strategic setting after the preferences are relatively stable. So it is to say that besides the economic interests, trade preferences of the business operators could also be deprived from political institutions, i.e., the voting rules and international regimes.

These institutional constraints exert direct influence on the content of the trade preferences. In the case of EC trade policies, it is argued by Van den Hoven (2002) that the Commission has a very clear integration agenda, which is oftentimes incompatible with demands for sectoral or national fragmentations of markets through protectionism. The bias of institutional design mitigates the pure economic preferences of small group

of constituencies: business operations want to lobby for specific beneficial policies for certain sectors through interactions with political actors, while the complexity of the multi-tiered system prevents the direct translation of these specific interests to real policy outcomes(Van den Hoven 2002). The result is that the Commission responds to those policy demands that are expressed in terms of pan-European welfare. The political structure and process in the EU thus have an impact on the content that can be lobbied for by European businesses. This structural constraint leads European lobbyists to the definition and support of coherent principles, instead of content specific sector interests, as is argued by Woll (Woll 2004, 42). The orientation of the business interest is filtered by the institutional constraints before they form as input into politics.

In the European context, business preferences define and re-define their preferences under regional integration and the evolution of international trade regime. This is especially the case in the new trade issues where the stake was more complicated than the simple removal of tariffs. In the complex service sectors, the objective of trade negotiations is the harmonization or the internationalization of domestic regulatory approaches. The harmonization or internationalization of domestic regulatory approaches provides more alternatives than the simple removal of tariffs in trade in goods. It is the regulatory framework at the regional and international level that leads the service providers to develop clear-cut preferences in trade policy.

d. Learning from interaction: the evolution of domestic preferences

Three analytical steps are needed to identify the evolution of the preferences of service industries. First, it is necessary to specify the economic interests at stake. In this case, it refers to the economic interests of service industries in the European market. Based on the interaction process specified above, it is necessary to check the preference evolution

process of those service industries, from the essential valued ends to the preferred political strategies. Second, there is need to characterize the organization of these interests and see if there is obvious change of organizational power. The third step is to examine how these interests are meditated through political institutions. The focus is especially on the interaction between the European service industries and the institutional set-up of the Community.

--*Evolution of liberalization-oriented preferences*

Trade policies are viewed by Rodrik as systematically biased against free trade, as firms usually have more incentive to get more rents by lobbying for protectionism (Rodrik 1994). But later on, scholars have found out that firm's attitude toward liberalization is positively correlated with its international externality (Milner 1987; Milner and Yoffie 1989; Gilligan 1997). Since then, the effect of internationalization on domestic politics, especially its distributional effects on the preferences of domestic actors have been studied by scholars of IPE (Keohane and Milner 1996; Rogowski 1989; Frieden 1991; Chase 2005). For example, Frieden (1991) shows that globalization through its increased capital mobility favors those firms that have a diversified set of operations in a variety of countries. This leads to the conclusion that internationalization more generally leads to an increased support of firms for global trade liberalization.

The nature-bounded orientation for protection is categorized as the first preferences available to the business actors. This tendency weakens as the international externality increases. It is argued that in cases of uncertainty, the domestic firms will take the protection position as default, even though they possess comparative advantage in the global market. This is the case of the service industries in the early 1990s, when they were simply not aware of their own preferences in the global market and preferred the

status quo to increased competition in their markets. In this scenario, the time factor from historical institutionalism plays a decisive role in understanding the evolution of preferences. The monopoly nature of the service providers perceives short-time preferences of more protection and less regulatory integration. While over the horizon, the perception of competition in a global market and the constraints in the institutional setting alters those preferences. The preferences change as the interaction deepens. The firms could change their attitudes from protecting domestic markets towards the policy change of liberalization.

Two factors determine the evolution of domestic preferences. First, the changes of regional institution have direct impact on the evolution of the business preferences. Within EU, there were significant changes both in financial and telecommunication service regulations at the community level in the 1990s. The service industries responded to that change and began to develop their preferences in trade. In the early 1990s, as the service related trade issues were first tackled in the international trade negotiation, most of the related business actors have no idea what it is about. It is until the late 1990s that the European service operators get used to the basis concepts of the trade negotiations and begin to gradually develop their own interests. Most large European operators agree that from 1996 onward “there was such an empowerment of the WTO that many companies discovered its importance” (Woll 2004, 192). It is thus in this interaction process that a clear-edged notion of preferences is developed as a response to the constraints in the strategic context by a learning process.

Second, when business operators are expanding operations on a global base, its activities will be circumscribed by the international regime governing the individual sector. The international regime could directly affect the perception of interests and preferences of the business operations (Frieden and Martin 2000). There were significant changes in

terms of international trade regime in the early 1990s, which for the first time brought the new trade issues into the negotiation agenda. This change had obvious repercussions on the domestic business actors. There were horizontal preferences for global liberalization in services and intellectual property, which was witnessed by the sector-specific service negotiations in finance and telecommunications from 1995 to 1997, as well as the on-going Doha negotiation. Facing the changes at the international level, the service operators quickly learn to develop their liberalization oriented preferences alongside the international negotiation on services after the mid-1990s.

--*The business associations*

The domestic preferences need to be organized in order to exert real influence, as the intensity and the organizational form of the preferences determine directly the lobbying power (Dür 2008). The organization form of the service industries experienced some substantial changes since the 1990s. In the beginning of the 1990s, there was no particular association uniting the related service sectors and express their preferences. It was until 1999 that the European Service Forum was found and began to represent the most powerful voice of the service association in EU. It covers for example big service operators from every EU member state and represent more than 80% of exporting service sectors in the EU, including financial, tourism, telecommunications, maritime transport, business and professional, distribution, postal and express delivery, IT, energy and the audio-visual services.

There are also other smaller business associations like ETNO for telecommunication representation since 1992. But the role of ETNO was very limited in the Uruguay Round, because most of the domestic telecommunication providers were not ready to support the multilateral talks at that time. In the early 1990s, there was lack of supranational

lobbying on the association level. After 1996, the network operators began to develop clear preferences and decided to profit from the global market. During the later phase of the sector-specific negotiations from 1995 to 1997, the domestic preferences began to get organized on the community level to conduct supranational lobbying. The EU telecommunication firms agree that associations, ESF and ETNO, are the most important ways of voicing their concerns about GATS-related issues after 1996. The big associations have formed what a neo-liberal coalition of business preferences by firms belonging to the international business elite (Van Apeldoorn 2002).

Alongside the establishing of business associations, there has been a gradual shift towards EU-lobbying. This tendency goes incidentally parallel with the trend that the Commission gets more exclusive competence in the debated areas. But at the same time, most of them were still in close contact with the national government, in order to make sure that their domestic market will not be endangered by the liberalization process. This two-level participation was crucial to understand the patterns of business preferences in Europe (Woll 2004). Telecommunication companies, for example, began to lobby for reciprocal liberalization of basic telecommunication services through ETNO and ESF in WTO. They were also seeking to maintain advantages and restrictions on foreign market access through their national government. The shift of business lobbying through business associations was to a large extent, initiated by the Commission's effort to gain domestic support (Van de Hoven 2002; Woll 2008).

--*The political interaction*

The evolution of trade preferences of service industries is quite obvious during the 1990s. Compared with the lack of trade preference in the early 1990s, there was an obvious change after 1996. Feeling this change, the Commission took the initiative to bring the

business interests into political interaction. This "symbiotic" relationship between the Commission and interest groups was viewed to gain more support for the Commission's proposals from domestic constituencies (Mazey and Richardson 2003, 209-212). Thus it leads to a situation in which "companies and the Commission present the member states with a negotiating strategy 'pre-approved' by European industry" (Cowles 2001, 171). The Commission has made a concerted effort to integrate firms and other private actors into the trade policy-making process in order to gain bargaining leverage not simply vis-à-vis third countries, but also over its own member states (Van den Hoven 2002).

This interaction results in two developments. The first is the support of the domestic interests on the Commission's preference of more liberalization. When firms increasingly want to seize the opportunities available to them at the supranational level, the Commission can deliberately choose the firms whose preferences are close to their own (Van den Hoven 2002; Woll 2004, 2008). Because the Commission favors more liberalization-oriented preferences, this interaction process will define and redefine the preferences of domestic business actors. In this way, the business actors have to face the trade-off of pressing for their immediate advantages and responding to the interests of the European Commission, which promises them access to the policy-making process (Broscheid and Coen 2003). Second, it strengthened position of the Commission vis-à-vis the member states, as the participation of interests groups can circumvent the national government and help to increases the legitimacy of the Commission on external trade issues.

2.4 Conclusion：a multi-level revision of the PA framework

2.4.1 The permanent delegation and wild agent

The conventional PA framework focuses on the purpose of delegation and the procedures of control (Pollack 1997,1999, 2003). The principals delegate its power to the agent in order to fulfill some functional purposes (Epstein and O'Halloran 1999, 29-33; Kassim and Menon 2003, 123-4), while at the same time maintaining control through different oversight procedures to prevent the agent from 'preference shirking' (Pollack 1997, Tsebelis and Garrett 2000). Most of the observers admit that the principals have firm control of their delegated power, or that the agent has only limited room for preference shirking. The PA framework, however, has difficulty in explaining why the Commission succeeds in pursuing its preference shirking and get the exclusive competence in all trade issues.

The Commission can explore the development in international trade regime as "window of opportunity" to push the member states to delegate more power. In this sense, the Commission is no longer a simple agent who just fulfills the goals of the principals and pursues only occasionally limited level of "preference shirking". The delegation within EU has more or less a "permanent nature" of power transfer, which gives the "agent" more leeway to develop its own preferences. In the institutional competition on power, the Commission has shown superiority in resource capacities and executing power which has formed a strong historical path within EU. The member states thus have to face the "lock-in" effect of European institutional setting and admit the Commission's authority in internal and external affairs. The delegated power from the principals is thus institutionalized in that "historical path" (Pierson 2000). In other words, the agent has more room to pursue actively its own preferences, while the principals have to face an

agent easily going wild.

Thus the Commission developed clear preference for exclusive competence in the new trade issues despite the strong opposition from the member states. Furthermore, it had persistently carried its "preference shirking' into different rounds of political bargaining. This persistence can not be explained by the conventional PA framework. This is to a large extent due to the permanent delegation nature within EU where the Commission possesses advantage in EU's institutional setting and the "historical path" vis-à-vis the member states. In external trade issues, the Commission is thus behaving more and more like a real "actor" instead of a simple "agent" of the member states.

2.4.2 The principals facing challenges: domestic constituencies going to the Commission

It is argued by many observers that the member states have firm control of the trade policy making from the beginning (Aggarwal and Fogarty 2004, 226–7; De Bièvre and Dür 2005; Meunier, 2005). The member states keep control of the Commission through the comitology measures. In terms of power delegation, the member states take the national sovereignty as a default point. This means that they will not transfer any power to the supranational level until they are willing to. Trade competence, belongs to the "sovereignty concern" of the national government and has high political salience, especially when it concerns the domestic sensitive regulations and standards. Thus the reaction of most member states to the Commission's proposal of exclusive competence was understandable in the beginning. Without significant pressure to give up their sovereignty concern, they would maintain the status quo and claim national control on the new trade issues.

But the dynamic of power distribution between the Community and the member states

are continuously weakened by two factors. First, the institutional bias in the international level exerts functional pressures to behave more pragmatically. The Commission enjoys a historical "lock-in" position of representation and *de facto* competence in international trade regime. It involves tremendous political risk to reverse the consensus of "community method" in external trade representation. The "impossibility" of the institutional reverse put the Commission on the advantageous role against the member states.

Second, as the internal competence is more and more concentrated on the Community level, it opens the backdoor for the domestic preferences to circumvent the member states and lobby directly in the commission. As more and more service providers support the Commission's preference for global liberalization, they would like to go directly to the Commission for business lobbying. The commission thus enjoys the support of domestic constituencies, which resembles to some extent the legitimacy nature of a "principal". The lobby effort of service associations on the community level since the late 1990s has also given direct pressure on the member states to loosen their sovereignty concern about the new trade issues. Thus the multi-polity nature of EU makes the PA relationship between member states and the Commission more complicated. The member states have to face the changed reality and give up their sovereignty concern on the new trade issues.

To conclude, there is need to add the multi-polity nature to the Principal-Agent framework. The European commission is by nature more like a "permanent agent" of the member states which enjoys significant degree of "preference shirking". It can "take the life of its own" (Pollack 1997, 1999) and actively explore the development in international regime to develop its clear-edged preferences for more trade competence. On the other front, the preference evolution of domestic service providers and the

association lobbying on the community level have given the Commission more leeway to strengthen its arguments. When the related domestic constituencies turn to the Commission for trade lobbying, the “ideological bias” (Meunier and Nicolaidis 1999) of the member states is gradually replaced by the consideration of efficiency and pragmatism in external trade policies. This change has slowly echoed the functional pressure of a strengthened international trade regime and thus made it possible to see the gradual enlargement of the Commission’s trade competence in different Treaty revisions.

CHAPTER 3

Identify the Target

External Trade Competence in Common Commercial Policy

Trade competence, like competence in other policy areas, reflects the ultimate authority and the responding mechanism of policy making. It means the form of authority to initiate proposals, to participate trade negotiations and to ratify the negotiated agreements. In the conventional domestic structure, trade competence usually falls under the sovereignty domain. That means the national government has the sole and ultimate right in deciding its trade policies, taking part in trade negotiations and ratifying its trade agreements. As to the European Union, trade competence has been no more a domestic sovereign issue since quite some long time. It has been transferred to the supranational level, taking form in two different levels of delegation. The Treaty of Rome has provided a legal base for the exclusive competence in the Community, at least in the conventional trade in goods. Under the form of a common commercial policy, trade policy belongs to one of the few limited policy areas[27] that the member states have accepted to pool their sovereignty and delegate competence and representation to the community. The pooling of whole trade competence into the Community has two dimensions of meaning. Internally, it is aimed to create common internal market which should be free of all kinds of trade barriers between the member states. Externally, the community should adopt unified external representation for all the member states with a common external tariff

[27] Other areas are internal market, competition policy and agriculture.

(Meunier and Nicolaïdis 1999). The following part draws a detailed analysis of the trade competence in its external representation from Rome Treaty.

3.1 Trade competence in external representation, origins and mechanism

3.1.1 The origins of trade competence in Rome Treaty

Within a broad framework of Common Commercial Policy, the 1957 Treaty of Rome granted the new supranational entity the whole competence of handling its external trade relations by Article 113. The core provisions of Article 113 set the supranational competence in commercial policies after the transitional period to 1966:

"*after the transitional period has ended, the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.*"

This is where trade competence of the supranational entity takes its root. This competence includes the elaboration, negotiation and conclusion of trade agreement with any other third countries in the world, which was defined by the paragraph 2-5 of Article 113. A common mandate for international negotiations shall be decided upon a simple majority in the Council. The Commission is then empowered right to take the exclusive trade competence and act on behalf of the member states in the external trade relations, but by a special advisory committee established by representatives from member states.[28]

[28] Article 113 was later amended to Article 133., so did the Special Committee 113 in Maastricht Treaty. For a detailed history of common commercial policy, see: Bourgeois (1987), Elsig (2002), Arnull (1996). An overview of the description and analysis of the commercial policy: Devuyst (1992), Maresceau (1993), Deutsch (1998).

From then on, trade policy has been given a collective entity with some unified identity and representation. It is no longer an internal policy which falls under the domain of state sovereignty. Three major principles are essential for this transfer of trade competence in practice: a unified code of external tariff; a commonly negotiated tariff and trade agreement with third countries; and a uniform application of trade instruments across member states.[29]

But there is lack of clarity about the contents of trade and the forms of the supranational competence in the original text of TR. To some observers, the "Rome Treaty's CCP articles were rather poorly drafted, especially with respect to definition and scope" (Devuyst 1992, 71). The ambiguity of the CCP articles showed the historical restriction of the initial designers, who could not foresee a major change of trade forms after the 1980s (Drake and Nicolaïdis 1992). This ambiguity provoked the actors to different interpretation of this trade definition in favor of their own interest. Furthermore, the judiciary's reluctance to articulate that scope of issues within CCP led to worsen the institutional overlap. This has caused the conflicting endeavors of different actors to seek rent in clarifying that institutional set-up, as was shown in the competence debate of new trade issues in the 1990s. The origin of the new competence debate was rooted directly in the ambiguity of TR.

Despite the ambiguity, however, the pooling of trade competence in CCP is significant in two senses. First of all, it signified the exclusive transfer of trade sovereignty to a supranational institution which has external influence at least in the legal terms.[30] State sovereignty has always been deemed as the core characteristic of a modern state, with

[29] See first paragraph of Art. 113 in Treaty of Rome. The contents of the others related articles are: Art 111-112 were applicable during the transitional period; Art.114 laid down the decision-making procedures. After the transitional period when unanimity was applied, QMV should be adopted.

[30] This is compared to the 1951 Treaty of Paris, the Coal and Steel Community, in which the power of the member states should not be affected by the integration of the coal and steel community. These institutions don't have external authority.

trade and economic issues very sensitive to that core. The transfer of exclusive competence to supranational institutions was a substantial step to initiate European integration. Second, by transferring its trade competence to the community level, the new institutional set-up increases both EC's external bargaining power and its liberalization in trade, because the structural mechanism determines how much resources actualize into actual power.[31] As is found out by some scholars, the delegation helps to insulate the trade policy-making process from domestic pressures and will thus promote a more liberal international trade order. Furthermore, a unified voice in trade policy can increase external influence and facilitate trade negotiations (Meunier and Nicolaïdis, 1999).

3.1.2 The mechanism of trade competence delegation: two levels and four steps

Art. 113 of Treaty of Rome provides the legal framework for the delegation and policymaking of trade issues. In practice, however, the delegation of trade competence happens at two levels, at the level of the member states and within the institutional mechanism of EU. In the first level of delegation, trade authority which was traditionally a domestic domain has been delegated out of the domestic political structure to the Council of Ministers of EU. The council of Ministers resembles *de facto* the highest power within EU. It is the institution that represents the interests of member states. Each national government thus delegates its trade competence to the supranational level to the Councils. There is no one Council *per se*, but rather there are many according to the different issues and each consists of the national ministers in the corresponding policy areas.[32] Thus the Treaty of Rome formally transferred the competence to negotiate and conclude international agreements on trade from the individual member states to the

[31] For example, the shelling conjuncture argues that he internal division increases its external bargaining power.

[32] The two most significant councils are General Affairs(foreign ministers) and ECOFIN(finance ministers). The presidency of each council rotates on a six-month basis. The one that attracts mostly the media attention is the 'European Council' which consists of the head of each of the state or government.

European Council, with a complete supranational competence.

The second level of delegation refers to the transfer of competence from the Councils of Ministers to the European Commission where the EU bureaucrats are in charge of setting trade agenda and defending the collective interest (Meunier 2005). To initiate the EU legislation belongs to originally one of the two major tasks of the Councils. But after the second level of delegation, the agenda setting is delegated to the Commission, while the Council is only responsible for the first task that is to reject or ratify the proposals emanated from the commission. According to the PA literature, the Council maintains effective control or influence in the formation of the proposals from the Commission (Pollack 1997, etc.).

Through the second level of delegation, the Commission has acted as agent and gained important legislative power from the member states. The Commission gains the right to elaborate proposals for the initiation, negotiation and conclusion of international trade negotiation. The official bodies related to trade policy are the Trade Directorate (DG Trade), Competition Directorate (DG Competition) based in Brussels. In terms of external trade relations, it is DG trade that is responsible to initiate proposals and participate in trade negotiations. It is represented by the EU trade commissioner.[33]

Before going externally to speak with one EU voice, the Commission's legislative power of agenda setting can be broken into four steps. In the first step, a special 113 committee plays an important role. After the Commission[34] sets the proposals for trade negotiations, the key policy discussions and revisions then take place in the 113 (latterly 133) Committee which comprises senior civil servants and trade experts from the member

[33] The trade commissioners since the 1990s are Leon Brittan, 1995-1999; Pascal Lamy, 1999-2004; Danuta HübnerPeter 2004; Peter Mandelson 2004-2008; Catherine Ashton, 2008-2010.

[34] Here the commission means different Delegates. It depends on the trade topic, but usually it is the Trade Delegate and Agriculture Delegate that take initiative.

states. It is noted that the Commission almost always follows the advice of the 113 committee, since it reflects the wishes of the national ministers who ultimately can refuse to ratify the agreement negotiated by the commission (Hayes-Renshaw *et al*. 1997).

The amended proposal is then transmitted to the Committee of Permanent Representatives (COREPER), which is composed of the national ambassadors from member states and the deputies of the community. After the discussion in COREPER, the proposal is then subsequently transmitted to the Council of General Affairs and External Relations. They are literally two most important councils in the community and have the power to establish the objectives of trade negotiation. It is composed of the foreign ministers of each member state and represents the national interests of them. They play the role of gate-keeping to insure that the Commission's proposal is not drifting away from the interests of member states.

In the last step, the Council issues a negotiating mandate to the Commission which should be agreed upon qualified majority.[35] Then the Council makes a negotiating directive that is not legally constraining. The Commission officials under the authority of the Commissioner of external economic affairs are then empowered right to conduct trade negotiations with third parties. But they can only act within the mandate set by the Council. After the agreement has been negotiated, it is again required to be approved by the council. This process is also required by qualified majority but in practice it is common that the difference between the member states could be overcome before it comes to the voting.

The four steps depict a clear picture of how the legislative power in traditional trade

[35] But it is widely argued that in practice the member states have always managed to reach consensus on a common text on this stage of process. See , Meunier, 2005.

issues is attributed to each procedure and each institutional body. It is to see that the Commission has the sole rights among all EU institutions to initiate trade proposals and enjoys exclusive competence in conducting trade negotiations. But the council also exerts some substantial influence in the process as the Commission would not raise a draft that would be likely rejected by the Council (Elsig 2002). The Council's final gate-keeping role in ratifying the agreement is also important. The competence is thus mainly concentrated at the community level by the Commission and the Councils.[36] The degree of competence enjoyed by the Commission is linked to the level of delegated competence.

3.2 Bridging the gap: shared competence and exclusive competence

Member states have delegated their authority to conclude trade agreements to the Commission who is required to act on their behalf (Pollack 1997; Nicolaïdis 1999). Under the PA perspective, the shared or exclusive competence matters mainly in different control mechanisms. In both cases it is the member states that have the ultimate authority with different binding mechanisms. In the case of exclusive competence, the authority acts through the voting parties of the Councils in the EU structure, who are nevertheless required to represent the interests of the principals, while in shared competence the authority lies undoubtedly in its national sovereign parliament. In practice, however, this difference matters most to the negotiating power of the Commission in international trade negotiations.

[36] The European parliament had no formal say in this process, unless in other fields of external agreements where it has a veto right. Some important modifications such as the 1987 Single European Act, the 1992 Maastricht Treaty, the 1997 Amsterdam Treaty and the 2000 Nice Treaty have not changed the role of the Parliament in this aspect. But the new Lisbon Treaty grants substantial role to the EP on foreign trade policy.

3.2.1 Ambiguity in Rome Treaty, shared and exclusive competence in practice

Instead of a clear definition of CCP in TR, there is the non-exhaustive list of uniform principles on which it is based:

"..the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff, rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in case of dumping and subsidies". (Art. 113(1) EC)

This basic definition has undergone little changes in different treaty revisions. But the ambiguity in definition has caused different interpretations of the scope of the CCP by different actors based on their own preferences. The Council shared the view that only measures relating to the volume or flow of trade fall within the scope of the Common Commercial Policy, while the Commission argued that the assessment needs to be made by reference to the character of the measure as an instrument regulating international trade.[37] Although there was no clear position from the Court, its case law[38] has contributed to the further detailing of the scope of the CCP (Emiliou 1996, 301).

There were thus no terms like "shared competence" in the original Treaty. In practice, the lack of clarity in the definition of exclusive competence in legal terms was latterly complemented by the legal practice. In the practice of CCP, the Commission had gradually come up with issues that the national states held stake in and wanted to reserve partly their national competence.[39] The word "shared competence" originates then from

[37] Detailed elaboration in Opinion 1/78, supra no, 34, pp 2880-2894.
[38] Opinion 1/75, supra no.30, Opinion 1/78, supra no, 34, case 45/86 supra no. 39
[39] For example, Luxembourg compromise in 1967.

the practice of CCP rather than from the legal context in the European treaty.[40] It is by the ECJ's case law that clarified in practice the *de facto* co-existence of exclusive and shared competence within the framework of common commercial policy.[41] By the legal practice of ECJ, it is specified that the EU member states were no longer allowed to adopt legislative measures or to conclude independent treaties with third countries where the EU power was exclusive. The court's case law demonstrates that "the Community has exclusive competence in relation to conventional as well as autonomous measures" (Emiliou 1996, 299). However, the list of exclusive EC competence is quite limited. This was verified by the ECJ's other rulings that certain competences were not exclusive EU competences and it thus did not prevent EU member states from acting.

3.2.2 Shared and exclusive competence in comparison

a. Difference in four stages

As is argued by some rational institutional perspective, the delegation of competence is done by some principals to fulfill some functions. The different type of competence delegation would have different efficiency of functional purposes related to the issues at stake. In the case of shared or exclusive competence, the level of delegation functions as an important institutional variable which could exert substantial influence on the nature of the bargaining directives as well as the bargaining power in the negotiation process.

To understand the difference between shared and exclusive competence, it is necessary to divide the external process into four stages (Figure 3-1): the design of the negotiation

[40] In Rome Treaty, the CCP falls under the exclusive EU competence with some general domestically-sensitive exceptions. There was no legal term like "shared competence" in the formal treaty revisions. It is in the Treaty of Nice that "shared competence" for the first time occurred in the legal context, despite of its existence from the beginning of the CCP.

[41] See for example, the advisory opinion 1/751of EUJ on export credit arrangement which leave some "common commercial nature" field in to the national competence, see the court Opinion 1/75, 1975 E.C.R. pp.1355.

mandate, the representation of the EU during the negotiations, the ratification of the agreement once negotiated and the implementation and enforcement of the agreement (Meunier and Nicolaïdis 1999). From the chart below, it is easy to see that the difference mainly lies in the authorization and ratification stage, with different voting rules and ratification party. According to Meunier and Nicolaïdis, the configurations in different stages could be analyzed with one parameter: to ask "how power is delegated at each of these stages corresponds to different mechanisms by which the principals may bind their agent and limit its margin of maneuver throughout the negotiations" (Meunier and Nicolaïdis 1999, 481).

Figure 3-1: The four stages of delegation in the European Union: attributes of delegation to the commission

	Authorization (content of mandate)	Representation (autonomy)	Ratification (authority)	Implementation (regulatory measures)
Exclusive competence (Art.113)	113 committee Council Voting: QMV	Commission (informal consultation)	Council (voting: QMV)	Commission (exclusive)
Shared competence (Art.113 235)	113committee Council Member states Voting: UV	Commission (informal consultation)	Council (voting: UV) National parliament of each member	Commission with delegated authority (in consultation)

Adapted from Meunier and Nicolaïdis (1999, 481)

b. Variables of comparison

For a better understanding of these differences, Nicolaïdis attributed three variables to the operationalization of the competence delegation: flexibility, autonomy and authority (Nicolaïdis 1999). Flexibility means the nature of the mandate given by the council at the beginning of an international negotiation. It varies in the extent of concessions that could be made by the commission. Autonomy refers to the extent to which the principals are involved in the negotiations. Usually there is no direct presence of the principals during the trade negotiations.[42] But this variable could be determined for example by the obligations of reporting regularly to the principals and "under the watchful eyes of the member governments" (Woolcock 2000, 373). Authority refers to the ability of the agent to make promises and deliver on these promises. It means the credibility during the negotiations and the ability to let the principals ratify the agreements.

Nicolaïdis makes a very good category of operationalizing the "delegation of competence". But all three of her measuring variables lie in the outgoing stage, namely in the external representation and negotiation stage. One more variable of competence delegation lies in the internal stage of decision-making. Different kinds of competence delegation are associated with different institutional rules which could have set the space of maneuver in the external representation and negotiation (Garrett and Tsebelis 1996). The institutional setting of different competences is taken as the fourth measuring variable of competence delegation instead of putting it in the external circumstance.

There are thus two sets of measuring factors in terms of different kinds of competence delegation. The first refers to the internal institutional rules oft defined in a clear legal context by the EU treaties. It circumscribes different spaces for the starting of the

[42] But for new trade issues, for example in Uruguay Round, it could sit behind the representatives.

negotiating directives under the different mechanisms of unanimous or majority voting. Assuming that the Commission does have different preferences from those of the member states, exclusive competence indicates a final proposal with greater level of liberalization than that of shared competence. The other measuring factor refers to the external bargaining power characterized by Nicolaïdis three factors: flexibility, autonomy and authority. This outlines the performance of the Commission in the external representation. *De jure*, the Commission works within the negotiating mandate set by the Council. It is left free to conduct the bargaining within that limit of the mandate until the final reached agreement is submitted to the council for ratification. *De facto*, however, the competence of the Commission is a day to day struggle. The Commission attempts to exercise as much autonomy as possible without provoking itself into the backlash of the member states (Meunier 2005, 58). A former trade negotiator recalled that the Commission had to negotiate while being flanked by member states representatives as if it were under arrest (Johnson 1998, 2).

c. Three points of difference between shared and exclusive competence

The difference between exclusive competence and shared competence can thus be understood from the differential institutional mechanism which reflects the level of sovereignty transferred from the member states to the community. Exclusive competence doesn't mean that all the authority of policy making falls into the function of the EU institutions and the national government has no more influence. It is only a delicate and balanced institutional design between the national and supranational levels in trade policy making process. The national government retains its influence by the setting of the binding procedure to the EU institutions with an inspecting and oversight mechanism. Similarly, shared competence doesn't mean that national governments also co-hold representation in the trade negotiations. Three points are elaborated in order to explain

the difference both in procedure and the substantial level of competence delegation.

First, the difference mainly lies in the authorization and ratification level with different binding mechanism, as different voting systems reflect the different level of transfer of national sovereignty. In the shared competence case, the voting rule for authorization of a mandate is unanimity. This rekindles the first ten years of CCP when each single member state retained the veto power to protect their sensitive sector interest (Hanson 1998, 56). As shown in the literature, unanimity voting usually leads to the default position of the most conservative member state because that member state is the pivotal player (Garrett and Tsebelis, 1996). It is difficult to reach a mandate for more liberalization in the mandate phase, let alone the strict oversight procedures in the bargaining stage. Besides, the concluded agreements in a shared competence case are also required to be ratified by the national parliament, which constitutes a second level of safe-guard of important interests. Therefore, it seems that with exclusive competence the EC speaks with one voice, whereas with mixed competence, there is a cacophony (Meunier 2005).

Second, shared competence differentiates substantially from exclusive competence in terms of the level of sovereignty transfer. Let's go back to the two-tier delegation process. In areas where shared competence applies, there is no formal delegation of authority or competence from the national to the supranational level in the first tier. In contrast with the purely national competence cases, the shared competence usually reflects a higher level of externality, but not high enough for a full level of competence delegation. The reasons here could be of the high sensitivity or complexity of the issue areas or related domestic regulations. Because of the lack of a systematic transfer in shared competence, the trade-off between the Council and the Commission could only be based on an *ad hoc* code of conducts which is specified case by case, as was shown in the service

negotiations after Uruguay Round. The incomplete delegation in the first tier caused the member states to grasp more control on the second tier, which is reflected by the unanimous voting for ratification in the Council and a final national ratification to guarantee its lowest national dominator.[43]

Third, it is important to note that this difference originates from the practice of CCP rather than from the legal context in the European treaty.[44] Instead of the legal context of an exclusive CCP by TR, it is by the ECJ's case law that clarified in practice the *de facto* co-existence of exclusive and shared competence. It was verified by the ECJ's other rulings that certain competences were not exclusive EU competences and it thus did not prevent EU member states from acting. In any case, the debate in the legal literature over the meaning of exclusive EC competence seems to be inconclusive to date (see, Burca 1999). It is only certain to notice that the *de jure* and *de facto* EU competence has grown over the years. *De jure* more and more policy areas have come under EU competence. *De facto* the Commission has developed strong institutional capacity and detailed knowledge of trade politics and member states have tended to cede more *de facto* competence to the Commission on many of the less contentious external trade topics (Woolcock 2009).

3.2.3 Why exclusive competence?

The matter of exclusive or shared competence has important implications for the policy making process. It is argued by Meunier that the Commission's negotiating competence and the voting rules are positively correlated:

[43] The difference is in practice more blurred than the procedural divergence. Even in the exclusive competence cases where the QMV applies, one big country could exert an informal veto to block either the authorization of mandate or the ratification in the council.

[44] In Rome Treaty, the common commercial policy falls under the exclusive EU competence with some general domestically-sensitive exceptions. There was no legal term like 'shared competence' in the formal treaty revisions. It is in the Treaty of Nice that 'shared competence' for the first time occurred in the legal context, despite of its existence from the beginning of the CCP.

"commission autonomy is fundamentally endogenous to the voting rules in place…when Unanimity is used (formally or informally), less policy-making functions are delegated to the agent: the most conservative member states tends to keep a tight leash on the Commission to ensure that the negotiating mandate is respected…Under majority voting, by contrast, negotiators usually have more bargaining latitude. The mandate given is more vague, thereby giving the negotiators more flexibility. Therefore the most conservative state does not need to keep the negotiators in check since it will not have the final say on the agreement anyway. (Meunier 2005, 59)"

Exclusive competence first increases EU's ability to pursue credible strategies in international trade negotiations. A more unified Commission with more authority could increase its credibility viewed by its partners and thus increase EU's margins of maneuver.[45] Also, without respect to the overall efficiency, the greater autonomy and authority enjoyed by trade diplomats in international negotiations, the more they are respected by their negotiating partners (Elsig 2002, 41). On the contrary, the extension of the shared competence will impair that credibility and thus reduce the quality of QMV in the adoption of the final agreements. Because shared competence set more tying-ups for the external presence by authorization and ratifying procedures, the trading diplomats have less credibility less room to maneuver. In practice, "zone of twilight" between exclusive and mixed competence has the potential to disrupt trade negotiations and to limit progress towards trade liberalization (Hahn 2002).

In shared competence, the requirement for a domestic ratification of national parliament in the ratification stage secures a last safe-guard to protect more the status quo than to

[45] This point has been doubted by some observers like Meunier who argues that a divided EU could also enhance its bargaining power. See. Meunier (2005).

take liberalization measures.[46] And the negotiation leverage and status as a negotiator decrease accordingly. The more exclusive competence the Commission has, the more flexible it is for the Commission to make concessions or package deals that would give great linkage to a successful agreement (Meunier 2005). Some might argue that the Schelling conjecture should also apply to shared competence, as the member states have more cards to play by strictly manipulating their own win-sets. On the international trade negotiation table, however, the "tying hand" effect of Schelling is less useful, because the negotiations are conducted with the same actors over years and they can learn to cope with the other party's limiting domestic win set. It is thus often to see that the opposing negotiators will copy this strategy and lead to an escalation of the ratification threats. This will result in an ever-decreasing win-set overlap and make successful agreement less likely.

Second, exclusive competence is helpful to avoid the lowest dominator in EU's trade policies and thus contributes to further liberalization of the trade issues. In the case of shared competence, each member state has veto power over the mandate in the policy initiating stage. It is easier to encourage the interest groups to go to the national government to block the liberalization oriented mandate and ask for protection. Because under shared competence, the lowest denominator of the most conservative needs to be satisfied, it is difficult to take liberalizing measures. Exclusive competence could purify an institutional setting by reducing the influence of national constraints to a minimum. This is especially true at the threshold of expanding the original 15 member states to a more domestically complicated and geographically different 27. The unanimity rule in both the authorization and adoption phase according to shared competence could impair the Community's capability to reach common positions, because each state could use its

[46] The studies of correlation between different voting rules and the real trade policy orientations show that the more QMV is adopted, the easier to adopt liberalizing policies in the issue area. See Meunier (2005), Garrett and Tsebelis (1996).

veto rights to maintain the status quo for its own national interests. A higher level of authority transfer from the principal to the agent could in this sense increase the accountability and efficiency of the EU institutions.

The point that protectionist trade interests dominate policymaking processes is well elaborated in the literature (Destler 1986; for a critique see Bailey, Goldstein and Weingast 1997). Competence delegation a higher level, in contrast, helps to reduces societal actors' control over trade policies (Dür 2008). Moravcsik also argues that the delegation of trade competence to the Commission helps to strengthen the state vis-à-vis societal interests, as it helps alter decision-making procedures and provide governments with additional ways to justify their policy choices (Moravcsik 1993b). They may hope that by delegating trade policy authority to another level, they can combat the extraction of rents by particular firms or sectors. On the other hand, the complex system of trade delegation could lead to protectionist EU in multilateral trade negotiations. (Messerlin 2001, 14-17). As to the service industries, it is hypothesized that the more exclusive competence the Commission enjoys in the service trade, the easier it is to seek a liberalized policy in this field.

It is because of this reason that the Commission proposed to have exclusive competence covering the new trade issues. Facing strong opposition from member states, however, EU has adopted a very pragmatic approach in terms of legal competence in practice. During the Uruguay negotiation the commission was endowed a de facto competence in the process of different negotiations, with a symbolic political victory at the last stage of conclusion of the final agreement. Although its proposal of extending the exclusive competence was rejected by the ECJ verdict in 1994, the Commission and the member states achieved some compromise which allowed the commission to negotiate on the on-going negotiation of new issues without prejudice to legal competence. And even the

stagnant Treaty of Amsterdam had in this aspect adopted an enabling clause which resembles the fast-track trade competence in US. This showed a least level of consensus between the Commission and the member states in response to the changes world wide.

3.3 The new competence debate, from Uruguay Round to Lisbon Treaty

The earlier ambiguity of shared and exclusive competence in practice didn't question the Commission's role of representation and the later ratifying procedures. In the earlier trade negotiations which dealt mainly with the conventional trade in goods, the Commission has acted as the sole negotiator on behalf of the community, with a widely accepted autonomy and flexibility by its trading partners, as is authorized by the legal terms of Rome Treaty. It is with the rise of the new trade issues into the big agenda in international negotiations that the problem of exclusive and shared competence was brought to the fore. The Commission's exclusive competence was fundamentally challenged by the emergence of these new trade issues, namely the trade in services, intellectual property right and investment measures from the early 1980s.

The successful inclusion of the new trade issues into the Uruguay Round of multi-level trade negotiation challenged the Commission's unique position on behalf of the European Union. To make it brief, the Commission wanted to include the new trade issues into the broad categories of an ambiguous trade conception in Treaty of Rome and thus claim an automatic extension of exclusive competence into the new trade issues. But to the member states, the services issues are far more complicated than the "at the border" tariff and quota restriction, with a complex involvement of domestic laws and regulations. Most member states are doubtful to the exclusiveness of the "trade issues" in the Rome treaty and are reluctant to give up their whole competence in the new trade sectors. The tension had been seen in the starting of the mandate of the Uruguay Round

of negotiation. The nature of this competence debate in the initial phase could be framed as follows: who, according the legal terms in the Treaty of Rome, has what extent of authority to negotiate these new trade issues? The development of the competence debate unfolds as follows:

3.3.1 From Tokyo Round to Uruguay Round, issue awareness and problem of delegation

Near the end of Tokyo round, the issues of subsidies, government procurement and technical barriers has raised the question of exclusive or shared competence in Common Commercial Policy. Most of the member states deemed these new issues too domestically sensitive to leave entirely to the committee (Meunier and Nicolaïdis 1999, 483). This problem was latterly pragmatically solved by avoiding disputing on the formal legal terms. The member states agreed to grant the Commission the mandate to negotiate on all issues, but without prejudice to how legal competences were assigned. This pragmatic solution was done based on the rationale of keeping the Commission's credibility and negotiating productivity with a single voice (Woolcock 2005). When it came to the conclusion and ratification stage, there was then a compromise solution which allowed the commission to sign all the agreements of the Tokyo round. But the disputed issues like ECSC tariff Protocol, the Standards Code and the Civil Aircraft Code were signed together by the community and the member states (Kuilwjik 1996). This showed rather a temporarily political agreement than a final legal solution to this issue (Bougeois 1987).

This temporary compromise was followed in the Uruguay Round with regard to services, intellectual property and investment. The Uruguay Round was designated partly to responding to the emergence of the new trade issues and to incorporate them into an international trade regime (Drake and Nicolaïdis 1992). The member states insisted that these new trade issues fall into pure national or at least shared competence, arguing that

these new trade forms were not foreseen by the definition of trade in Rome Treaty. While the Commission longed for an exclusive competence over all trade issues and envisaged the replacement of common commercial policy with a common external economic policy with a much larger scope (Maresceau 1993). Finally, the Commission and the member states agreed informally to leave the question of legal competence pending while EU speaks with one voice with some *de facto* authority in the newest multi-national trade negotiations (Woolcock 2005). Thus Punta del Este declaration launching the Uruguay Round was approved by the Council and by the representatives of the member states "to the extent what they are concerned" (Emiliou 1995, 297). The Commission conducted the negotiation on behalf of the Community and the member states, enjoying *de facto* exclusive competence.

Because of the *ad hoc* settlement of the competence issue, the problem didn't come to the fore during the negotiations. It was supposed that the competence issue, regardless of extent in nature, could be very contentious had there been significant policy divergence between the member states. But in practice, the member states showed great willingness to guarantee the efficiency and productivity of the representation of the Commission. They are more result-driven and are thus opt to leave the legal competence dispute in the back scene, in order to keep the EU's credibility and thus the efficiency of the negotiation (Woolcock 2002). More surprisingly, the clash between the principle of unified response with exclusive competence and the sovereign concerns was not witnessed most seriously from the new trade issues, but rather from agriculture, a sector which has enjoyed exclusive competence since the founding of Rome treaty. The latterly-reached Blair House Agreement accorded with some concessions from the EC side has evoked enormous opposition from the member states, most famously from the

French government.[47]

Despite of the pragmatic settlement during the negotiations, the question of legal competence arose again when it came to the final adoption stage. The commission wanted the final agreement adopted as a single package by EU, under the reasoning that all the issues were negotiated as a whole in the Uruguay Round (Woolcock 2002). But the member states wanted a national ratification to the new trade issues that they thought are outside of EU competence, because of the domestic sensitivity. There seemed no way around this competence issue. This disparity leaded to different forms of manifestations on two fronts, the formal signatory of the Uruguay Round agreement and the further legal debate about this competence issue in the ECJ.

The member states' attitudes to the final signatory of the agreement were quite pragmatic. When the signing of the treaty came near, the Council and the Member states departed from the idea of signing the Treaty because of its coverage on "matters of national competence" (Emiliou 1996, 297). There was again a temporary compromise between the Commission and the member states in the last phase. "Both the council president and the external trade commissioner signed the Final Act of the Uruguay Round on 15th, April 1994 on behalf of the community, while representatives of each Member State signed in the name of their respective government" (Meunier and Nicolaïdis 1999, 484). A more symbolic victory of the national positions was to be seen, but it didn't require a further national parliamentary ratification (some states choose to undergo such ratification) (Arnull, 1996).

Besides the symbolic victory of the national positions, this compromise was rather a

[47] For a more detailed description of Blair House crisis, see Woolcock and Hodges (1996); Paemen and Bensch (1995).

temporary solution to the conclusion of the Uruguay Round. The dispute was postponed instead of being solved. By signing the final agreement, the representatives of the member states took the view that the Final Act and the WTO Agreement covered matters of national competence. While the Commission holds that the agreements fall exclusively within the competence of the European Community (Emiliou 1996, 297). The Commission and the member states still remained deeply divided in the core of the legal competence debate. With the new edifice of WTO replacing GATT,[48] the member states asserted their status of contracting members in WTO on the one side, but rejected to the Commission's proposal of a unified representation with exclusive competence on all trade issues on the other. This has finally led to a final manifestation of competence debate on the legal front.

3.3.2 The resort to ECJ and the verdict of the Court in 1994

Without further political compromise from the member states, the Commission decided to bring the issue to the ECJ. It issued a legal accuse on 6th April 1994 pursuant to Art. 228 (6)[49] of EC Treaty to review the question of competence and the scope of Art.113, hoping to get the legal support from the court. The Commission's calculation is to finalize the competence debate by the legal aid of the ECJ, which has proved to be quite supranational-oriented based on its former verdicts. As was observed by many, the Commission was quite optimistic to a positive response from the court because of the support of competence expansion from the ECJ on its historical cases (Elsig 2002; Bourgeois 1995). The Council and eight member states opposed to the Commission's

[48] GATT lacks a formal institutional set-up. This framework for multi-national negotiation consists of only signatories rather than real members. The Commission only negotiates on behalf of its member states in practice. So the question of a Community membership in GATT never arose.

[49] Art. 228(6): "the Council, the Commission or a Member state may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article N of the Treaty on European Union."

reasoning.[50] The competence issue thus finally came to the legal front. It has become a test case to the post-Maastricht institutional framework related to the distribution of institutional power and the efficiency of its external trade policy in a changed world.

There are good reasons for the observers to believe in the ECJ's support of the Commission's proposal (Hilf 1995; Bourgeois 1995). The automatic expansion of trade competence would be based on four arguments. First, the community's external power should be in line with its internal powers (*in foro interno, in foro externo*) (Emiliou and O'Keefe 1996, 38). The Single European Act in 1986 has covered the uncharted service industries and other new issues, and this expansion in the internal front call a similar expansion in the external front (Emiliou 1996, 298). Second, there is need for an evolutionary understanding of tradition trade concepts (Meunier and Nicolaïdis 1999). With the changing nature of trade, new mechanism other than tariffs and quotas plays a more important in hurdling international trade. The "domestic regulations applied to foreign firms, goods or people as byproducts of competition law, environmental policies and labor standards are all bound to fall progressively within the ambit of trade" (Meunier and Nicolaïdis 1999, 490). The third argument is an institutional one: it was a great success to bring the new issues into the world trade agenda in the Uruguay round (Drake and Nicolaïdis 1992). The EU's trading partners are used to deal with one EC with exclusive competence in the multi-lateral negotiations. The lack of clearness in competence will cause confusion by EU's trade partners and thus reduce the Community's bargaining power.

The Commission cares much about a unitary representation of the Community in WTO. It was aware about the case-law tradition of the Court concerning the scope and the

[50] The countries were labeled as "sovereignty camp" which include Denmark, France, Germany, Greece, Netherlands, Portugal, Spain, UK.

nature of CCP(see Opinion 1/75, 1355; opinion1/78, 2871), and hope to include that all parts of the WTO agreement of CCP in its exclusive competence. The Court, however, finally stood aside the member states which were reluctant for an exclusive competence in the new trade issues (Opinion 1/94, E.C.R.). Despite of its confirmation to the Commission's exclusive competence in trades in goods in the outward negotiations, including the products covered by the ECSC and Euratom treaties, the court finally ruled a shared competence when it comes to the negotiation of non-goods trade on 15th Nov 1994 (Bourgois 1995; Hilf 1995).

This verdict was a heavy blow to the Commission's proposal. It was denied on the ground that the EC had neither completely harmonized all services sectors nor all matters covered by TRIPS (Opinion 1/94, E.C.R.). The ECJ only ruled the first category of services falling under the EU exclusive competence. Only when there was a cross-border supply of services, or when the labor associated with the provision of a service crossed a border, the Commission enjoys the exclusive competence in its external representation.[51] The Court thus made a distinction in the consumer's country or a movement of natural persons across the external frontiers of the member states (Cremona 2000, 11). Some observers noted that this judgment has significantly limited the scope of EU's competence in services, because most services are provided by establishment (investment in a branch or subsidiary in the target market), rather than through cross-border supply (Woolcock. 2002).

This ruling has halted the expansion of trade competence to the commission. It implies that "mixed agreements" based on shared competence issues had to be relied upon more often, given the fact that new free trade agreements include trade in services and

[51] The distinction made by ECJ between modes to supply services and services as such had an immediate consequence: competence is shared since trade in services is not restricted to a specific mode to supply services, or in other words, cross border supply of services, see. Tridimas (2000).

intellectual property rights due to their increased economic significance. It limits thus the unwritten EU authority, which has been slowly developed through case-law (Hilf 1995). It has also posed a number of potential difficulties for the EU (Krenzler and Fonseca-Wollheim 1998). As it is more and more difficult to disentangle the trade in goods and trade in services, the absence of exclusive competence for service could thus undermine existing EU competence for trade in goods (Woolcock 2002). It is in consideration of these negative potentials that the court stressed simultaneously the importance of working together in issues of shared competence from both sides.

Apparently the court's ruling didn't satisfy the Commission. In its sight, the legal verdict of the court limits significantly its room of maneuver and impairs its efficiency in negotiations. Facing the on-going GATS negotiations, the Council and the Commission had agreed quickly an *ad hoc* code of conduct for the GATS negotiations after Uruguay Round. This code of conduct would not set a precedent in the assignment of legal competence. It allowed the Commission to be the sole negotiator in the formal meetings in the "requirement of unity of international representation in international community", while member governments could attend the negotiations. In the informal meetings however, it is the Commission that has the sole presence, with the obligation to inform the member governments timely of the discussions and decisions reached in such meetings (Hilf 1995). The Commission didn't want the *ad hoc* code of conduct to replace permanently the unwillingness of the legal support from the Court. The lack of a general code of conduct in the legal competence has thus led the political bargaining to the 1996 ICG to Amsterdam Treaty.

3.3.3 1996 IGC and Amsterdam Treaty.

The competence debate was further carried to the 1996 IGC by the Commission in its proposal draft of the revision of Art. 133. Under the leadership of the trade

Commissioner Sir Leon Brittan, the Commission handed in a cautious proposal of extending the competence into the limited new trade issues.[52] By the time of 1996 IGC, the national positions have also changed significantly after the Court's verdict. The original "sovereignty group" shrunk to a minority including France, UK, Denmark, Portugal and Spain. While the "expansionist group" gained strength with the join of Germany. The reasons for the change of the member states remain largely unexplained (see Meunier and Nicolaïdis 1999). This was the brief picture of the political positions shortly before the 1996 IGC.

The Commission's initial proposal to seek exclusive competence during the IGC didn't come to real results, with the exceptions and caveats clauses strongly required by some member states. The Dutch presidency's another proposal to grant the community exclusive competence in new trade issues covered by GATS and TRIPS was still fraught with the member states' insistence of adding numerous exceptions to the competence transfer.[53] Furthermore, for the sectors under the exclusive competence, a code of conduct was introduced to guarantee fuller participation of the member states during the negotiations. All these has "amounted in fact to a codification of existing practices, although the commission would have preferred not to see the potential for restrictive interventions by states enshrined in such a way" (Meunier and Nicolaïdis 1999, 495). And the code of conduct to guarantee fuller participation of member states has even aimed to strengthen the oversight mechanism and thus reduce the relative authority and autonomy of the Commission.

In the last day of the Summit, the Commission drew back its compromised proposal

[52] According to Meunier and Nicolaïdis (1999), the Commission has phased out the new areas trade and environment and trade and social standards on the consideration of precaution. See the original proposal, European Commission, 1/330/96.

[53] This includes the maritime and air transport services. Also the broad exceptions stated in the WTO charter.

itself and would like to maintain the Status-quo, with the hope of "better to keep options open and gamble on a better future political climate in the court as in the council" (Meunier and Nicolaïdis 1999, 496). On the sides of the member states, they have again adopted a pragmatic approach to the competence problem under the looming next round of multi-lateral negotiations. The final amendment to Art.113 (renumbered 133) took the form of an European version of US fast track procedure, asking an unanimous council to *ex ante* decide the future expansion of exclusive competence to the community.[54] This is nothing but a legal confirmation of the *ad hoc* code of conducts in terms of shared competence issue. The Commission was obviously on the losing side of the game.

After the ECJ ruling of 1994, the commission's hope of revising that piece of legal verdict through political bargaining has failed in Amsterdam Treaty. Although the scope of Common Commercial Policy is extended from goods to negotiations on services and intellectual property, it strictly limits the Commission's room of competence by an *ad hoc* unanimous voting in the Council. The EC continues to face some difficulties in creating a coherent foreign economic policy. It did not receive the extension of EC powers in the field of external trade policy, especially in the new trade issues, although some foundations for a broader scope of EC powers in this field was laid (Krenzler et al 1998, 223). It included some amendments stating that Article 133 EC procedures can extend over intellectual property and services, which gives the Commission the hope of tackling the competence issue in the next round of IGC. It is well recognized that the increasing importance of the Community's foreign trade relations require effective modification of the Treaty in the future (Hilf 1997, 454). It is thus in Nice Treaty that further changes take place in the framework for conduction and adoption of negotiations in services and intellectual property rights.

[54] The amended Art. 133 (5): " the council, acting unanimously on a proposal from the commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to negotiations and agreements on services and intellectual property insofar as they are not covered by these paragraphs'.

3.3.4 The 2000 IGC and Treaty of Nice

The dawning light was finally seen by the revision in the 2000 Nice Treaty. After complicated political bargaining at different levels, it is in the Treaty of Nice that the Art 133 adopted the most substantial revision since the Treaty of Rome. Under the discussion of adopting majority voting rule for the preparation of a future 28 membership, the Art 133 TEC has undergone some major changes. The term "shared competence" has occurred for the first time in the Treaty context. The Commission has also gained exclusive competence in most of the new trade issues, with some exceptions on culture and audiovisual industry where shared competence applies.[55] The Commission assessed these modifications moderate and was generally satisfied with the final settlement of the legal competence debate (Commission 2000c).

First, there are substantial changes to the content of exclusive trade competence. With respect to trade in services, the EC's competence has been enlarged from the "cross-border" services to all four types of services. As for intellectual property, paragraph 5 of Art. 133 is still restricted to commercial aspects of intellectual property, staying almost the same as in the Amsterdam Treaty. Also, the revised article 133 reiterates the Commission's legal right to negotiate on behalf of the member states with third countries on issues including trade in goods and trade in services, whether in WTO or in bilateral agreements. For the conduct of such negotiations, the Commission's mandate can be granted by qualified majority, so no single member states could wield a veto. After the legal authorization phase, the Commission then could perform with unified representation in negotiations, obliged to consult member states at the official

[55] Some argue that these exclusion clauses mainly reflect the insistence of France, e.g. Meunier and Nicolaïdis (1999). Other areas where shared competence prevails are: transport, educational services, social and human health services.

level. The final ratification could be done by qualified majority.[56] No ratification at the domestic parliament is further required by the new 133 Article. It is in this way that the competence in trade the new trade issues found their legal basis in the Nice treaty (Krenzler et al 2001).

Second, qualified-majority voting has been another major characteristic of the newly drafted Common commercial Policy context. In the big 2000 IGC context, it is one of the major goals to adopt QMV in order to improve the efficiency of the decision making process, especially when facing an enlarged EC of 28 memberships. Because statistically, enlargement will increase the risk of a member state using its veto to prevent the Community from adopting a common position, as was latterly seen in the Irland's No to the Lisbon Treaty and the political crisis in European integration. But at the same time, it lists out several situations to waiver the use of QMV.[57] Thus in the end it is only some specific services sectors, such as the GATS protocols on telecommunications or financial services that can be concluded in accordance with the rules of Art. 133 (1-4) EC with exclusive competence. As for the commercial aspects of intellectual property rights, because EC has not yet enacted internal rules in several areas of intellectual property rights, the unanimous voting is required by the EC council (Leal-Arcas 2004, 14).

This progress thus has its limitation. As observers argue, the new provisions of shared competence would threaten the uniform principles of CCP, and the enlarged scope of CCP is not in line with that of international economic law which evolved from the conclusion of the WTO agreement (Leal-Arcas 2004, 12). Besides, although the exclusive competence has been extended to all four types of categories in Nice Treaty,

[56] However, unanimity will be required if only one of the service sectors or intellectual property rights in the agreements is covered by Art 133 (5.2)EC.

[57] They are 1).where it is required for the adoption of internal rules, 2). where powers have not yet been exercised by adoption of internal rules (article 133.5.2 of the Nice Treaty), 3). agreements under the "cultural exception" clause of article 133 (6) of the Nice Treaty must be concluded by common accord between the EC and its Member States, and 4). horizontal agreements.

there are still exceptions which allow the *de jure* co-existence of national competence and exclusive competence. The dual competence problem in EC's external economic representation thus remains unsolved. It is because of this reason that many commentators argue that the Treaty of Nice only codified the Opinion 1/94 of ECJ (Krenzler et al 2001). It reflects the reality that has existed since the beginning the whole competence debate. So some observers perceive these changes only a small step forward in strengthening the EC's capacity to act in its external economic relations (Leal-Arcas 2004, 14).

3.3.5 The 2003-2004 IGC, failed European Constitution and Lisbon Treaty beyond

There are some significant changes in the 2003-2004 IGC to draw an European Constitution. The CCP part of the Constitutional Treaty remains almost unchanged in the 2009 Lisbon Treaty. There are three main changes with respect to the new competence debate in new trade issues. First, the community has gained exclusive competence in the common external economic relations. With the Lisbon Treaty there will be no more shared competence and thus no longer a requirement for agreements to be ratified by national parliaments in the new trade issues. The new competence debate is finally settled, as it is explicitly stated that EU competence will be extended to all service trade, trade related intellectual property rights, and also to foreign direct investment (Art 207 (1)). All key aspects of trade have come under the exclusive competence of the Community, thus bringing to an end of the long standing debate on competence in these fields.

There are, however, some exceptions to the use of qualified majority voting, to reflect concerns about retaining cultural and linguistic diversity and effective national health, education and social policies (Art 207 (4)). As for the aiming of preserving the Union's "linguistic and cultural diversity", Lisbon Treaty provides for unanimity in the

negotiation and conclusion of agreements in the fields of culture and audio visual services. The same also applies to the social services, educational and health services which are covered by Art. 207(4) b. It requires again unanimity rule if an agreement "risks seriously disturbing the national organization of such services and prejudicing the responsibility of member states to deliver them."

But different to the special treatment to those exception cases in Nice treaty, the last safe-guard of the national interest only stays in the unanimity voting in the council in Lisbon treaty. This means that if an international agreement is finally conducted including the audio visual or cultural services, or the agreement of GATS includes the aspects of social, educational and health services, it is no longer a mixed agreement *per se* and thus doesn't need a further ratification in the national parliament. The member states thus don't have an automatic and unconditional veto right, giving up its national competence in a symbolic way by renouncing the national ratification.[58] In other words, this special locution only guarantees the member states to raise concerns of those domestically sensitive issues and requires the close cooperation in the adoption phase.

Second, the Commission has also gained exclusive competence in foreign direct investment. This has finally reflected a parallel evolvement of the international economic law and the EU's institutional setting in terms of CCP, as FDI has been incorporated into the WTO edifice since the end of Uruguay Round for the future international negotiations. Traditionally, international trade agreements and international investment agreements cover different aspects of international transactions: trade agreements concern the exchange of goods and services across borders, whereas investment agreements concern protection of investment in a particular country. The member states

[58] The role of the national parliament on trade issues is not to be exaggerated. In practice the scrutiny power of the domestic ratification is quite limited, because most of the deals have been finished in the community bargaining process before it comes to the national ratification.

have been acting quite independently in this aspect till the time of Lisbon treaty, negotiating their own bilateral investment agreements to provide protection for fund repatriation and against expropriation. Extending the competence to conclude such agreements to the Union would have remarkable practical consequences: Some Member States, such as Germany and the UK, are currently parties to more than 100 bilateral treaties with different countries.

The last and most significant change related to CCP is an increased role of the European Parliament in the decision making process. This significance could be assessed in three ways in the Lisbon treaty. First, EP gains shared power with the council in the external economic relations. Art 207(2) states that the EP and Council act by means of regulations in accordance with the ordinary legislative procedure shall adopt the measures defining the framework for implementing external trade policy.[59] Art 290 then gives the EP scrutiny powers extending to a right to veto the entry into force of delegated acts. Second, the Commission is obliged to consult the EP on the conduct of trade negotiations, although the EP will still have no power to authorize trade negotiations under Lisbon Treaty. And last, the EP has enhanced his power in the final ratification phase of the agreement, based on a 'take it or leave it' basis, with no power to change the content of the final agreement. EP must give its consent before all trade agreements are adopted.[60]

So it is in Lisbon Treaty that the Community acquires exclusive competence in all key policy areas. This shows a significant increase of power of the supranational institutions

[59] This includes for example to adopt regulations on topics such as anti-dumping, safeguards, "fair trade" instruments such as the Trade Barriers, or when it comes to implementing autonomous trade measures such as the EU's Generalized System of Preferences (GSP) schemes, Regulation (TBR) and rules of origin.

[60] In practice one must assume that the EP will be asked to give its consent for all trade agreements. This has indeed been the case in the recent past for both multilateral agreements, such as the results of the Uruguay Round agreements of the WTO, and for a range of bilateral (Association) agreements. This means that the bilateral FTAs being negotiated with South Korea, ASEAN, India and Central America as well as any further comprehensive Economic Partnership Agreements (EPAs) with the African Caribbean and Pacific (ACP) states will, require EP consent.

in the framework of EU. The role of domestic ratification will be excluded in the game, as there is no more mixed agreement as was defined in the Nice Treaty. Besides, it is worth to note that the inclusion of FDI into EU competence has been a major progress towards the creation of a comprehensive EU position in international trade negotiations. This has reflected the evolved nature of global political economy in which trade and investment are more and more inextricably linked (Woolcock 2008, 5). Last, the enhanced role of EP in the common commercial policy is more of symbolic meaning as some real influence, because the "take it or leave it" ratification power could be seen as a "nuclear option" and thus the denying of the final agreement in a major round of international negotiation seems very unlikely. This change can be interpreted as the change of control mechanism from the member states to the Community's institutional setting.

The laying of exclusive EU competence has significant meanings to the efficiency of EU in international trade negotiations, as well as to the institutional evolvement for a more competent outward presence of the enlarged Community. With more and more competence in key policy areas concentrated at the EU level, it shows a greater capacity and willingness of EU to tackle the complex problems in a new global political economy. It is argued that Member States have tended to leave the detail of trade policy more and more to the Commission (Woolcock 2008, 6). There is also an acceptance, based on decades of experience, that the EU is more likely to achieve its aims in international trade and investment negotiations if it speaks with one voice. The consolidation of EU competence in Lisbon treaty could be seen as one of the most significant changes to the institutional setting in trade policy making in European common commercial policy. There is need to explain why and how this institutional change happens.

CHAPTER 4

Issue at Bay

The New Trade Issues—Service Trade as Example

The nature of world trade has undergone some substantial changes since the 1980s. Many products, which have long been considered genuine domestic activities, have increasingly begun to cross national borders (Drake and Nicolaïdis 1992). The revolutionary development of the transmission technologies in internet has accelerated this trend of development. The new trade issues, including trade in services, trade in intellectual property right and trade in investment measures have become more and more important. Among them, service is the most prominent part, as it provides the basis for liberalization in intellectual property and investment. Most of the member states' concern of the new trade issues is also mainly on the sensitivity of the service sectors. It is the most debated part in real trade negotiations and is seen as the determining factor to the success of the on-going Doha Round (Leal-Arcas 2008). Thus for a better understanding of the competence debate concerning the new trade issues within EU, this chapter tries to depict a detailed picture about the nature and characteristics of service trade.

4.1 Issues at bay, services as a new form of world trade

4.1.1 What is service trade?

There is lack of clear definition of services compared to merchandized goods. According to OECD, Services are "heterogeneous outputs produced to order and typically consist of

changes in the condition of the consuming units realized by the activities of the producers at the demand of the customers".[61] Service industries are those "produce outputs that have many of the characteristics of goods, i.e., those concerned with the provision, storage, communication and dissemination of information, advice and entertainment in the broadest sense of those terms--the production of general or specialized information, news, consultancy reports, computer programs, movies, music, etc."(OECD). Despite the complexity of definition, services are usually seen as intangible, invisible and perishable in contrast to goods and don't require the direct interaction between producers and consumers in the exchange process. It is sometimes also difficult to separate service from goods with which they may be associated in varying degrees.

Nevertheless, trade in services constitutes a different characteristic to trade in goods. In the exchange of goods, trade policies are traditionally delivered to address the price, number and product standards of the items sold during border transactions. In services, however, it is the regulation of production and provision process that is mainly addressed in trade negotiations. The focus of domestic regulation constituted a distinctive characteristic of service trade, as services belonged to the sectors that were traditionally heavily regulated in the domestic market. It is either in the pursuit of a universal service objective or to ensure standards for their production, sales and safety that would make them comparable for consumers. Thus the norms applying to the provision of service do not need to address the product, as it is by the tariff regulations or quantitative subsidies to goods. The trade of cars, for example, will be framed in terms of its content, while the exchange of financial services across border will be addressed in terms of liabilities and obligations.

[61] OECD definition, http://www.oecd.org/faq/0,3433,en_2649_34233_23183508_1_1_1_1,00.html

A first line is draw between passive and active service trade based on the difference of provision process. In active service trade, the provider moves to another state and provides services to the costumers. In passive service trade, it is the buys that move to the country of the provider and receive services. There is also a third type which is called correspondence services which resembles the trade of goods most closely (Hailbronner and Nachbaur 1992, 108), as in the case of radio service. Also, by the difference of service products, the classification of service can be divided into: distributive services (transport, communication, retail), product services (financial services, insurance and freelancer services), social services (health and education) and personal services (entertainment, hotels and restaurants) (Nicolaïdis 1993, 142). There is a more detailed distinction made by GATS Art 1(2) which defines four modes of services which consists of four types of transactions or modes of supply (figure 4-1):

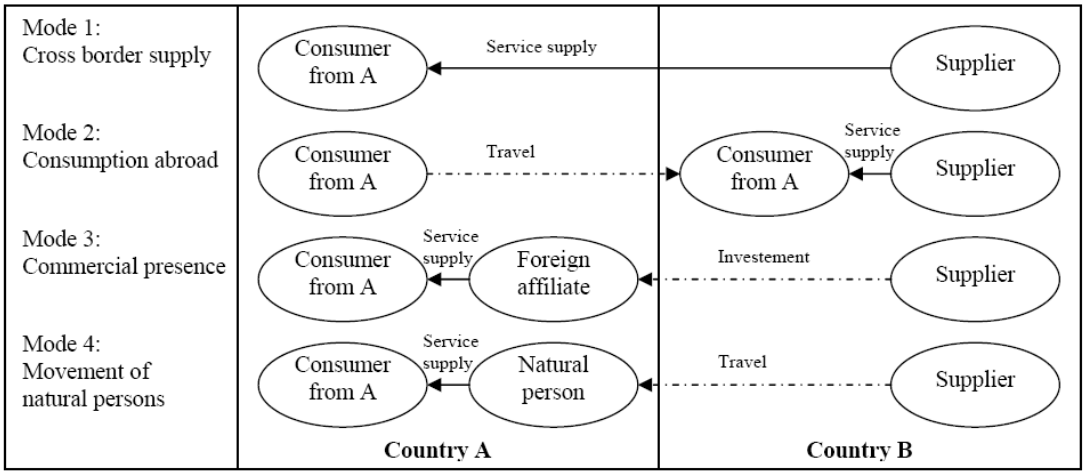
Mode 1: Cross-border supply is defined to cover services flows from the territory of one Member into the territory of another Member (e.g. banking or architectural services transmitted via telecommunications or mail);

Mode two: Consumption abroad refers to situations where a service consumer (e.g. tourist or patient) moves into another Member's territory to obtain a service;

Mode three: Commercial presence implies that a service supplier of one Member establishes a territorial presence, including through ownership or lease of premises, in another Member's territory to provide a service (e.g. domestic subsidiaries of foreign insurance companies or hotel chains); and

Mode four: Presence of natural persons consists of persons of one Member entering the territory of another Member to supply a service (e.g. accountants, doctors or teachers).

Figure 4-1: four types of service (Woll 2004, 138)



Under this definition, there are altogether twelve types of services covered by the GATS (figure 4-2). The GATS provides a starting point for the trade liberalization in service factors. But there are some aspects that need to be noted. First, it excludes certain sectors or activities that are considered as the key functions of governmental services. These are services that are supplied neither on a commercial basis nor in competition with other suppliers, such as health or education based on non-market conditions. There is also sector-specific exclusion in air transport services exempting from coverage measures affecting air transport rights and services directly related to the exercise of such rights (Adlung and Mattoo 2008). Second, apart from that incompleteness of service trade categories, there is argument that the non-binding categorization should be harmonized and rationalized.[62] There would seem to be scope for reducing overlap and redundancies, for defining services in a more technologically neutral way, and for reflecting more closely the structure of service industries.

[62] Electronic Commerce and the GATS (12/07/1999), ESF position paper, www.esf.be

Figure 4-2. Classification of services covered by GATS

1.Business services	7. Financial services
2.Communication services	8.Health-related and social services
3.Construction services	9.Tourism and travel-related services
4.Distribution services	10 Recreational cultural and sporting services
5.Educational services	11.Transport services
6.Environmenttal services	12. Other services not elsewhere included

Nonetheless, the GATS' definition covers a much broader scope than GATT in merchandise trade. The traditional trade flows across borders is only the first mode covered by GATS. This goes in line with the ECJ 1994 ruling that the Commission has exclusive competence in this category. But the other three types of transactions provide some regularly existing service forms: the supplier and consumer interact by the way of consuming moving abroad (going abroad for education, i.e.), or the supplier moving to the territory of the consumer (either by commercial entity or natural person). This also implies the peculiar nature of many services, which can be properly defined and assessed only if characteristics of the provider are taken into consideration as well. Also, the measures that might affect trade in services are very broad. According to Art.xxv11 of GATS, a measure could take virtually any form, including that of law, regulation, rule, procedure, decision and administrative action.

Service exchanges were also difficult to measure and categorize. Most often, governments lumped services into a broad "tertiary" sector which included everything

that was not manufacturing or agriculture. The content of service trade is much broader than the traditional balance of payment used for the trade of goods. For a balance of payment, supply and consumption has to be divided into imports (credits) and exports (debits). In service trade, a service is “exported” if it is traded between residents and nonresidents. But if the service trade occurs between a foreign affiliate, i.e. a German branch of a US company and a German resident, it is not considered an export from a balance of payment perspective, but it is a service transaction falling under the coverage of the GATS (Chang et al. 1999; Karsenty 2000; United Nations et al. 2002). Unlike the balance of payments approach, the modes of supply approach do not rely on residence, but on an amalgam of nationality, territorial location and ownership or control. As we will see, this corresponds to the primary interests of firms, who are less concerned with exports and imports than with territorial location or ownership and control (Maurer et al. 2008, 139)

4.1.2 Why service trade?

The trade theory in comparative advantage and gains from specialization arising from increasing returns to scale or agglomeration, applies also to the trade in services (Krugman 1980, Helpman and Krugman 1985). The explanation of comparative advantage relies on the fundamental differences between countries to generate trade. The second explanation is helpful to explain the trade between similar countries: it could be the path dependence and specialization that lead to trade between them. These two explanations could also shed light on the trade in services, not only in the first mode of cross-border transactions, but also to the other modes of trade, including commercial presence and movement of natural persons (Copeland and Mattoo 2008).

The comparative advantage theory focuses on the differences in technology, natural resources, land/labor ratios, government policies, institutions and other factors that could

lead to differences in the prices of both inputs and outputs in the absence of trade. It is the price differences that create incentives to trade. Factor supply is one major source of price differences, which usually refers to the differences in the availability of arable land, skilled labor and capital (Frieden and Rogowski 1996). For example, a country with abundant labor force will likely export labor-intensive goods and services. Another source of difference arises from technological differences which could affect both trade in goods and services. It is important to note that these technological differences could evolve over time in response to the national policies by policy makers.

Standard trade theories predicts that if markets are perfectly competitive, then a country will always gain from trade, in the sense that the country as a whole can consume more after trading than before. The logic behind this is that if the markets are perfectly competitive, then profit maximizing firms will end up maximizing the value of national income. As to the single market actors, the producers gain from trade because that they have access to a larger market and higher prices. The consumers gain because that they get access to both a wider variety of goods and services and to low-priced imported goods and services. This logic also applies to the service trade: a country will gain from the import of services, if the terms at which international transactions take place are more favorable than those available in domestic markets (Copeland and Mattoo 2008, 89).

Trade can also be influenced by increasing return and lock-in effect. It is argued that history matters, and decisions made in the past have a large influence on current patterns of trade and apparent comparative advantage. Take two students with equal talent as an example. One student chooses to study law and becomes a lawyer after the study. The other student studies medicine and becomes a doctor later on. The two students are able to trade with each other based on their respective specialization which is influenced by a

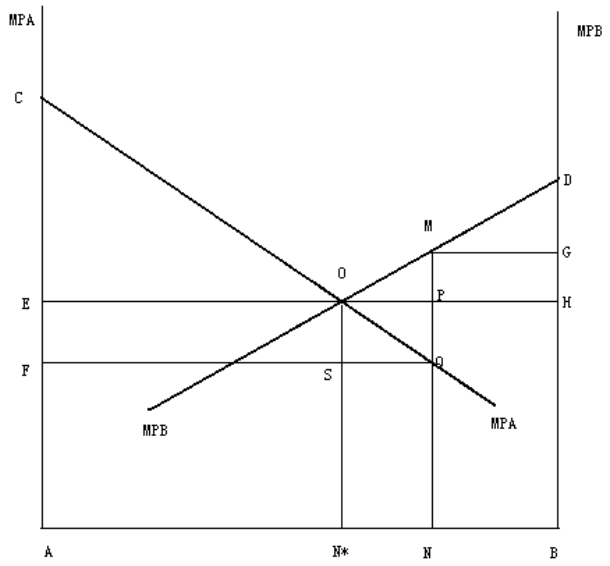
lock-in effect of their original choice. At the beginning, each student could have gone down a difference path, but once the investments have been made, it is very costly to switch fields. The increasing returns is a second explanation to trade, there are at least four different ways that scale effects can generate trade: market niche effect, the development of firm-specific intangible assets, agglomerations and networks (Woll 2004, 94; Chase 2005)

A simple charter adapted from Bhagwati(1965) can help illustrate the warfare effects of service trade (Figure 4-3). The easy model is built with a world of two countries, A and B, and two factors of production, capital and consultants. The products delivered are the consulting services that can only be traded by the movement of consultants to the location of the clients. For the sake of clarity, capital is assumed to be immobile but the analysis also applies when that assumption is relaxed. The width of the box is equal to the total consultant endowment of the two countries. Every point along the horizontal axis represents an allocation of lawyers between A and B. the Number of consultants in country A is measured from the origin A and the number in B is measured from B. supposing initially that there are consultants in country A and in country B, and the vertical lines MPA and MPB represents the marginal products of consultants in each country. This means that if all consultants are allocated to country A, then it produces the consulting service at an amount of MPC. Both MPA and MPB are declining as more consultants are allocated to the other country.

Now assuming that factors are paid their marginal product, consultants will be paid NQ at home A and NM in country B. by adding up the marginal product of each consultant in a particular country, we can determine the total GDP of that country. That equals the area under the MP curve for that country, up to the number of consultants it has. For example, the output of home A is everything under the MPA to the left of point N, while the output

abroad is everything under the MPB curve, to the right of point N. Now we suppose that the return to consultant is lower in country A as in country B. if they can move, some will then leave home and go abroad to take the much higher returns. This flow from home to abroad will stop when the return to consultants is equal in bother countries, which will occur where the two MP curves cross and N*N number of consultant have moved. At this point, there is AN* consultants in country A and BN* in country B. the equalized return will be N*A. By this free movement of consultant there is more value to be created as OQM which makes both countries better off.

Figure 4-3: Effects of free trade in services



The aim behind the liberalization of trade in services was to facilitate an increase in the specialization of trade. Thus, increased market shares in trade in services would offset the loss of market shares in manufactured goods. The argument was based on the theory of comparative advantages and on the fact that trade in services is subject to restrictions

from governments wishing to retain strict control over such strategic activities. The redefinition of markets is less a result of policies than of direct pressures from TNCs operating on a world scale. It is the trans-national service companies that wanted a liberalization approach *per se* in the global market.

4.1.3 Special characteristics of service trade

a. Domestic regulation of production and provision process in services

In the past, the traditional non-tradeability of services was attributed to two factors. First, services are not storable, implying that services have to be produced and consumed in the same location and point in time. Second, services are usually intangible, which requires close and continuous interaction between producers and consumers. But since the 1980s, these two factors have been encountered by information and communication technologies with a trade "enlarging" impact. This has allowed for increasing transportability of service activities, particularly those that have been most constrained by the geographical or time proximity of production and consumption (Soete 1987). By collapsing time and space at decreasing costs, the new data technologies make it possible for services to be produced in one place and consumed simultaneously in another.

As indicated above, it is the regulation of production and provision process that is important to service sectors. As it is difficult to separate production from their consumption in services, it is necessary to make an artificial distinction from the factor mobility. There are three kinds of regulations to services following the delivery process: regulations concerning market access, regulations of mode of operation (for example, certain solvency requirements, speed-limits), regulations about the products themselves and their distribution (Roth 1998, 25). Compared with regulation on goods, the regulation on services is much more constitutive and relies heavily on what we can

compare to process standards (Troberg 1997, 1472).

The regulation of production and provision process thus constitutes one substantial difference compared to goods in term of trade distortion measures. In trade in goods, competitive pressures have direct impact on product and process standards (Scharpf 1999).There is direct demand for high-quality product standard from the consumer interests. But process standards are much more subject to competition, as costly versus cheap production processes determine competitiveness (for example, environmental standards in steel production) (Schmidt 2009, 37). As far as process standards need to be harmonized for trade in services, there is thus much less scope to use different process standards as a basis for competitive advantages for services than there is for goods. Given the constitutive role of regulation for services, competition in rules - rather than markets – makes service a "harder case" for liberalization than goods. This is not only because they are generally more regulated, but "because of their mode of delivery, which often involves the movement of either service providers or consumers across borders" (Nicolaidis and Schmidt 2007, 719).

Trade in services is thus tightly intertwined with the notion of regulation and the barriers to service trade are thus more regulatory barriers. Market entry and harmonization of different domestic regulations are thus two main objects of international trade negotiations. Different domestic regulations cover a big variety of standards in the provision process: from the accreditation of professional formation, to the supervision of the execution and enforcement of procedural standards. The core challenge of service trade is therefore to address the trade-restricting effects of regulation (Feketekuty 2000; Mattoo and Sauvé 2003).

Traditionally the regulation of service sectors is purely a sovereign act. Different states

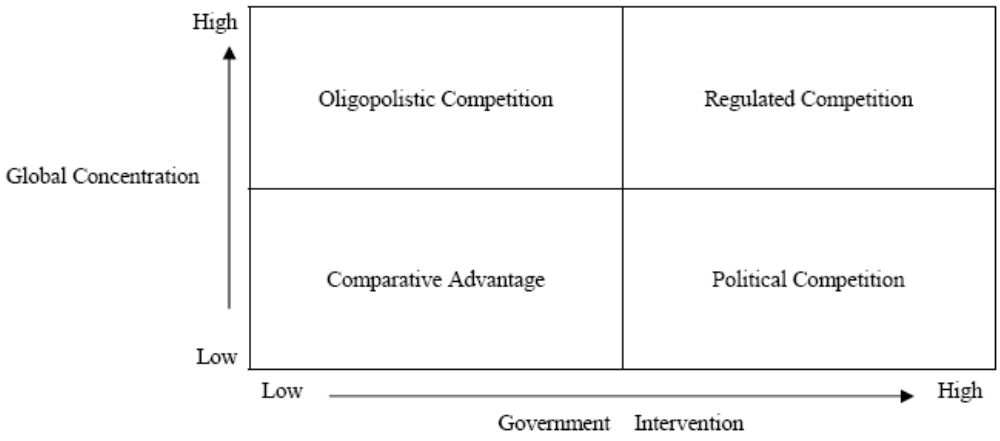
have rights to regulate its domestic sectors by its own regulations. But as trade in services gains its prominence, those regulatory measures tends to exert obvious trade-distorting effects. There are active barriers and negative barriers to be seen by trade-restricting effects of regulation. Active barriers refer to the restriction on accessing of the service. For example, the domestic regulatory prohibit the provision of banking service by foreign banks with discriminatory measures in regulatory requirements. Thus it directly blocks the consumer to obtain the services from the provider other than national banks. Negative barriers focus mainly on the professional standards which inhibits service trade indirectly. For example, different accreditation systems of lawyers within EU might inhibit the legal services across national borders. Because each country has its own language and test standard for the accreditation of national lawyers which are very difficult for foreigners to meet. In service trade, the first case is generally categorized as discriminatory barrier to trade, while the second is called non-discriminatory barrier to trade (Woll 2004, 140).

b. The regulation regimes to service trade

The complexity of services leads to the new form of regulatory and competition systems. According to Woll, these characteristics make foreign investment and market access two most important issues in the case of service trade and other new forms of trade issues (Woll 2004, 46). The stakes in international trade negotiations are more nuanced than the dichotomy of liberalization and protection, because of the international activity of businesses and their internationalization (Dunning 1997, Hiscox 2002). According to Yoffie (1993), trade in services functions more like a “regulated competition” rather than a free trade model, which is a substantial difference to trade in goods. In Figure 4-4, trade in goods is primary influenced by the level of industry concentration and the level of government intervention to that industry (see also: Woll 2004, 46). If the trade

distortion barriers are eliminated, most of the exporting firms will then compete on the national comparative advantage over others (lower left-hand box). But in contrast to goods, most of the service industries like telecommunications are concentrated and government intervention is high, which constitutes a "regulated competition" (upper right-hand box).

Figure 4-4: Drivers of international trade (Yoffie 1993, 19)



By this new definition of competition, the lobbying efforts of these service industries thus focus more on the definition of larger regulatory regimes rather than simply pushing for or against market-opening (McGuire 1999). And this kind of new preferences displays a larger range of policy alternatives than liberalization or protection. It is thus no wonder to find out that "all business under regulated competition regimes is in support of regulation", as we can clearly find out in the position papers of the ESF. There are three different regulation regimes related to service trade: non-discrimination, mutual recognition and harmonization. Under a non discriminatory regime, the regulation of a certain country needs to provide equal treatment to all service providers, national or foreign. Under mutual recognition, the home country A and country B accepts the service as an equivalent to service coming from a provider in its own country, both have separate

regulations in its own country. Under harmonization, both countries negotiate a common standard. The WTO employs a regime based on non discrimination, while the European Union employs either mutual recognition or in some cases harmonization (Nicolaïdis and Trachtman 2000; Schmidt 2004).

This new notion of market regulation implies the increasing awareness of the changing nature of trade: more than 60 percent of the FDI takes in form of trade, the boundary between services and goods is eroding and consequentially the modes of trading have become more complex (Cowhey and Aronson's 1993). Thus it is more appropriate to call this new regime a "market access regime" (Woll 2004, 47). The stake of a market access regime is therefore the internationalization or the harmonization of domestic policies, because the firms concerns more on the restrictions on their operation abroad and would devote economic resources for political lobbying. This new form of "regulated competition" is especially true for international service trade.

4.1.4 Service trade in the international trade regime and EU

a. Service trade in GATS

Since the 1980s, services had become items appropriate for international trade and governments faced increasing pressure to withdraw the extensive controls over service provision. There are three periods distinguished by Drake and Nicolaïdis (1992) for that development: 1. the issue identification period, with the pioneering work of some researchers, there was meetings organized by OECD in 1972 to discuss topics related to 'Trade in services'. 2. the consolidation period from 1982 to 1986, as services were added to the table of negotiated topics by preparation of a new round of GATT negotiation. 3. a period of multilateral negotiations from 1986 to 1994, with the launching of the Uruguay Round and the creation of GATS which includes services into

the multinational trade negotiations and provides a new international regime on service trade. 4. the development period, with the ongoing negotiation of telecommunication and financial services in the late 1990s and the Doha negotiation.

The incorporation of GATS into WTO indicates a landmark in the development of service trade (Mattoo and Sauvé 2003). The aim of GATS is to establish a framework of rules to ensure that domestic services regulations do not constitute unnecessary barriers to trade. It has borrowed the terms and concepts from the GATT, but the coverage of GATS is wider than GATT which covers only the traditional mode of cross-border exchange. The GATS also includes the movements of consumers and factor flows (investment and labor) as well. Also, the scope of relevant discipline is not confined to the treatment of products and services, but also extended to the measures that affect service suppliers (producers, traders and distributors).

The GATS agreement of 1994 lays out the rules that govern the application of MFN procedure to services. Covering all services (with the exception of government services and most air transport services) supplied through the four modes listed above, the GATS specifies that commitments on the trade of goods should apply equally to services and service providers from all countries (MFN – Article II), that regulation should not restrict foreign services or service providers ("market access" – Article XVI) or discriminate against them in a manner that is inconsistent with the binding commitments ("national treatment" – Article XVII). In short, it prohibits the use of discriminatory barriers to the trade in services. However, non discriminatory barriers based on regulatory diversity were much harder to address. The agreement therefore provided for the continuation of negotiations along sectoral lines, such as the financial and telecommunication services negotiations in the middle 1990s.

b. Service trade in EU

EU accounts to the world's largest exporter of commercial services, accounting for 27, 2% of total global services' transactions (2006 - excl. intra EU 25). There have been tremendous changes in terms of service regulation in the past 20s. Regulatory reforms are to be seen in almost every member states in formerly highly-regulated service sectors such as telecommunications, financial services and transport. Combined with changing consumer preferences, the technical and regulatory innovations have enhanced the "tradability" of services and, thus, created a need for multilateral disciplines. The European service provides has gone through an obvious preference evolution, from no clear-cut preferences in the beginning to firm liberalization all around the world.

The EU's preference toward liberalization in services evolves quite slowly, as member states were eager to maintain their existing regulatory regimes (Young 2007). EU has not yet reached this stage of integration in service trade. It was the Single Market project for 1992 that set the stage for the comprehensive integration of a growing list of service markets (Schmidt 2004). Early achievements of the 1992 program were the facilitation of financial service trade and the harmonization of horizontal issues affecting services (Molyneux 1996). The internal air transport market was liberalized in the 1990s (Kassim 1996; Holmes and McGowan 1997). The telecommunication markets are fully liberalized since 1998 (Schmidt 1998; Thatcher 2001), and liberalization of postal services has been reached in 1997 (Geradin 2002). Also, gas and energy markets have been liberalized in 2007 (Schmidt 1996; Eising 2002). Most of the liberalization measures happen after the 1990s.

4.2 Developing the trade agenda in services and the role of corporate interests

4.2.1 The corporate interests behind the trade agenda

a. The support of corporate interests

The emergence of service trade as a policy issue was not only an undertaking of international organizations or intergovernmental negotiations; it was also shaped by the continued participation of business interests. Since the 1980s, the advances in information and communication technologies have gradually eroded barriers between industries and contributed to the deregulation pressures in many countries. The technological developments have increased international "tradability" which goes far beyond the traditional cross-the-border transactions and sales by local subsidiaries (Gallouj and Weinstein 1997). This had foremost revolutionized the activities of the baking sector by making long-distance service possible. This change had thus mobilized the banking sectors to seek political support on a global level (Drake and Nicolaïdis 1992). This explains why the United States had been the main proponent to bring service issues into the Uruguay Round. Its enthusiasm was strongly backed by a vociferous finance-sector lobbying and a determination to reap the benefit of U.S. comparative advantages in financial services by gaining access to world markets (Woll 2004).

The American financial service companies thus played a key role in bringing the issue onto the international negotiating table (Drake and Nicolaïdis 1992; Sell 2000; Woll 2004). On the European side, however, firms were much less in evidence during the service negotiations in the Uruguay Round and the sectoral negotiations that followed GATS. It was not until the middle 1990s that the European business actors began to initiate lobbying in the political process. This move, however, was not so much on their

own initiative but, most importantly, "in response to the active encouragement of the European Commission, which was looking for business support for the difficult financial service talks in the 1990s" (Woll 2004, 14). This change was attributed to the initiatives of the Commission to involve the business interests of related service industries into negotiation after the middle 1990s. For example, EU Trade Commissioner Sir Leon Brittan began to create business associations between 1995-1999, in order to encourage the political participation of firms throughout Europe. From the late phase of the sector-specific GATS negotiations, the Commission began to consult extensively with industry representatives in two sectors: financial services and telecommunication services (Van den Hoven 2002, 10).

During the preparation for the GATS 2000 negotiation, Sir Leon Brittan continued to strengthen the role of the European corporate interests in service industries. He asked Andrew Buxton to form an European service industry group that would serve as a political forum to service providers throughout Europe. The European Service Network was launched on 26 January 1999 and later renamed European Service Forum in October (ESF).[63] This marked a turning point on the role of the European service operators on the external trade negotiations. The role of business lobbying in services should not be underestimated any more. But the core characteristic of that lobbying resembles a "reversed lobbying process", which means that they are involved in a preference evolution process and correspond to the interests of the Commission.

b. Stakes at hand for the corporate interests

As mentioned above, the definition of international regulatory regimes has important effects on the competition structures of firms. And the lobbying on regulatory solutions

[63] Introduction about European Service Forum is available on www.esf.be.

displays a much larger breath of policy solutions, all of which have to be mastered by the affected firms. This complexity has lead to a slow evolution of business preferences, as it takes time for the service providers to develop their own preferences to the negotiated regulatory regimes in international arena. The European service providers responded slowly to the changes at the regional and international level, before they developed clear-edged preferences in terms of international trade. Put in a precise historical and political context, it is then possible to understand the evolution and the intent of business lobbying.

One fundamental characteristic of the preferences of service providers is the "conception of control", rather than a simple division between liberalization and protection in international trade (Fligstein 2002). Either more protection or more liberalization, the firms are likely to possess a level of dominance in a specific market. By adopting specific strategies, these conceptions of control reflect market-specific arrangements of firms for internal organization, tactics for competition or cooperation and the status of firms in a given market. When facing new entrants or new external markets, the incumbent market actors will try to replicate their conceptions of controls by political interventions of their governments, which was especially the case for the European service providers in the early 1990s.

This is also true when they want to expand in a global market. Because it is the regulatory regime that matters most to the multinational service providers, they will encounter compatibility problems in regard to the functionality of the guiding regulations. In that case, the best solution is to support the reproduction of the market structure of their domestic setting in an international context as well. Thus when the European service monopolies had no intention to expand in the global market before the 1990s, they would like to prefer the status quo and maintain their monopoly status in the

domestic market. But when facing the structural and regulatory changes both from the regional and international level, they would respond slowly to these changes and choose to expand in an international market. The incumbent service monopolies are thus more and more engaged in international activities and can develop their clear-edged preferences for international trade. This development has two outcomes in the perspective of IPE. First, there is a closer link between the domestic business interests and the regional or international regulatory framework which can to a large extent influence the preference evolution of those corporate interests. Second, the functional role of the states is gradually retreating from the territory bound, as more competence is concentrated on the supranational level to tackle more complicated tasks (Strange 1996).

4.2.2 European telecommunications services under change

There is a large variety of service sectors from telecommunication over financial services to individual services such as hair dressing. Of all the different service sectors, telecommunications play a central role. Telecommunications make possible the delivery of services that previously required face-to-face interaction between customers and service suppliers, especially in those cases in which the substance of the service consists of information. National and international access to these networks is, therefore, essential to enter the growing technology-intensive areas in services described earlier. This is why it is among the first tackled issues in the GATS framework of 1995 and was picked out for a separate negotiation from 1995 to 1997(Woll 2004, 156). The telecommunications sector is a perfect example of a service industry in which market opening and FDI have progressed hand in hand. The trans-nationalization of the telecommunications industry and the increasing pressure for liberalization are closely intertwined.

According to the definition of WTO, telecommunication “cover a great diversity of services related to the transmission of information over long distances, such as telephone,

fax and internet, but consequentially also data transmission, which might include entire audio-visual products".[64] There are two different types of telecommunication services that are tackled in the international level. The first refers to the "basic telecommunication services" under which are the most commonly used telecommunication methods such as voice telephony, telex service, telegraph service, or facsimile services. The second category is the so-called "value-added services" which refer to telecommunication services "for which suppliers 'add value' to the customer's information by enhancing its form or content or by providing storage and retrieval", such as on-line data processing, electronic mail interchange etc.[65]

a. Pressures on the European telecommunications for change

Until the 1980s, European telecommunications services were widely treated as natural monopolistic regimes which fell under the absolute control of national sovereignty (Clegg and Kamall 1998). Post, telephone and telegraph (PTT)operators at that time were treated as to fulfill some public policy objectives - including providing universal service, cross-subsidizing services to support local communications and subsidizing social and/or economic needs — rather than just maximize profits (Noam 1992). At the start of the 1980s, the telecommunication service, networks and equipment as well as the making of telecommunications policy were monopolized by the national PTTs (Sandholtz 1992, 225). For example, In France and Germany, the administrative units responsible for telecommunication and postal services (PTT) were part of the civil service and operated under ministerial control (Goodman 2006). Even where the state was not the direct owner of the telecommunication provider, the sector was long perceived as a "natural" monopoly. High capital intensity for telephone lines and

[64] http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm.
[65] The commerce of services or goods over the internet is dealt with in a separate declaration on e-commerce in the WTO framework and will also not be included in our working definition.

technology seemed to restrict the possibility of introducing competition, because investment would not be profitable.

The monopoly nature of the telecommunication providers had little incentive for global trade, except for those operations in the formal colonies (Thatcher 1999a; Clegg and Kamall 1998, 40). There were strong preferences from national governments to retain control and sovereignty over communications. Two factors, however, had increased pressure for an institutional change. First, the emergence of new technologies that have revolutionized the traditional telecommunication networks and services (Thatcher 1999a). When the costs of setting up new networks decrease in line with the reduction of transmission and networking costs, it indicated a big chance to enlarge their services to the other markets (Goodman 2006, 26). Second, the role national PTTs as public service providers was influenced by the neo-liberal economic ideas since the 1980s.[66] It was under this change of course that the reform of the old inefficient framework became inevitable (Sandholtz 1992, 256).

But the pressure for change was intensified after the 1980s, with an obvious supranational involvement of the European Commission in this sector to be seen. The 1987 Green Paper was the first signal from the Commission for a wide regulatory framework in Europe. By the mid-1990s, these were sufficiently comprehensive to constitute a fully-fledged international regulatory regime: they comprised a set of binding formal rules and less formal norms covering most aspects of telecommunications accepted by member states (Krasner 1983, 2). By the late 1990s, a comprehensive EC regime had been established that covered the entire sector and prohibited national

[66] Departing from the Keynesian worldview which stressed the intervening role of the state for economic growth and social stability, there was an obvious change of discourse to the neo-liberalism after the 1980s. Emphasizing the role of competition and liberal ideas, the government of western European countries started to embrace the deregulation and liberalization as the best policy choice to improve competitiveness in a global market.

monopolies and laid down rules governing competition. The 1998 effective liberalization of telecommunications services heralds full liberalization for most telecommunications sectors. Almost parallel to the internal reform, there are also efforts to take regulation reform at the international level. The telecommunication sectors had been one of the major topics in Uruguay Round and had been carried on to GATS negotiations from 1995 to 1997. There was an obvious change in this field in the last decade (McGowan 2000).

b. The evolution of business preferences-learning from interaction

--*Changes with the development of EU regulation*

The first and most important pressure came from the internal market, as the role of the community in telecommunications services regime changed substantially since the 1980s. The Commission used its competition powers under Article 90.3 EEC to force liberalization of first telecommunications equipment, services and networks. The initiation of the Commission's efforts for liberalization services was first marked by the 1987 green paper, on "the Development of the Common Market for Telecommunications Services and Equipment" (Commission 1987),[67] which was endorsed by the Council in June 1988 (Council 1988). Specifically, in June 1990 the Commission issued Directive 90/388/EEC to the member states requiring them to withdraw all special or exclusive rights for the supply of "value-added" telecommunications services, in order to break the national monopoly of supply.[68] This move encountered resistance from some member states that questioned the Commission's competence in this area. But in 1992, the ECJ

[67] The Commission proposed open competition for the provision of all services except voice telephony, see Commission (1987).

[68] The directive does not use the term 'value-added' services. Instead it applies to all telecommunications services except certain 'reserved' services, including voice telephony. Commission Directive 90/388/EEC of 28 June, Official Journal L 192 (24 July 1990).

had upheld the Commission's decisions for both equipment and services and had paved the way for further liberalization. .

The Commission subsequently amended the directive to encompass satellite communications (1994), cable television networks (1995), mobile and personal communications and voice telephony (1996).[69] In 1996, the Council adopted the Commission's Green Paper to prepare for the full liberalization of the infrastructure by 1998. At the same time, the national reforms began to take place responding to the external regime change (Thatcher 1999a). With the exception of British government which had taken liberalization in the 1980s, other European countries began to take reform measures after the 1990s (Goodman 2006, 30). In 1993, the member governments had reached a political agreement on the liberalization of voice telephony which was latterly implemented in most of the member states at the beginning of 1998. The old telecommunication regime was fundamentally changes in about 10 years by this reform process (Sandholtz 1998; Schmidt 1996).

This liberalization process was accompanied by the support of the domestic service providers (Commission 1993). For example, most of the domestic operators were willing to accept full liberalization, although some retained reservations about the pace of liberalization and the degree of re-regulation (Thatcher 1999a, Holmes and Young 2002). Support for liberalization was particularly strong from large companies. The incumbent telecommunication operators welcome the liberalization measures from the Commission, because they believed that it would enable them to enter new and more dynamic service markets (Thatcher 1999a; Sandholtz 1998). As commented by Woll, the preference evolution of the domestic service providers was so dramatic that they base their

[69] Commission Directive 94/46/EU, Official Journal L 268 (19 October 1994). Commission Directive 95/51/EU, Official Journal L 256 (26 October 1995).Commission Directive 96/2/EU, Official Journal L 20 (26 January 1996). Commission Directive 96/19/EU, Official Journal L 74 (22 March 1996)

calculation on the long-term anticipation of a global market (Woll, 2004).

After the initial reform, the Commission has undertaken continuous measures for the consolidation of the EU regime from 1997 to 2000. For example, during 1997-1998, the Commission has established a common framework for general authorizations and individual licenses, guaranteed the new entrants' access of incumbents' networks at cost-based prices, set rules for pricing by operators, and addressed the issue of universal service.[70] By a series of measures, the Commission gradually put the telecommunication under the domain of competition law rather than sector specific regulation. At the same time, it has also grasped the chance to put the newly emerged issues, such as internet, electronic commerce and data protection, under its regulation. The Commission's more comprehensive approach culminated in a proposal for an overarching draft directive in July 2000. The intensified internal evolution had given most of the domestic service providers a totally new chance to develop their own preference and do business lobbying. As indicated, there is after 1997 an obvious change of business lobbying curve, as most of the big companies went to the Community level to communicate their business preferences.

--*Changes with international trade negotiation*

The preferences of domestic service providers were also in interaction with the international regime. Since the late 1980s, the EU's telecommunication regime had been developing in parallel with the multilateral negotiations. For example, the commission's first green paper occurred during the Uruguay Round negotiation. It stressed the external dimension and expressed the aspiration that the EU should become a major telecommunications services exporter, calling for an consensus for the Uruguay

[70] See, Directive 97/13/EC Directive 97/33/EC Directive 97/51/EC Directive 98/10/EC

negotiations (Commission 1987). Similarly, the liberalization of EU's voice telephony occurred as the telecommunication was being negotiated from 1995 to 1997 under GATS. After that, the new regulatory framework is being advanced as the GATS 2000 negotiations took place. This provides evidence that the internal evolution of the EU's telecommunication regime can be analyzed under the development of the international institutions. The business service actors are also involved in the interaction in the international level, especially after they have begun to realize their preference after 1996.

The interaction between the EU internal regime and the international negotiations was very close. For example, as the EU regimes developed, there is a recurring topic about the conditions of access for operators from other countries. In particular, there was strong support for creating a link between opening the EU's market to third-country firms and comparable access to their home country markets. The Commission and Council's preferred means of achieving this objective was via multilaterally agreed liberalization (Commission 1993; Council 1993, 1994). Similarly, the Council's Resolution also provided one of the foundations for the EU's negotiating position in the GATS basic telecommunications services negotiations (Commission 1997b). Another foundation for both internal liberalization and external negotiation was the Council's December 1994 resolution (Council 1994), liberalizing telecommunications infrastructures. It set the same timetable with the same scope for additional transition periods as did the 1993 Resolution on services. Both resolutions asked the Commission to develop the details, which it did in Commission Directive 96/19/EU. Crucially, those member governments that wanted extended transition periods had to seek the Commission's approval.

The development of the internal regime and the domestic support provided the basis for external negotiating positions. This external dimension of telecommunications negotiation was complicated by the disputing allocation of competence between the EU

and its member states. But the member states chose to let the dispute aside and to negotiate collectively in international negotiations. Thus, as part of the decision to negotiate collectively, the member governments chose to follow the traditional procedures of trade negotiations, which made the Commission the negotiator. The Commission thus became a crucial intermediary between the development of the EU regime and the negotiation of the multilateral regime (Young 2002).

This interaction had important implications on the domestic service providers. For example, the concluding of the basic telecommunication negotiation in February 1997 made great progress in market access. On the one side, the domestic actors will respond directly to this institutional change and allocate their recourses to the lobbying in the community level to influence the position of the Commission. On the other side, because external competence for telecommunication services is shared between the EU and the member states, all of the member governments individually have to ratify any international agreement. This implies that negotiating positions had to command the unanimous support of the member governments. This institutional set helps to let the most conservative position as the lowest denominator, and thus make the domestic liberalization preferences of the service providers ally along the Commission to support for more competence.

4.2.3 The evolution of corporate preferences

In telecommunications, the main domain of monopoly was the voice telephony of national monopoly providers. Later on, this was also extended to the non-voice traffic by established firms (Clegg and Kamall 1998, 45). But along with the internal liberalization process, the picture has changed as many domestic telecommunication firms began to enter the European or international market since the middle 1990s. Three motives explain the stakes of the telecommunication actors: market-seeking, cost-reduction

seeking and resource seeking (Dunning 1992, 1994). First, the telecommunication firms can try to establish and maintain a commercial presence in foreign markets, which is close to the market-seeking motive (ITU 1997, 33). Second, the technological advance has made it possible for the operators in the most liberalized countries “export” network operation services on low charges (Clegg and Kamall 1998, 64). As to the resource seeking, it is the motive for strategic asset- or capability-seeking that is applicable to the telecommunications industry (Clegg and Kamall 1998, 65). One of the most common ways to acquire these assets in the telecommunications industry is to form a joint venture with a partner in the target country.

There was a rapid growth of transnational telecommunication firms since the 1990s. Also, former national monopolies consider investment opportunities overseas in order to reduce their dependence on their home markets. As the domestic markets are too small to extract adequate returns, many service firms feel the need to diversify their activities on a global base. For the telecommunications firms looking to internationalize, there are four main methods for entering a foreign market: buying a stake in an incumbent operator; establishing a joint venture with a local partner with its own network; leasing lines; or the construction of a new network Clegg and Kamall 1998, 70). In the absence of an export mode, many telecommunications firms newly exposed to liberalization use minority ownership as a rational incremental internationalization strategy. There was rapid expansion of minority holdings in local telecommunications operators by the European telecommunication providers (see chapter 7).

When the domestic sector moves towards internalization, the incumbent’s interest turns not only to seek opportunities in global markets, but also retaining some advantage in the home market. This was the notion of dominance discussed above, as most of the service providers don’t want to lose their market share in domestic market. This is why the

market structure in domestic services has largely determined the structure of international markets. Once outside the domestic markets in which they are the incumbents, operators become ardent advocates of liberalization abroad, and expect their home governments to support them. It is the leading agent of free trade in telecommunications services and directly contributes to competition and integration at the regional and global levels. In the case of EU, this evolved preference makes most of the big firms to the Commission to conduct business lobbying. This had indirectly strengthened the Commission's position vis-à-vis the member states and gained more argument for its claim of exclusive competence

CHAPTER 5

ECJ 1994 Ruling

In the Middle of Nowhere

The ruling of ECJ 1994 was the first turning point of the competence debate. By bringing the competence issue to the legal front, it has become a test case to the post-Maastricht institutional framework related to the distribution of institutional power and the efficiency of its external trade policy in a changed world. There was a clear restriction of exclusive competence of the supranational institutions by the Court's ruling. The opinion 1/94 has received a lot of critics because it added more ambiguity instead of clarifying it. The lack of clarity in the external trade representation could pose serious problem of the Union (Hilf 1997, 437). Following is the elaboration about the background, the preferences of the major actors involved and the analysis of the final ruling.

5.1 Before the ECJ 1994 Ruling --Actors and preferences

During the Uruguay Round of negotiation, the member states showed great willingness to guarantee the efficiency and productivity of the representation of the Commission. They are more result-driven and are thus opt to leave the legal competence dispute in the back scene. But when the negotiation came to the final adoption stage, the *ad hoc* compromise of the competence dispute was questioned again.

The EC Commission took the view that the WTO Agreement fell, in its entirety, within the EC's exclusive external competence. The final agreement should be adopted as a

single package by EU, under the reasoning that all the issues were negotiated as a whole in the Uruguay Round (Woolcock 2002). The Member States, however, argued that no such exclusive EC competence existed in respect of GATS and TRIPS and, therefore, the WTO Agreement should be regarded as falling partly within the competence of the EC and partly within that of the Member States. Art. 300 Treaty Establishing the European Community (ECT) provides for a particular procedure enabling the institutions and the Member States to obtain an opinion from the ECJ on the question of the distribution of competence under an international agreement, and, upon the conclusion of the WTO Agreement by the EC, the Commission decided to make use of this facility.

Two points elaborate the importance of the new issues included in the WTO framework. First, GATS subjects the supply of services to international rules similar to GATT. It lays down essentially a series of general obligations and disciplines. It covers trade in services in all sectors, except “services supplied in the exercise of governmental authority” (Article 1 (3)). Similarly, TRIPS covers a wide range of intellectual property rights, copyright and related rights, trademark, protection of topographies of integrated circuits and of undisclosed information, etc. There are special rules relating to the existence, the scope and the exercise of intellectual property rights, as well as the enforcement of those rights. Second, because of the nature of foreign economic relations, the division of competence between the commission and the member states has important implications for their respective roles in the functioning of WTO, the DSB, and the enforcement of trade instruments. A divided competence will obviously impair the Commission’s credibility in its external representation.

But the arguments of the Commission represent a wide interpretation of the Court’s rulings. With respect to the relationship between the Community’s internal legislative competences and external implied treaty-making power, the Council and the member

states took a rather restrictive interpretation. They acknowledged that the Community enjoyed certain powers in those fields but not exclusive power in nature (Emiliou 1996, 306). They care more about the domestic sensitivity and thus want to maintain the national ratification as the last safe-guard to those issues. Eight states (Denmark, France, Germany, Greece, Netherlands, Portugal, Spain and the UK) were on the opposite side of the Commission. Belgium was the only country to publicly favor the Commission's position. The other three countries (Luxembourg, Ireland, Italy) took no sides, although they supported the Commission's initial proposal in the beginning. According to Emiliou, this is not at all surprising because "member states are very sensitive when it comes to limiting their treaty-making powers which are still considered to form part of the hard core of their sovereignty" (Emiliou 1996, 298).

5.1.1 The Commission's shirking of preferences after Uruguay Round, using policy window

a. The Commission as rational actor

The Commission had tried to maximize its external authority before the ECJ 1994 ruling. In the IGC of Maastricht, the Commission proposed to replace the common commercial policy (then Arts 110–16 EEC) by a common "external economic policy" (Commission 1991, 92). It interpreted this new concept very broadly in that it would not only cover trade, but also other "economic and commercial measures involving services, capital, intellectual property, investment, establishment, and competition" (Commission 1991, 92). Its primary aim was to "to put an end to constant controversy surrounding the scope of Art. 113" and thus strengthen its authority in the institutional setting (Commission 1991, 93). The member states refused this proposal and redrafted Art. 113 so that the compromise reflected mainly their own preferences. Nevertheless, it showed a clear preference of the Commission to maximize its trade authority in the external economic

relations.

This topic was again heavily opposed by the member states near the end of Uruguay Round. Without further political compromise from the member states, the Commission decided to bring the issue to the ECJ. It issued a legal accuse on 6th April 1994 pursuant to Art. 228(6) of EC Treaty to review the question of competence and the scope of Art.113, hoping to get the legal support from ECJ. The commission's calculation is to finalize the competence debate by the legal aid of the European Justice Court, which has proved to be quite supranational-oriented based on its former verdicts. Because the Court's case law demonstrates that the community has exclusive competence in conventional as well as autonomous measures.

The Commission's resort to ECJ indicates a clear shirking of preferences from its principals from a PA point of view. This shirking can be explained by the historical path dependence. According to Pierson, the earlier historical decisions may cause unintended consequences which help the agent diverge their preferences from that of the principals (Pierson 1996). While the EC had historically *de facto* succeeded to the rights and obligations of its Member States under the GATT 1947, it has been the sole representative of EU in international arena for trade negotiation. This historical decision has formed a kind of path dependence which encourages the Commission to assume exclusive competence to conclude the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) and its annexes, including the GATS and TRIPS.

The commission's advantage on technical expertise has also led to more opportunistic behavior. In the PA relationship, although there are constraints from the principals, the agents can use informational asymmetry and more expertise to pursue its own interests. This is especially the case for multi principals. In terms of its external trade policies, the

Commission is more dedicated for liberalization, compared with the member states. This pursuing of maximizing its own power belongs to one of the dual features of the agent, besides the solving of collective problems. Some even refer the Commission as a rational opportunist who aims to use every window of opportunity to expand its policy domains and to create new ones (Cram 2001). The Commission wanted to grasp the establishment of WTO as a window opportunity and to ascertain its trade competence to conclude the Multilateral Agreements on trade in goods, as well as those concerning the new trade issues. It pursued rationally to maximize its power in the EU's institutional set-up.

b. The WTO as window of opportunity

When the GATT turned into the World Trade Organization in 1995, it also brought new trade issues under GATS, TRIPS and TRIMS (Hoekman and Kostecki, 2001). For example, services were considered fundamentally different from goods: their mode of delivery and other issues seemed to make them unfit for an international trading regime. The GATS aims to bring service exchange under the same trade regime as the exchange of goods. Yet one of the principals of liberalization under the GATT regime, the most favored national (MFN) principal, is quite radical: any signatory had to be offered nondiscriminatory market access. This entailed a considerable risk of free riding, as more open markets would have to accept entrants from markets that were much slower in reducing barriers.

The prospect of MFN applying to all service markets at once was unacceptable to a large number of countries, and so the solution proposed was to negotiate sector by sector, with countries submitting lists of commitments on their liberalization projects. As it became obvious that such sector-specific negotiations would not be completed within the Uruguay Round, it was agreed that sectoral negotiations would need to continue after the

establishment of the WTO. For telecommunication services, the Uruguay Round had achieved only an agreement on the principle of liberalization and commitments on some elements of telecommunication services, called value-added services. Basic telecommunications, the heart of telecommunication services, remained to be negotiated. The same also applied to financial services. The enlargement of the WTO's content and the on-going trade negotiations provided the Commission a perfect window of opportunity to pursue its own preferences.

As argued by Knodt, the changing of GATT to WTO has caused increasing embeddedness of EU in international context (Knodt 2004). The Commission has in the first place grasped the change from GATT to WTO as a window of opportunity to expand its exclusive competence and pursue its own interests. It has clearly identified the functional enlargement in the institutional change and seen more opportunity to increase its own competence at the same time. It is thus no wonder that the claim of the Commission goes in line with the enlarged aspect of the new international institution. For the first time in history, the related new trade issues were added to the negotiation agenda and the concluded final agreement marked the establishment of a more enlarged institutional framework on trade. These new issues were not even covered by EU treaty itself. But the pressure of adaptation of the WTO changes was easy to be seen, which was forced by both main actors within the EU - the Commission and the member states - and driven by institutional self-interest.

Another change is from the institutional procedure related to DSB within WTO. In general it can be said the level of institutionalization is deepened by the tightened procedure of the DSB. The legal system has moved from non-binding arbitration in the GATT to a more court-like system of mediation between the disputing parties in the WTO. Thus for the members, it is much easier to establish a panel, or to apply to the

Appellate Body or use countermeasures if need be. In all of those legal activities, the Commission has foreseen its important role in the new legal procedures. When it comes to the dispute in the new trade issues, it is unimaginable for the Commission to see a broken picture of trade competence. It would definitely impair its room of maneuver and shadow its overall representation credit. Whatever the competence is, there would be pragmatic adoption of a *de facto* exclusive competence of the Commission responding to the changes of the DSB.

The Commission's claim for more exclusive competence is thus interpreted as the grasping the window of opportunity in WTO changes. The European community had to face the pressure from the development of the international trade system. The European Commission, because of its direct embeddedness in international trade institution, took the initiative and brought the competence debate to the fore. There is no doubt that the Commission had played an active role and presents itself as a driving force from the very beginning. It had explicitly expressed its preferences of overstretching its exclusive competence to the areas of GATS and TRIPS dimensions of the WTO. The strongly institutionalized trade regime led to the Commission's preferences for exclusive competence in the new trade issues.

It is worth to note that the Commission is also internally debated whether to bring the case to the ECJ. According to Elsig, there is one pragmatic side who argued that the "mounting international pressure on the EU to act quickly and firmly would incrementally increase the Commission's leading position in the medium term without judicial assistance" (Elsig 2002, p94). They held the opinion that it was not possible that the court would declare an exclusive foreign trade authority of the Community's when most member states, with the exception of Belgium, argued strongly against the exclusive authority of the Community (Hilf 1997, 440). While Sir Brittan overcame

internal resistance and intended to seek more clarity on the basis of the institutional setting, which would consolidate the legitimacy of the Commission's actions.

As was observed by many, the Commission was quite optimistic to a positive response from the court because of the support of competence expansion from the ECJ on its historical cases (Hilf 1995, Woolcock 2002, Bourgeois 1995). But in order to see the whole picture, we also need to turn to the side of the member states and analyze if they are ready to delegate the powers to the Commission.

5.1.2 The preferences of principals: default sovereignty point and domestic interests

When the signing of the treaty of Uruguay Round came near, Member states began to reiterate the domestic sensitive side of the new trade issues and thus saw it as "matters of national competence" (Emiliou 1996, 297). Finally, the Council president and the external trade Commissioner signed the Final Agreement on behalf of the community, while representatives of each Member State signed in the name of their respective government, without a further national parliamentary ratification (Arnull, 1996). This move was interpreted as a temporary compromise rather than a final solution of the competence dispute. With the new edifice of WTO replacing GATT, the member states asserted their status of contracting members in WTO, but rejected to the Commission's proposal of a unified representation with exclusive competence on all trade issues. It is necessary to look into the member states in order to understand why there is strong opposition to the expansion of exclusive competence in new trade issues.

Two arguments are made in this analysis. First, the member states as principals take the no-delegation of competence in new trade issues as the default point. This is because of the sovereignty nature of the modern state or the "ideological bias" called by Meunier and Nicolaïdis (1999, 485). From the PA point of view, the principals would like to

delegate its power to the agents only based on functional purposes (Thatcher and Sweet 2002, 4; Tallberg 2002, 26-27; Pollack 1997, 105-106). When they are not clear of the functional uses, they are usually very cautious to delegate their power. Second, the domestic interests matter in the delegation of exclusive competence in the new trade issues. It is argued that the competitiveness of the new sectors calls for more exclusive competence in the Commission because this could be better served by the Commission who has more liberalization oriented preferences and the common position could not be taken hostage by the state with the least readiness to confront international competition (Meunier 2005).

a. The default point of national sovereignty

It is to tackle more complex task in new conditions or faced with limited time pressure for some certain task that the principals would delegate the power to the agents. The more sensitive the tasks are to the national sovereignty, the more reluctant are the principals to delegate that power to an agent. Some authors argue that there are different attitudes toward the overall delegation of sovereignty in the EU level and the positions of the member states could be analyzed according to the division between sovereignty or integration camp (Meunier and Nicolaïdis 1999, 485). This study stresses the default position of the sovereignty transfer based on the PA framework. The principals are not ready to make a transfer of sovereignty in its domestic sensitive domain, unless there are sufficient pressures for functional purposes, which might come from international level or from domestic constituencies. This is especially the case in terms of the new trade issues, as most of them are highly related to the domestic regulations.

The conventional division of sovereignty or integration camp cannot help understand the national positions in terms of the new trade issues. Meunier and Nicolaïdis noted that the

Council and eight member states including some belonging to the “integration camp” clearly opposed to the Commission’s reasoning. France strongly opposed to the further delegation of power in the new trade issues because it was labeled as the helm of the traditional sovereignty camp. This was partly proved by the refuse of the Maastricht Treaty in national referendum. The similar case is also witnessed by Denmark where its concern for national sovereignty was heightened by two Maastricht Referendums. But Germany and the United Kingdom, which were traditionally seen pro-liberalization states in the EU, were also allied opposite to the Commission. By Britain, there is the prevalence of the traditional sovereignty bias against supranational authority. As to Germany, it is argued that the national legislators are particularly reluctant to give up their powers of the domestic regulations related to the new trade issues, which belong to the bureaucratic tradition of the German culture (Meunier and Nicolaïdis 1999). Similarly, the other countries like Greece, Spain and Portugal were also united to the anti-expansion side. Among all the member states, only Belgium explicitly supported the proposal of the Commission. The opposition from almost all the members state showed that they “are very sensitive when it comes to limiting their treaty-making powers which are still considered to form part of the hard core of their sovereignty” (Emiliou 1996, p 298).

The notion of “default sovereignty point” is adopted as the starting point of analysis. Under this notion, the resistance from most member states to the Commission’s proposal is understandable, because they need to be persuaded to give up their sovereignty concern and delegate more competence. It is argued that this default position of sovereignty persistence could be changed from two directions. The first is the increased level of embeddedness in international trade institutions. The second is the influence of the domestic preferences. But at the time of the ECJ 1994 Ruling, both factors were in the initial phasing of exerting real influence. For example, the new international trade

infrastructure was still on the paper and would come into force in 1995. Although the Commission has foreseen the increasing embeddedness of EU in international trade issues, it took some time for the member states to adjust to this institutional change. Also, in the early 1990s, most of the domestic service industries had no clear-edged preferences at all (Woll 2004). They were trying hard to understand what was going on and how they should respond to these changes. It needs time for them to develop stable preferences in external trade.

This default sovereignty position is also reflected by their initial confusion of stakes at hand in service trade. When services were first proposed to be brought into the framework of the multilateral trading system by the US, the member governments of EU didn't even know where their interests lay (Drake and Nicolaïdis 1992; Woodrow and Sauvé 1994). After assessment of their service industries revealed that they were net exporters, however, they, particularly the British and French governments, backed the inclusion of services in the Round. As to the EU side, the inclusion of services in the agenda was not taken seriously in the very beginning. It was seen as potential benefit to France which had the second largest export share in service trade in 1987, in order to compensate its potential give-up in agriculture issues (Paeman and Bensch 1995). Under this circumstance, it is normal for most of the member states to refuse the further delegation of competence in the new trade issues to the Commission.

Besides, there was no real progress in terms of the liberalization measures in service negotiations during Uruguay Round. The only European country that would welcome liberalization measures in both sectors is UK, as was the first European country to undertake liberalization measures since the 1980s in telecommunication and financial sectors. For the other member states, most of them were not yet converted to the liberalization trend. Within EU, these two sectors have not even been liberalized

internally. This explains why the negotiations on telecommunications concentrated on only "value-added" services and commitments largely left "basic" telecommunications to one side.[71] When most member states were having trouble in reforming the national monopolies in public service sectors in the early 1990s (Thatcher 1999a), it is normal to understand their negative response to the Commission's proposal.

b. Domestic telecommunication sectors

Because the concept of trade had traditionally not applied to services, only few affected companies were familiar with the workings of international trade negotiations and their terminology. This was true for service companies from all sectors, even when the companies were private, competitive, and very interested in expanding in foreign markets. Taking telecommunications for example, most of the member states were taking measures to liberalize this sector in the early 1990s. Below is a detailed elaboration of the domestic preferences of three most important member states, as to show why there is less mobilization despite its competitive advantage in its telecommunications sectors.

France: The service sector, especially the telecommunications, was perceived with vital importance to the economic and political power based on the ideological commitment to Gaullism. By the end of 1980s, there was very advanced and sophisticated telecommunication system in France (Goodman 2006). Following the 1987 green paper on new telecommunication regulation inside Europe, the reform process in France was very slow. Only very limited reform measures are introduced to the telecommunication sector in the early 1990s. France Telecom had not been privatized by the early 1990s. It was continued to be used for government objectives, and a monopoly over voice phony

[71] Only eight countries included any aspects of basic telecommunications in their Uruguay Round schedules. See WTO, 'Telecommunications Services,' background note by the secretariat S/C/W/74) (8 December 1998), available at http://www.wto.org/english/tratop_e/serv_e/w74.doc

services and public network infrastructure was maintained.

So before the mid-1990s, the telecommunication service provider was still a public actor. The policy community is highly concentrated around the DGT and government (Goodman 2006, 36). It is the Direction Général de Télécommunications (DGT) that functions as the national PTT. Senior DGT officials work with close relations with the key actors in the government. There was only marginal role for other actors (Thatcher 1999a). The status of administrative of PTT also drags the efforts of further reforms (Goodman 2006, 37). The employees are afraid to lose their civil servant status which is highly rewarded in France. According to Goodman, *Etalism* facilitates some degree of reform, but this reform is within the constraints of the DGT framework. The DGT, as a public administration, upheld a tradition of neutrality which precluded private interest in intervention in the public interest.

Germany: German telecommunication market was regarded as one of the least open in Europe (Schmidt 1996). The tightly closed community was centered around senior DBP officials, the PTT minister, the minister of Finance and the Minister of Economics (Goodman 2006, 41). It is by the creation of a special commission headed by Prof. Witte in 1985 that embarks the government's first intension to restructure the DBP (Thimm 1992, 56). But from the beginning, the institutional constraints (amendment to basic law) for a qualified majority foreclosed the option for the special commission to recommend liberalization on the scale that had been achieved in the UK (Thimm 1992, 57). After a broad consensus-reaching process (Schneider et al 1994), the reform was able to begin in the summer of 1989. The whole reform had undergone a long process, as the DT was not separated from the federal administration until the late 1990s. In the early 1990s, it continued to subsidize the postal services and contribute to the deferral budget, and gained the additional burden of modernizing eastern Germany's network (Thatcher 1995,

250). There was no incentive for liberalization strategies in the early 1990s.

UK: From the 1980s, the Thatcher Government embarked a reform initiative that turned UK into one of the most competitive telecommunication markets (Thatcher 1995, 244). After several reform acts, BT was privatized and competition was introduced into most of the sectors, including value added network services. The Office of Telecommunications (OFTEL) was created as an independent body to supervise the privatized BT to behave normally. These reform measures have contributed to the status of highly competitive least-regulated telecommunication system in the world in the early 1990s (Thimm 1992, 160-180). Despite of its competitiveness in international market, BT had not developed a clear strategy for global liberalization in the 1990s. This was mainly due to the effect of the protection measures in telecommunication sectors world wide.

5.1.3 The no-response of the domestic interests

As shown in the above introduction of telecommunication sectors in France, Germany and UK, there was surprising lack of interest of the European service providers on international trade. Statistically speaking, EU took 47% of the world export share in commercial services in 1990, while US and Japan only 17.24% and 5.18% (WTO 1998). The three biggest member states France, UK and Germany all possessed a large share in the export of service trade. But the European business community was largely absent from the negotiations, despite the importance of multilateral trading stakes. Of all the service providers, for example, Only UNICE declared in favor of the Commission position, and Commissioner Jacques Delors complained openly about the lack of business support (Van den Hoven 2002, 10).

Most of the European service sectors didn’t have any idea of what their preferences are

in the beginning of the 1990s. Although there is little dispute that EU has highly developed service industries and enjoyed comparative advantage in terms of service trade, most of the business actors in EU market took the form of national monopoly and were reluctant to change the status. Take telecommunication sectors for example, most of the national monopolies were totally foreign to the technical governance of telecommunication services. When they first got involved in international trade issues, the "fundamental stake was therefore to understand what was going on and whether this was important enough to invest their time and resources" (Woll 2004, 192). This was also true for other service sectors in EU, even when the companies were private and very interested in expanding in foreign markets (Woll 2004).

Thus most of the European telecommunication providers did not imagine the impact the WTO negotiations would have in the early 1990s. They also had no opinion of what was going on in the trade negotiations. It took them quite some time to learn what was going on in the international service negotiations and to start interaction with political actors. It was no wonder that even though sector-specific negotiations had been going on since 1995, many companies affected by the changes were not engaged in the process. As one interviewer put it:

"A lot of companies were skeptical. They were wondering what we were doing, thinking that there were some ulterior motives behind our plans. They asked us, why we wanted a new round. And why does it have to include services?"

Without clear preferences at hand, there was no organized interest or political interaction to be seen in the early 1990s. There was no powerful business association either on the national level or the European level to promote more liberalization in services. As was described by Woll "the mobilization of telecommunication companies has to be

understood like the attempt to jump on a train that had visibly started moving. This was true for service negotiations in general and telecommunication liberalization in particular" (Woll 2004, 194). Because of that ambiguity of preferences, there was thus no solid business support for free service trade on the European side from the beginning. It was until the failure of the independent sector negotiations in 1996 that companies started organizing and lobbying. It was also from then on that the extremely low level of interaction between the business interests and politics began to change. It was EU Trade Commissioner Sir Leon Brittan that started creating a series of associations between 1995-1999, in order to encourage the political participation of firms throughout Europe.

Without the support of the domestic service providers for more aggressive liberalization measures in service negotiations, the national governments would like to maintain its default position of sovereignty transfer. Thus the national position of the EC on trade in services or intellectual property rights is decided in national capitals before they are presented and defended in the framework of 133 Committee (Leal-Acras 2007). Without the interests of the domestic service providers, the member states had no reason to change their default sovereignty point. Thus most of them seemed to be satisfied with the status quo of shared competence in the new trade issues. The Commission, however, wanted to bring the competence to the legal front and seek the support from ECJ which had proved to be pro-integration in its historical cases in terms of trade competence. It is then the ECJ's 1994 ruling that is analyzed in the following part.

5.2 The resort to ECJ and the verdict of the Court in 1994

5.2.1 Getting support from the historical cases: the guided principles to CCP

The Commission issued a legal accuse on 6th April 1994 pursuant to Art. 228(6)[72] of EC Treaty to review the question of competence and the scope of Art.113, hoping to get the legal support from the court. The commission wanted to seek legal support from European Justice Court, which has proved to be quite supranational-oriented based on its former verdicts in its historical cases. It is important to track the historical trails, because "minor changes in case of law interpretation hint at a considerable variance on the side of explanatory factors for the outcome of judgments" (Elsig 2002, 92).

As argued by Emiliou (1996, 305), with respect to its external representation, the E.C Treaty adopts the model of enumerated powers (competences d'attribution) by allocating specific powers to the Community, while the non-allocated powers remaining with the member states. Thus the scope of issues on which the Community has the power to enter international agreement is quite limited. According to the Art. 228(1), the commission is to negotiate the agreements "where this Treaty provides for the conclusion' of such agreements"(Art. 109, 113, 130m, 130y, and 238 E.C).

But by its case verdicts (e.g. 22/70, supra no 54), however, the court has rejected this principle and favored a principle of *in foro interno, in foro externo* in the early years, which means the Community's Treaty making powers are co-extensive with its internal powers. By a series of case interpretation related to the scope of CCP, the list of community activities has been expanding because there are always new areas added into

[72] Art. 228(6): 'the council, the commission or a Member state may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article N of the Treaty on European Union".

practice and confirmed by the Single European Act. And in the opinion 1/76 (Supra no.56, 755), the Court went even one step further in interpreting the ERTA, arguing that the external competence is not dependent on the actual adoption of internal measures. Thus the states were allowed to continue negotiating international agreements only with a joint approach, and they need to respect the Community's interests and follow a consultation procedure with the commission. This underlies the increasing number of mixed agreement in EC from the 1970s. There was little doubt that the Court had worked closely with the Commission in pushing the scope and speed of economic integration.

It was because of this reason that the Commission was quite optimistic when it decided to resort to the Court for legal support. It relied on the doctrine of "implied powers" as formulated by the Court in ERTA and Opinion 1/76 to find support for its exclusive competence argument. From the legal ground of ECJ case law, the Commission made at least three arguments to support its opinion: it seeks external competence from the provisions of the Treaty establishing its internal competence(the SEA included the new trade issues in the internal market); or from the need to enter into international agreements with a view to achieve the objectives of the community(Opinion 1/76), or from the existence of legislative acts of the institutions giving effect to that internal competence (ERTA). Further more, there is also argument of efficiency and effectiveness (representation and negotiating power of the Community), namely that the Commission with exclusive competence could have more bargaining power in the international negotiations (Meunier and Nicolaïdis 1999).

5.2.2 The Court's final decision

The Court, however, stood aside the member states which were reluctant for an exclusive competence in the new trade issues (Opinion 1/94). It has reviewed the individual agreements of WTO separately. Despite of its confirmation to the Commission's

exclusive competence in trades in goods in the outward negotiations, including the products covered by the ECSC and Euratom treaties, the court finally ruled a shared competence when it comes to the negotiation of non-goods trade on 15th Nov 1994(Opinion 1/94, Hilf 1995):

1. *the community has sole competence, pursuant to article 113 of the EU treaty to conclude the multilateral agreements on trade in goods. Para 27*
2. *the Community and its member states have jointly competence to conclude GATS. Para 47*
3. *the Community and its member states have jointly competence to conclude TRIPS. Para 71*

a. Trade in goods.

The Commission's main submission was that Art113 E.C covered the WTO agreement as a whole. The Court declined to follow the Commission's broader approach but at the same time conceded to the Commission a number of small victories over a number of long-standing disputes. This refers to the application of Art. 113 to ECSC and Euratom Treaties, Agreement on Technical Barriers to Trade, the Agreement on the Application of Sanitary and Phytosanitary Measures, and Agreement on agricultural products.

The Court recognized the exclusive competence of the Community under the CCP to conclude GATT. But there was difficulty to overcome in relation to goods under ECSC and Euratom Treaties. As to Euratom products, neither the Council nor Member states had made observation. Thus the Court limited itself to referring to Article 232(2) EC. But the question whether the same applies to ECSC products was quite disputing, because

the Council and most member states refer to Art. 71 ECSC and argue that Member states were competent. The Court ruled that EC's exclusive competence under Art. 113 EC "cannot be impugned on the ground that (these agreements) also apply to ECSE goods" (para 27). Thus the Community alone was responsible for "tariff regulation of products covered by the Euratom and ECSC Treaties" (Emiliou 1996, 302).

Another recurrent issue is whether international agreements on trade in agricultural goods within the meaning of Art 38(3) may fall under Art 113 EC or whether Art. 43 EC is the only legal basis. The UK held that the commitments to reduce domestic support and export refunds fall outside the Art. 113, because they affect the common organizations of the markets and concern EC products rather than imported products (Bourgeois 1995, 769). But the Court concluded that the Community has exclusive competence in agricultural products on the consideration that

"*the fact that commitments entered into the Agreement require internal measures to be adopted on the basis of Article 43 of the Treaty does not prevent the international commitments themselves from being entered into pursuant to Art. 113 alone"* (para 29)

Similarly, the agreements of ASP and TBT fall within the ambit of the CCP in the Art. 113. As reflected in the preamble, "the establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary measures in order to minimize their negative effects on trade (para 31)". This serves to especially reinforce the Community's role in Geneva, although it just legitimizes the existing practices (Elsig 2002, 95). The Court held for the exclusive competence without hesitation and discounted arguments put by the Dutch government that as the TBT agreement is mainly about harmonization measures and member states should retain competence because of the optional nature of certain EC directives and incomplete

harmonization within EC.

This was but a small victory, because some member states departed from the principle that they held competence regarding tariff regulation for these products (Hilf 1995). The legal declaration on the community's exclusive in trade in goods is no big surprise, because the markets of these products were integrated deeply, and the granting of external competence to the Community was widely anticipated and also accepted.

b. Trade in services and TRIPS

As to trade in services, the Court recognized the Commission's argument that services sector has become the dominant sector of most European countries and the export of services has a high value-added content. It recognizes that "trade in services cannot immediately, and as a matter of principle, be excluded from the scope of Article 113, as some of the governments which have submitted observations content" (Para 41). But it restrains itself from proceeding further down this path. Instead, it adopted a pick-and-choose strategy and recognized that only the cross-border supply of services was sufficiently similar to cross-border supply of goods under CCP (Para 44, see also Meunier and Nicolaidis 1999, 488). Thus by making a distinction between cross-frontier services and services including a commercial presence in consumer's country or a movement of natural persons across the frontier (Cremona 2000, 11), the three other modes of supply of services(consumption abroad, commercial presence and presence of natural persons) were excluded from exclusive EC competence. It referred here to Article 3 EC (ex Article 3) which lists the activities of the EC, and distinguished *inter alia* between a common commercial policy (Article 3(b) EC) and measures concerning the entry and movement of persons in the internal market(Article 3(d) EC)'

Transport services (maritime and aviation services) are also entirely excluded from the CCP within the Art. 113 EC. It refers to the specific title of the Treaty(4) on transport services. Also, by referring to the opinion 1/76, it rejects the distinction drawn by the Commission between commercial agreements and technical agreements (Bourgeois 1995, 771). It also ruled the precedents of embargos based on Art. 113 and involving suspension of transport services as being not relevant, taking the opportunity to point that a practice had been engaged in before did not prove that it had been done correctly, and thus excluded transport from the CCP.

The court adopted a similar method as that of services to draw a line between rules of the TRIPS agreement concerning measures to be applied at border crossing points and rules concerning other measures. The Community only enjoyed exclusive competence to former measures under Council Regulation 3842/86 to prohibit the release for free circulation of counterfeit goods (Bourgeois 1995, 71). As to the latter, they do not fall into the scope of CCP. If there are efforts to harmonize protection of intellectual property in the international level and at the Community level, the "Community institutions would be able to escape the internal constraints to which they are subject in relation to procedures and to rules as to voting" (para 60). This means they would be able to circumvent the internal procedural and voting requirements (Emiliou 1996, 305). Similar to that of GATS agreement, the internal harmonization is a precondition for the exclusiveness of competence on the part of the Community in TRIPs agreements (Elsig 2002, p96).

c. Implication of Community's External Power

This verdict was a heavy blow to the commission's proposal to include the new trade issues into its exclusive competence. The Commission's proposal was denied on the

ground that the EC had neither completely harmonized all services sectors nor all matters covered by TRIPs. The ECJ only ruled the first category of services falling under the EU exclusive competence (Meunier and Nicolaïdis 1999). Only when there was a cross-border supply of services, or when the labor associated with the provision of a service crossed a border, the Commission enjoys the exclusive competence in its external representation (Tridimas 2000, 52).[73]

The judgment is based on the notion that only this category of services is not "unlike the trade in good, which is unquestionably covered by common commercial policy within the meaning of the Treaty"(see para 44). While the other three modes of services involving the movement of natural and legal persons were covered by a treaty objective distinct from that of establishing a common commercial policy. The Court thus made a legal distinction in the consumer's country or a movement of natural persons across the external frontiers of the member states (Cremona 2000, 11). Some observers have noted that this judgment has significantly limited the scope of EU's competence in services, because most services are provided by establishment (investment in a branch or subsidiary in the target market), rather than through cross-border supply (Woolcock 2002). With respect to TRIPS, it fell completely outside the scope of the common commercial policy.

Thus with respect to GATS and TRIPS, the Court "confirmed its ERTA ruling to the effect that member states lose their powers to the benefit of the Community as and when common rules come into effect which could be affected by international negotiation" (Emiliou 1996, 306). First, in the domestic domain, the Community did have external powers to harmonize national rules which could have a direct effect on the establishment

[73] The distinction made by ECJ between modes to supply services and services as such had an immediate consequence: competence is shared since trade in services is not restricted to a specific mode to supply services, or in other words, cross border supply of services.

and functioning of the common market, and the Member states in that respect have lost their powers. But in the external domain, the Community's external powers depended upon the extent of internal harmonization. But if harmonization was not yet complete in all these fields, the power to conclude the GATS and TRIPS was shared between the Community and the Member states (Emiliou 1996, 306).

5.3 Agent kept in line: stop the expansion?

5.3.1 Interpretation of the verdict: expansion stopped

This ruling is an obvious step back with respect to the scope of the common commercial policy (Bourgeois 1995, 779). First, although the Court has recognized the changes in international economy (para 40, 41), it did not support its relevance to the wider interpretation of the Commission's trade competence. Second, it has thrown away the former principles relating to the definition of the scope o CCP. Both the ERTA and the opinion 1/76 were redefined. This opinion is likely to have negative effects on the administration on the EU side of the WTO Agreement and on the status of the EC within the WTO. The ambiguity in competence would lead to "endless discussions" whenever GATS or TRIPS is related in the WTO framework. Hilf argues that ambiguity in the trade competence will impair the Art 113 which is aimed to strengthen the Community (Hilf 1997, 453).

There was also awareness of the Court's precarious position. It is observed that different to the former cases, the Court was "under the obligation to adjudicate on major constitutional and institutional issues in the face of strongly opposing views by the Commission, on the one side, and by the Parliament, the Council and the majority of the member states on the other" (Emiliou 1996, 309). Some authors argue that the Court could have gone the other way, and rule instead of exclusive competence in favor of the

Commission (Hilf 1995, Bourgeois 1995), For example, had the Court accepted the Commission's argument for a wider definition of trade competence, the result would have been "the transformation of the CCP into a common policy on external economic relations" (Emiliou 1996, 310). Because of the close link between foreign policy and commercial policy in nature, the Court's support of the Commission's claim to exclusive competence would have been at odds with the intergovernmental nature of the EC (Arnull 1996).

The ECJ's ruling has thus halted the expansion of trade competence to the Commission. The legal verdict of the Court implies that "mixed agreements" based on shared competence issues had to be relied upon more often, given the fact that new free trade agreements include trade in services and intellectual property rights due to their increased economic significance. It limits thus the unwritten EU authority, which slowly developed through case-law (Hilf 1995). It has also posed a number of potential difficulties for the EU (Krenzler et al 1998). Because it is more and more difficult to disentangle the trade in goods and trade in services and the absence of exclusive competence for service could thus undermine existing EU competence for trade in goods (Woolcock 2002). It is in consideration of these negative potentials of the ruling that the court stressed simultaneously the importance of working together in issues of shared competence from both sides.

Apparently the court's ruling didn't satisfy the Commission. The Commission had hoped to request the ECJ under the procedure of Article 300 (6) EC to confirm its exclusive competence in the new trade issues. Its main argument is that the Community would have more negotiating power when speaking with one voice. The member states, however, hoped that the court could establish a clear dividing line between the Community and national competence with respect to trade liberalization for purposes of

ratification and future negotiations. The verdict was a great shock to the Commission because its competence in the new trade issues is greatly curtailed by a formal legal binding.

But because of the pressure of unfinished GATS negotiations, the Council and the Commission had agreed quickly an *ad hoc* code of conduct to further the on-going negotiations in services. This code of conduct would not set a precedent in the assignment of legal competence. It allowed the Commission to be the sole negotiator in the formal meetings in the "requirement of unity of international representation in international community", while member governments could attend the negotiations. In the informal meetings however, it is the Commission that has the sole presence, with the obligation to inform the member governments timely of the discussions and decisions reached in such meetings. No detailed indication for that compromise was included in the ECJ's ruling (Arnull 1996). Thus to the Commission, the legal verdict of the court would limit significantly its room of maneuver and impair its efficiency of successful negotiation. It didn't want the *ad hoc* code of conduct to replace permanently the unwillingness of the legal support from the Court.

5.3.2 Explanation: the agents kept in line

Observing from the PA perspective, the ruling was not a total surprise at all. Although there was an initial change on the international level, namely the coverage of new trade issues in international trade institution, the principals were still reluctant to give up their authority in them. This was due to the default position of the national sovereignty and the lack of domestic interest support. Thus the ruling of ECJ reflects the calculation of political acceptability among the member states. In the legal interpretation of EC's external competence, the judges have traditionally "trodden a fine line between a pro-integration bias based on the teleological nature of the treaty and the respect for the

member states' legitimate claims of sovereign jurisdiction" (Meunier and Nicolaïdis 1999, 492). When the principals were not ready to revise the ambiguity of the treaty texts, the judges would like to maintain the status quo rather than push the principals for change. One important principle of ECJ was to strike the balance between the two factors under the calculation of the political climate (Weiler 1991; Burley and Mattli 1993; Alter 1998). Given the distrust on the Commission because of the Blair House Crisis, together with the wide spread skepticism in the aftermath of Maastricht debates, the Court had clearly seen the reluctance of the member states to delegate more powers to the Commission in the new trade issues.

There is no wonder that the Court's decision is a highly political one. It has to consider the political spirit at the time of the Ruling and the vociferous opposition of the Council. Because of the opposition of eight member states including France, Germany and UK, there is no surprise that the Court took a more conservative line. As many authors indicated, there is clear tendency towards more mixity in the post Maastricht climate where the principles of enumerated powers, subsidiarity and protection of national identity are the order of the day (Emiliou 1996; Heliskoski 2001; Hilf 1997). From the German side, the German constitutional Court (Bundesverfassungsgericht) has held that the principle of limited authority of the union is indeed the fundamental guiding principle of the entire TEU (Hilf 1997).[74] Thus it is the member states as principals that are skeptical of a wider interpretation of the trade competence. They want to maintain their own WTO membership and thereby their politico-economic role in the framework of the WTO agreement. The interests of the principals were well respected in times of dispute:

[74] Entscheidung des Bundesverfassungsgerichts(BVerfGE) 89, 155(181f, 189, 194f, 209ff), see also, Hilf (1997).

"*…the court…appears to have fallen into line with the mood of the other institutions (except the Commission perhaps) and the member states and no longer reaches its decisions giving priority to the goal of integration over every other consideration. It seems that the Court is increasing reluctant to tread on the toes of the Member states without their explicit consent (Emiliou 1996, 310)"*

The Commission's shirking of preferences was thus legally denied by the ECJ which is actually another agent delegated judicial power from the principals. This shows proof that the principals within EU have good control of their delegated power. Although the Commission has grasped the window opportunity by WTO and wanted to expand its external competence, there is lack of correspondence both from the national governments and the domestic interests. To put it simple, most of the principals didn't even know what was going on with the new trade issues and would rather like to maintain the status quo. The ruling of ECJ well reflects that political calculation.

It is interesting to note that the member states seem to be well aware of the "enormous bargaining power which they exercise collectively" (see the UK statement in para. 102). This was one main argument posed by the Commission, as the EU would have more clout in international bargaining with one single voice and more authority, while exposing the internal divisions would be a bargaining handicap. The plausible explanation is the low awareness of the related trade issues. As explained in the beginning of this chapter, most member states are not clear of the national positions in the international negotiations relating to the new trade issues, and most domestic constituencies have not yet developed their set preferences. When there is a lack of clearly articulated interests and preferences, the member states would like to take a conservative position and maintain their power instead of conferring it rashly to its agent.

From a practical point of view, the ECJ verdict also shows some pragmatism in clarifying the trade competence. The Commission's claim is based on the consideration to preserve the Community's unity of action and effective representation in the international arena. Recognizing the legitimacy of the Commission's claim(para 107), the Court tried to compensate for the Commission by emphasizing the requirement of close cooperation between the member states and the Community institutions both in the process of negotiations and conclusion and in the fulfillment of the obligations entered into. This is a tactical compromise facing the strong opposition from the principals to delegate more competence. By limiting the expansion of the Commission's exclusive competence, the Court has in this way provided a practical coding for the both parts to cooperate closely in the international negotiations. But there are no clear declarations as to how the competences are to be divided between the Community and the Member states.[75]

5.3.3 Strong principal control

Noticed by Hilf (1997, 437), the lack of clarity as to the extent of the foreign trade policy could be the most important constitutional problem of the Union. It concerns the federal balance between the member states and the Union. The ECJ's 1994 Ruling reflects the concern about the member states' default sovereignty point:

"*the member states are uncertain at present of the extent of their remaining authority and already consider it a vital question whether they can keep their independent places at the international negotiating table or must cede them to the European Union (Hilf 1997, 438).*"

[75] The only case in which the community and its member states agreed on a declaration concerning the division of competences was with regard to the UN convention on the Law of the Sea (1982)

This also provides argument of the firm principal control in the integration process. Based on a PA analysis, there are scholars stressing the runaway-bureaucracy thesis. The regulatory bureaus and other agents possess an incontrovertible informational advantage over their legislative principals, whose oversight procedures are lax and ineffective, leaving agents free to "run amok" in pursuit of their own policy preferences (Weingast and Moran 1983). Thus in the study of European integration, they typically attribute considerable independence to both the Commission and the ECJ (Burley and Mattli 1993; and Mattli and Slaughter 1995). But this analysis shows firm control of the principals in EU in the initial phase of competence debate. This is in line with the "congressional dominance" school which argued that principals retain total or near-total control over the actions of their agents (Weingast and Moran 1983). Garrett makes a similar claim about the ECJ, arguing that "the principles governing decisions of the European court and hence governing those of domestic courts following its rulings are consistent with the preferences of France and Germany" (Garrett 1992, 558)

To conclude, The Court's mediating role between the Commission and the Member states was not an easy one. With regard to foreign affairs powers, the ECJ is proving to be on the whole not so much a dynamic and driving factor of integration, but rather an institution which safe-guards the federal balance between the community and its member states (Hilf 1997, 454). Taking the political climate into account, the ruling reflects more of the Court's caution rather than its departure from historical verdicts. The golden time when the Court functioned as the pusher of integration by legal verdicts in the 1970s was gone. It has suffered political backlash from the member states in the late 1980s (Meunier and Nicolaïdis, 1999, 493; Alter 1998). This verdict also signaled a retreat from the judicial activism and an attempt by the Court to show its more balanced position in the distribution of the competence in different levels of EU. To the Commission, the ball was then sent back to the politicians. The competence dispute

would be only completely resolved by amendment of the treaty which clarifies a detailed coding of delegation and control between the principals and agent.

CHAPTER 6

The 1996 IGC to Amsterdam

For The Sake of Good Purpose

After the ice of 1994 ECJ ruling, there were slow developments both on the international level and the domestic level. On the international level, the sector-specific GATS negotiations were initiated in 1995 to tackle detailed problems in telecommunications and financial services. During the service negotiation in Uruguay Round, there were no substantial achievements on measures of liberalization. Thus the ambiguity of trade competence didn't pose a real threat to negotiating power of the EU in the Uruguay negotiation. When the voluntary negotiation sector-specific liberalization went on, however, it is interesting to see the mounting pressure for a clear competence from the EU's increasing international embeddedness. Also, in the domestic level, the service providers began to learn slowly from the on-going regional reforms and the international negotiations, in order to develop their clear-cut preferences for international trade. This is the background information to the 1996 IGC leading to Amsterdam Treaty.

6.1 Increasing international embeddedness and the waking up of domestic service actors

6.1.1 More than the change of rules: Further service sector negotiations after Uruguay

The change of GATT to WTO has caused increasing embeddedness of EU in international context, as it added GATS and TRIPS into the WTO framework (Knodt 2004). But the real outcome of service negotiations in Uruguay Round was very

disappointing. The final agreement was rather limited in comparison to the great measure of liberalization in trade in goods. There were no substantial measures to advance liberalization. The scope of the agreement even excluded the most important aspect of telecommunications services. Given the importance of the telecommunications sector, both in its own right and as a facilitator of other activities, there was a strong desire among a core group of governments, including the US and EU, to tackle "basic" telecommunications services thoroughly (WTO 1996). This has thus led to an agreement under which voluntary negotiations continued after the Round without endangering the conclusion of the GATS or the establishment of the WTO (WTO 1994).

It is but the following sector-specific negotiations in telecommunication and financial services that rewrote the core of the new rules. The negotiation process is interpreted as the further embeddedness in the new international institution. Taking telecommunications for example, the first round of negotiations in telecommunications took place in May 1994, with a participation of 33 out of 125 governments in Uruguay Round. It was finished by 69 countries in February 1997 (Young 2002). The period of the negotiations covered roughly the time space from the ECJ 1994 ruling to the Amsterdam Treaty.

a. The Europeans' *de facto* competence: internal division

The external telecommunication negotiation happened while EU was concentrating on its internal reform. There was thus agreement within EU that "external negotiations cannot proceed faster than the internal process of liberalization" (Commission 1994; Council 1995). This was a two-tired consensus behind the EU's negotiating position: the external negotiating position would be based on the agreed internal framework, and the internal framework had been agreed unanimously (Young 2002). The competence of the

Commission is thus based on a temporary *ex ante* codification of the status quo, clarifying that the Commission had the right to represent the member states for telecommunication negotiations, but the scope of the representation should follow the two-tired principles. This is already a *de facto* form of the American "fast track" competence in EU, as the Commission is the sole negotiator for EU despite the internal dispute (Woolcock 2000).[76]

But following the ECJ 1994 ruling, there is need for close cooperation between the Commission and the member states. In practice, the Commission and member states jointly negotiate and co-author their statements. Since the two still acted jointly, there was no Article 113 Committee *per se*. Instead, member states formed an "Ad hoc 113 Service Committee" to meet and follow discussion. It was noted by Woll that the *ad hoc* committee "decides by unanimity, while the real decides by qualified majority" (Woll 2004, 226). This joint structure thus made it difficult to find a common position, as the internal division insider that *ad hoc* committee hinders the negotiating power.

Coordination between the different countries and the Commission was thus not easy. The initial EU offer presented to the negotiation in October 1995 reflected this division (Commission et al. 1995). It proposed to bind the liberalization process underway at the Union level on a most-favored-nation basis, which reflected firmly the agreed internal framework and the allocation of competence within the EU. It was actually a composite of the member governments' individual qualifications (where made) to liberalization. These qualifications can be put into two categories: existing national ownership restrictions and additional transition periods for implementing EU liberalization. Under the two resolution by the Council (93/C 213/01 and 94/C 379/03) establishing the

[76] The EU delegation is quite large throughout the negotiations. Apart from five to six people of the Commission, there were at least two representatives of each member state; the delegation quickly had about 40 members

liberalization framework, the deadline was set on 1 January 1998, with longer transition periods for some member states (Commission Directive 96/19/EC). Different member states have different qualifications based on this internal factor.

For example, about half of the member governments tabled no reservations.[77] Belgian and French governments insisted that broadcasting services were not part of basic telecommunications services (Drake and Noam 1997). This position was carried by the French government to the 2000 IGC, asking for the exemption of exclusive competence in audio and cultural aspects. The Greek, Portuguese and Spanish governments tabled the maximum transition period, while the Irish government tabled a shorter transition period than the EU's deadline. The Italian government reserved the right to impose restrictions on telegraph services by third-country firms (Holmes and Young 2002, 143). The final EU offer resembled a clear hybrid of different individual countries offers.

The internal division obviously lags the Commission's negotiating power. A member states representative remembers that during the GBT round, "the Commission had the annoying tendency to negotiate more with the Member States than with the rest of the world (Woll 2004, 114)". The Commission had to go back and forth to convince the member states maintain a coherent common negotiating position, which was quite often refused by them (Holmes and Young 2002, 143). The divided competence also made the negotiation more complicated. The negotiation partners also got puzzled by this internal division, as "the Commission and the member states often came up with different opinions in the same meeting" (Woll 2004, 227). This complication on the EU side also contributed partly to the deadlock of talks in April 1996.

[77] The countries include Austria, Denmark, Finland, Germany, the Netherlands, Sweden and the UK, see Commission and member states (1995).

b. Basic Telecommunications Agreement and the role of the Commission

The central negotiating objective of the EU and its member governments was securing "effective and comparable" market access to third-country markets. As the internal framework had significantly accelerated the pace and enhanced the scope of liberalization in some member states, they began to seek liberalization measures in third countries. The markets of North America and Japan was particular attractive to them. The Europeans particularly wanted national ownership restrictions removed, especially in the US (Commission 1997a). The negotiating offer of the EU firmly reflected this preference. Behind it was a desire to facilitate the internationalization strategies of many of the European telecommunications operators. Another main objective on the EU side was to secure agreement on the EU's type of regulatory approximation at the multilateral level (Commission et al. 1995).

The Basic Telecommunications Agreement, was finally adopted on February 15, 1997 and entered into force on February 5, 1998. This agreement was signed by more than 50 members, setting out the regulatory principles that would need to accompany telecom liberalization. It specifies pro-competitive safeguards against the market power abuse of the dominant provider. It requires the establishment of an independent regulatory agency and spells out conditions for interconnection, license attribution, universal service, or spectrum management. It also sets up a set of model commitments for others to commit to the EU's own system of using competition policy as the basis of the regulatory framework for telecoms (Holmes and Young 2002). On the European side, this agreement muted the different qualifications of member states. It has permitted the redefinition of some specific national qualifications into general principles, as its proposal laid down rules for the allocation of "scarce resources" (Tuthill 1997).

The Basic Telecom Agreement provided the framework for global liberalization of a service sector under the GATS and completely revised the regulatory paradigm of telecom service provision. Compared to the GATS negotiated at the end of Uruguay Round, the Basic Telecom Agreement was a great step further in the direction of institutionalization. It not only rewrote the rules and standards of the telecommunication services, it also contained the first international attempt at determining a common approach to competition policy in a specific sector through this agreement (Tuthill 1997). There were thus substantial changes about the regulation of the telecommunication services.

For the EU Commission, the negotiation of telecom service trade tied together several stakes. After the ambitious intra-European liberalization projects, a central stake was to align international policy with European objectives. Throughout the 1990s, one can therefore find a temporal concordance between intra-EU timetables and international deadlines, which was one of the primary objectives of the Commission (Holmes and Young 2002). Negotiating the modalities of international telephony at the WTO rather than the ITU further increased the field of competencies of the EU. At the WTO, it is the European Commission who negotiates for the member states. At the ITU, the Commission only had access as an observer. The European Commission was therefore interested in the conclusion of a successful agreement as central to the evolution of the international negotiations.

During the entire period of GBT negotiations, services remained under shared competence, so that offers and statements were authored jointly by the European Commission and the member states (Woll 2004, 225). The role of the Commission during the negotiation has strengthened its preference on exclusive trade competence. Also, realizing the great diversity of the member states in internal positions, the

Commission would argue reasonably for more trade authority in new trade issues. This was proven by the relatively small space of compromise given the diverse qualifications of member states in telecommunication negotiations. For the sake of efficiency, it tried to reach a constitutional solution in the 1996 IGC to gain more competence, because moving back and forth between two authorities hinders the EU's bargaining power.

6.1.2 Business began to wake, learning hard to fill the gap

a. Initial moves in the early 1990s

It was until the end of the Uruguay Round that the telecommunication network operators and service providers slowly begin to realize that the international architecture of telecommunication services was about to change (Woll 2004, 193). Thus most of the European telecommunication providers were slowly responding to the political changes. When the Uruguay Round was just finished and the sector-specific negotiation had been going on since 1994, there were obvious regulatory changes to the competition policy of telecommunication services. For example, the value-added services had been open to competition in the last agreement of the Uruguay round. But the companies affected by the policy changes were not active at all in the on-going sector negotiation process.

Nevertheless, there were some initiative moves of the European telecommunication service providers in the global market after the early 1990s. They began to organize several joint ventures in order to facilitate international operations. But these moves were more or less based on strategic considerations, as the European network operators seemed like large potential investors. For example, after France Télécom and Spain's Telefonica, several European operators started investing abroad in the mid-1990s. Also, British Telecom, Deutsche Telekom, PTT Telecom, France Telecom, Telefonica, and Telia all entered alliances that allowed them to propose global business services

increasingly in demand by large telecommunication users (Clegg and Kamall 1998).These moves of internationalization strategy together with the liberalization process both at the European level and the international level led to the slow wake-up of the business interests. Thus it was commented by Woll that “These alliances were not only the product of deregulation and increasing liberalization, they also gave a substantial boost to these processes” (2004, 161).

The background for that international strategy is the liberalization process in European countries. This is a rather complicated process, as different countries have different schedules to complete (Thatcher 1999a). After some judicial wrangling over internal competences, the Commission was able to propose the liberalization of telephone services in 1993 and infrastructures in 1994. In 1996, member states reached agreement on implementing liberalization by January 1, 1998 (Sandholtz 1998; Thatcher 1999b; Holmes and Young 2002, Goodman 2005). For the government, the long term strategy is to encourage changes that would help their national operators internationalize and succeed. The member states began to initiate privatization in telecommunication sectors, to respond to the EU-imposed competition and changing market conditions (Thatcher 1999a). The privatization process and the evolution of the business preferences were parallel in the mid-1990s. Following is a brief introduction of France, Germany and UK in this aspect.

France: In the early 1990s, the public and private authorities became increasingly aware that the state could no longer control the modern market economy (Schmidt 1996). The change of government in 1993 was seen as a policy window to further transform the institutional framework and monopoly status (Goodman 2006, 39). Further reform was justified as beyond the control of the French government by reference to technological and economic developments, international competitive pressures and the need to comply

with EC directives (Thatcher 1999a, 158). The most difficult part of the reform is the civil servant status of France telecom. There was strong demonstration from the union who are afraid to lose the status and the associated privileges. Finally, a deal was made in May 1996 when France telecom agreed not to release any employees other than those willing to leave early, and they will hire employees as civil servants until 2002 (Thatcher 1999a, 162). Following this agreement, the status of France telecome was partially privatized in 1997, although the government remained as the largest shareholder. Competition was introduced into network infrastructure and voice telephony services (Goodman 2006, 40).

Germany: Faced with the threat of increased competition and the need to internationalize, the DT began to push hard for privatization after the early 1990s (Thatcher 1999b, Schmidt, 1996). The political barrier was also removed as the Kohl government tried hard to undertake basic law amendment for further liberalization. Under the post reform 2, the Deutsch Telecom became a public corporation in Jan 1995 and was privatized partially in the end of 1996, while the government remained as the largest shareholder. By the 1996 Tele Act, the network infrastructure and telephony services were liberalized and a separate National regulatory Authority was created (Goodman 2006, 46).

UK: UK had taken liberalization measure in the 1980s. By the time of the 1990s, numerous operators and service providers have entered the market. BT is one of the most influential in this process based on its resources. It also began to internationalize, the company concentrated on extending its influence in North America, and European markets in the 1990s.

b. The waking up of business interest: changes begin to happen

As the EU framework for telecom liberalization and domestic reform moved forward, business actors started looking at the new opportunities that they might get out of a new international framework. Because the option of a protected monopoly position was no longer available, market opening became appealing because it promised new business opportunities abroad. This had gradually led to the change of preferences toward international trade. As noted by Woll, the waking up point was agreed to start from 1996 onward, as the large European operators agree that the changed international regulations have great impact on their preferences (Woll 2004, 163).

But the evolution process was quite slow, as the national base of companies had an important consequence for their approach to internationalization (Cowhey and Richards 2000, 156). Thus before 1998, there was no large phone company, whether from competitive markets or monopoly markets, that had truly global supply and distribution strategies (Woll 2004, 163). On the other side, most of the service providers were more and more clear about the future evolution of their preferences, as they have seen that the market pressure from the users' need will push them to go more international (Cowhey and Richards 2000). It was not until the late 1990s that internationalization had become a major strategy of the service business operators (i.e. see public ownership table 6-1). There was a mature time point of preferences evolution in the late 1990s, which was witnessed by the clearly defined business preferences, well organized lobbying platform and active interaction among the business actors and the political actors.

Table 6-1: The level of public ownership of national telecommunication (Conway and Nicolette 2006)

National operator	Country liberalization date		Public ownship(percent) 1994	1996	1998	2000
Belgacom	Belgium	1998	100	51	51	50
BritishTelecom	UK	1998	1	1	0	0
DeutschTelecom	Germany	1998	100	74	63	56
France Télécom	France	1998	100	100	62	61
KPN	Netherlands	1998	66	45	44	43
PTA	Austria	1998	100	100	100	75
Telecom Italia	Italy	1998	50	50	5	3
Telefonica	Spain	1998	34	21	0	0
Telia	Sweden	1991	100	100	100	71

This time point for change was exactly in the middle of the 1996 IGC to Amsterdam Summit. Before 1996, European network operators were not involved in the sectoral negotiations that had begun in 1994 (Woll 2004). With the announcement of the 1998 deadline, the European Telecommunication Network Operators association (ETNO) began to show its political support and helped the Commission negotiate the Basic Telecom Agreement in 1997. Although the time of political participation of the business actors was relatively late, it is nevertheless better than never.

The slow evolution of the business preferences led to the observed changes of national preference during the IGCS. For example, as service industry pressure mounted, the Germany government moved from the sovereignty against more complete competence to

the expansion camp. The UK also wavered at the end of the negotiations, even though it was not enough for a complete change as in Germany. However, the waking-up of the business preferences was not deciding in 1996 IGC because of three reasons. First, the newly evolved preferences of the business operators were not significant in the beginning. Second, it need time to be reflected on the political arena. Business lobbying not only needs economic and political resources, it also needs time. Third, there was no strong organized form of business preferences among the business actors. Thus the evolution of business in the initial phase doesn't help to change completely the default position of the national sovereignty. This was also because that in terms of complete competence in trade issues, the member states' "distrust for the commission as an international negotiator appears to have proved a sufficient counterweight" (Moravcsik and Nicolaïdis 1999, 65).

The initial wake up of the business preferences was thus far from powerful enough to influence the EU position in telecommunication negotiation from 1994 to 1997. Thus the European delegation was although led by the Commission, it were the relations between the Commission and the member states that influenced the delegation's stance. That was exactly what was described by the ECJ 1994 ruling "cooperation between the commission and the member states" which indicated a shared competence for international trade talks. The Commission has seen the industry support from the domestic level, but it was not strong enough for a course of reversal. This gave it imperative to initial political interaction with the domestic business actors through the "reversed lobbying process" in the late 1990s.

The time from ECJ 1994 Ruling to 1997 Amsterdam treaty is like a preparation period for the telecommunication service providers. Under the directive of the new EU telecommunication regime, the domestic operators were prepared to privatization and

internationalization. With slowly evolved preferences, they were eager to jump onto the train that was leaving and began to look at their suitcases to understand what they got and what they wanted. There was a dramatic wave of privatization and internalization occurred during the latter half of the 1990s. They even occurred in many of the countries with traditionally less liberal governments, including Greece, Portugal and Spain. Besides, the national monopolies began to face a freer market with the entry of new operators. There has been a sharp increase in the number of firms offering a variety of telecommunications services in EU member states. The European service operators began to go global for more interests. It was thus after the Amsterdam Treaty that the business preferences began to formulate clearly its preferences and stakes in international negotiations. These preferences were more responded by the political actors in Nice Treaty.

6.2 The IGC and the preferences of different actors

It was the 1996 IGC that provides a first platform to observe the preference changes of different actors after the 1994 ECJ ruling. It officially took place on 29 March 1996 and lasted from nearly 15 months. The main purpose of 1996 IGC was to conduct Treaty amendment and pave new road for further integration. The discussion of trade competence was initially only a small topic as it was added to this agenda. As shown above, the Commission had been leading the delegation in separate telecommunication and finance sector negotiations before the beginning of 1996 IGC. Its desire for a more coherent commercial policy and complete competence didn’t vanish because of the ECJ ruling. In contrast, it wanted to use the IGC as a political platform to realize legal changes to the competence debate. This endeavor, however, was not echoed fully by the evolution of domestic preferences. The waking up of the business interests was not strong enough to push a reverse point for most of the member states. The default position of national sovereignty was still not challenged .

6.2.1 The actors and their preferences

a. The commission's own proposal in IGC: shirking of preferences from the principals.

Despite the continuous desire for complete competence, the Commission handed in a cautious proposal in the beginning of 1996 IGC.[78] The Commission's cautious stand was explained by Elsig as "preoccupied with trying to defend itself from the attacks of the member states on its prerogatives (Elsig 2002, 114)." Actually this stand reflected clearly the political climate at that time. It was only about one year after he ECJ ruling. The Commission was under the consideration that the member states would remain reluctant to the proposal asking for complete transfer of sovereignty to the Commission. In the PA relationship, the agent is not in the equal role as the member states. It has to learn to plays its position in a delicate PA framework. This is why the Commission provided very modest proposals and hoped to persuade the member states.

The ongoing service negotiation gave the Commission good reason to restate its concerns. Having to move back and forth between two authorities hindered obviously the EU's bargaining power in the on-going negotiations. Besides, realizing from its experience to mediate the diverse positions among member states in the negotiation, the Commission stressed the practical efficiency of the negotiating all the new trade issues under exclusive authority. It has thus given high priority to obtaining more authority in negotiating trade policy. It clearly outlined its visions and objectives for the Amsterdam Treaty (Commission 1/330/96) and put some special emphasis on the functional role of the Union and it s role as international actor. It wanted a constitutional solution that would give it support for the exclusive competence in international negotiations:

[78] The Commission has phased out the new areas trade and environment and trade and social standards on the consideration of precaution, see the original proposal, Commission (1/330/96).

"*the treaty should be updated to take account of the radical changes in the structure of the world economy, in which services, intellectual property and direct foreign investment play an increasingly important role. These developments are reflected in the increased responsibilities given the World Trade Organization. The Community's powers in these areas are poorly defined, leading to needless procedural wrangles. This detracts from the Community's ability to defend the interests of the member states and their businesses. The Commission believes that the Common Commercial should be clarified accordingly (Commission 1/330/96).*

The Commission had taken the advantage of its legislating role and thus made an offensive to modify Art 113 by putting pressures on the member states to give up shared competence in the new trade issues. Under the PA perspective, it followed its shirking of preferences after the Uruguay round and took advantage of the asymmetry information and its expertise in on-going service negotiations (Pollack 1997, 108). Nevertheless, it was also pointed by other authors that there was no evidence that principals lack that kind of information during the negotiations (Moravcsik and Nicolaïdis, 1999).

It is interesting to analyze the Commission's phrasing of the terms. In order not to provoke the member states' fear of losing more sovereignty, it argued that its aim is not about expanding competences in any field, but about "consolidation, democratization and simplification". This stand was commented by Meunier and Nicolaïdis as inconstant with its general line (1999, 494). It is rather a tactical swift of than a change of preference. Because its statements during the negotiation has desperately shifted the trade competence to "the only area" in Amsterdam agenda where it was asking for greater competence. It shows a vivid picture of the agent wanting to get more power from its principals.

The initial proposal was not welcomed by the member states at all. Despite the hard mediation of the Dutch presidency, the member states insisted adding numerous exceptions to the competence transfer.[79] This was *per se* a codification of existing practices, although the Commission would have preferred not to see the potential for restrictive interventions by states enshrined in such a way (Meunier and Nicolaïdis 1999, 495). And the code of conduct to guarantee fuller participation of the member states has even aimed to strengthen the oversight mechanism and thus reduce the relative authority and autonomy of the Commission. Facing the strong backlash from the member states, the Commission disappointedly drew back its compromised proposal itself and wanted to maintain the status-quo, with the hope of "better to keep options open and gamble on a better future political climate in the court as in the council" (Meunier and Nicolaïdis 1999, 496).

b. The preferences of the member states:

It is difficult to generalize the state positions as they usually hide their real preferences in the course of political negotiations (Da Conceicao-heldt 2002). It is not easy to separate the real preferences from tactical negotiation goals. Despite that difficulty, it is clear in the beginning that the metaphor of a state-like polity of EU and more supranational power is not well embraced by the member states (Elsig 2002, Moravcsik and Nicolaïdis 1999). The default sovereign point is taken as the initial point of the member states with respect to further competence transfer. To trace the change of preferences, it is necessary to observe the official statements of the member states during the IGC.

There are some obvious changes of national positions after the ECJ ruling. The chart

[79] This includes the maritime and air transport services. Also the broad exceptions stated in the WTO charter.

shows that the European countries continued to enjoy competitive advantage in service exports in the 1990s (Table 6-2). The development from international level and domestic level had contributed to the change of the some member states. As noted, the sovereignty camp shrunk from a majority to a minority, consisting only of France, UK, Denmark, Portugal and Spain. A significant change was Germany's support of complete competence for the Commission. It is worth to note that the UK' position had evolved significantly during the course of negotiation, which was attributed to the amounting pressure of domestic service sectors (Moravcsik and Nicolaïdis 1999). It is now necessary to turn to each of the member states to see their preference evolution:

France: France remained opposed to the transfer of competence to the community in the new trade issues and had rejected the Commission's proposal on modifying Art 113 from the beginning. This stand was not surprising to most observers. One explanation is that there is still shadow effect of the Black House crisis on the French government (Meunier and Nicolaïdis 1999). Another argument is that the division in French government has externalized French domestic politics. This led at times to a split in the French delegation, sometimes on crucial positions (Dehousse 1999). That explains why it is against improving the Commission's exclusive competence while at the same time advocating majority voting in the field of the third pillar (Petite 1998, Dehousse 1999). As is recognized in the literature, the French position is generally regarded as unwilling to transfer further supranational competence to the Community (Elsig 2002, 117).

Table 6-2:International competitiveness of commercial services 1990 and 1996($m and %)

	1990				1996			
	Exports	Imports	Balance	World Exports Share	Exports	Imports	Balance	World Exports Share
World	793300	824200	-30900	100.00	1264700	1259300	5400	100,00
US	136750	98210	38540	17.24	214030	139690	74340	16.92
Japan	41130	87420	-46290	5.18	66380	128670	-62290	5.25
EU(15)	373800	356200	17600	47.12	533200	520800	12400	42.16
France	66274	50451	15824	8.35	82585	65617	16968	6.53
Germany	54530	81990	-27460	6.87	78570	126310	-47740	6.21
UK	53510	44690	8820	6.75	77550	63780	13770	6.13
Italy	48711	49860	-1149	6.14	69145	66870	2275	5.47
Neth.	30100	29476	624	3.79	48605	44710	3895	3.84
Spain	27649	15196	12454	3.49	43954	23894	20060	3.48
Bel.-Lux	24706	24296	410	3.11	34575	33164	1411	2.73
Austria	22754	14104	8650	2.87	35146	30580	4566	2.78
Sweden	13452	16959	-3507	1.70	16669	18651	-1982	1.32
Denmark	12731	10106	2625	1.60	16448	14972	1476	1.30
Greece	6514	2756	3758	0.82	9262	3830	5432	0.73
Portugal	5054	3773	1281	0.64	8066	6636	1430	0.64
Finland	4562	7432	-2870	0.58	7237	8567	-1330	0.57
Ireland	3286	5145	-1859	0.41	5376	13228	-7852	0.43

Source: self-edited from WTO, WB, OECD.

UK: The UK's general stand in 1996 IGC was quite conservative. It was opposed to almost every institutional change and it was clear from the beginning that the 1996 agenda would be set by other actors (George 1997, 108). It stuck firmly to intergovernmentalism and unanimity as the best way inside EU (Elsig 2002, 117). This was partly due to the election on May 1, 1997, and the British delegation had to play a very narrowed two-level game (Putnam 1988). Thus its stance to changes on Art 133 was firm and this resistance also spilled to other member states that were not as strongly opposed to the changes (Elsig 2002, 117). But its preference evolved during the course of the IGC. Although UK is still in the sovereignty camp, its position on the competence issue became less radical and more open to compromise throughout the negotiations (Meunier and Nicolaïdis 1999, 494). This shift was explained by Moravcsik and Nicolaïdis (1999) as the mounting pressure of the domestic service sectors.

Germany: Germany changed its position to support the Commission's exclusive competence. Some observer interprets the change as the reason that the German trade authority was afraid that it had more to lose in keeping future agreements captive to the protectionist demands of other countries (Meunier and Nicolaïdis 1999, 494). Facing the opposition from other countries, the German State Secretary Hoyer expressed its disappointment on the issue of modifying Art. 113 (Elsig 2002). Others attribute the evolution of domestic preferences to the change of position (Moravcsik and Nicolaïdis 1999). As to the increasing autonomy of the Commission, the German government proposed more measures to counter the Commission's autonomy (Devuyst 1998, 617). It also questions the Commission to initiate policies in certain fields (Petite, 1998), especially the Commission's power in competition policy for example. This is why it stressed the importance of tighter control mechanisms when it agreed to transfer more competence to the Commission (Beach 2002).

Italy Ireland and Belgium: these countries were supporting further institutional adjustments in terms of the external trade competence. They realized that without more competence in the Community, they would be at the mercy of EU big trade countries (Meunier and Nicolaïdis 1999, 494). Italy has explicitly inclined toward a better coordination of the Union's actions within the WTO (Elsig 2002, 118). Belgium is one of the leading countries that support the Commission's quest for a more coherent commercial policy (Elsig 2002, 118). These countries' positions were very close to the Commission on many issue. They have also supported extending QMV to other fields and advocate more institutional change to prepare for the future of EU. Belgium has been a strong advocate of more integration within EU.

Denmark and Holland: Denmark was very cautious to grant more transfer to the Commission in trade issues, as a result of the national referendum of Maastricht Treaty (Beach 2002). The Dutch position underwent some substantial changes in the external trade policy. It was explicitly against the more competence of the Commission in the beginning. Then it functioned as an honest broker and proposed last-minute proposal to bring the Commission and other countries to an agreement in modification of Art.133. The convergence of the Dutch position with that of the Commission towards the end of the IGC is best explained by the good cooperation between the two during the Dutch Presidency (Meunier and Nicolaïdis 1999, 495).

Finland, Sweden, Austria: The position of the new three EFTA countries can be put into one category. All the three new member states Austria, Sweden and Finland were firmly with the expansionists. But they have failed to create any sort of operational alliance as they sought to retain power over other institutional issues during the Amsterdam conference and the revision of 113 was not their top priority. This was due to the result of

their marginal power in the first time of negotiation after they join EU (Elsig 2002, 119). Also, because two big member states were still officially opposing the revision, it seemed ‘unrealistic to waster political capital on an issue where France and UK were divided on the other side” (Meunier and Nicolaïdis 1999, 495).

Portugal, Greece and Spain: Greece changed its position to support the Commission because it wanted to get an exception for shipping services. Portugal and Spain were in the same camp as France, opposing not only further transfer of trade competence to the Commission, but also the increasing application of QMV inside EU. This was explained partly as the ideological concerns, and partly as the sector concerns (Meunier and Nicolaïdis 1999, 495).

6.2.2 The course and result of the negotiation: fast-track trade competence

It is not aimed to describe the detailed course of the negotiation process. The final negotiations usually proceed in an environment characterized by secrecy and a lack of transparency (Da Conceicao-heldt 2002). There is growing sense of uncertainty during the final hours of the negotiations, as the various packages were finalized. This runs counter to the basis assumption of full-information in the negotiations (Pollack 1999; Beach 2002). This study only aims to check the preferences of the actors by their statement papers and analyze the final result.

As the IGC came to the end, there is pressure for last minute deal. Under the mediation of the Dutch presidency, a new draft was presented to make the deal. Under the new draft will the Commission have exclusive competence to the areas of which it took in Uruguay round, but on a post-hoc extension. It will have exclusive competence on the on-going WTO service negotiations. This draft was close to the preferences of the Commission, as it indicated that the Commission would have *per se* the same powers in trade of services

as it had in goods. But it would need the mandate from the Council with qualified majority (Meunier and Nicolaïdis 1999, 496).

Although there is increasing willingness from the sovereignty camp to reach compromise over the scope of competence in exchange for extensive exceptions and guarantees, they were still very cautious in enlarging the Commission's competence. Some states wanted an explicit inclusion of a series of exceptions to the new scope extension, especially in maritime and air transport services. Besides, they wanted to strengthen the oversight procedures to get better control of their delegated power. Some even wanted to introduce elements of a code of conduct that would guarantee fuller participation of the member states in the negotiation process even for the sectors that fell under exclusive competence. The Commission was required to work under the tight directive of the Council. This amounted in fact to a codification of existing practices, although the Commission would have preferred not to see the potential for restrictive interventions by states enshrined in such a way. "With this set of caveats, the sovereignty camp could be reassured that any margin of interpretation that the commission could potentially exploit in the future had definitely been eliminated"(Meunier and Nicolaïdis 1999, 496).

Facing these strong restrictions from the member states, the Commission had to prefer the status quo and persuaded the presidency to withdraw its proposed compromise. This move was interpreted by Meunier and Nicolaïdis as to "keep opinions open and gamble on a better future political climate in the court as in the council" (Meunier and Nicolaïdis 1999, 496). As response, the member states eventually agreed to a simple amendment to Art 113 (renumbered 133). They also allowed for future expansion of exclusive competence to the disputed sectors with a unanimous vote in the council.[80]

[80] The amended Art. 133 (5): " the council, acting unanimously on a proposal from the commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to negotiations and agreements on services and intellectual property insofar as they are not covered by

So it was not a surprise to see that the Art.133 was not changed much as a result of the failed compromise. Despite numerous discussions and the mediation of three presidencies, the result of competence debate in Amsterdam Treaty was only a minimum. Only paragraph 5 of 133 was reframed as following：

“ the council, acting unanimously on a proposal from the commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to negotiations and agreements on services and intellectual property insofar as they are not covered by these paragraphs’

This amendment did not extend the scope of EC powers in the field of external trade policy. But it has laid foundations for a broader scope of EC powers in this field (Krenzler and da Fonseca-Wollheim 1998, 223).The extension of exclusive competence should be the result of a case-by case political decision rather than some uncontrollable spillover (Meunier and Nicolaïdis 1999, 496). Although this amendment stated that exclusive competence can be extended to services and intellectual property, the unanimity request makes it a hurdle to reach decisions to make that extension.[81] Also, not all agreements on intellectual property and services would have to follow that procedure, because there are aspects of services and intellectual property which already fall within the scope of the EC’s common commercial policy. Furthermore, in cases when the member states are forced to reach a common position, it is still more difficult than under the exclusive competence. It is still a shared competence in nature. According to this amendment, the Commission’s role to act as a representative in such negotiations is still limited, provided the Council agrees to that application by unanimity

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these paragraphs’. See Young (2000).

[81] See the consolidated version of the Treaty establishing the European Community, article 133 (5), 1997 O.J. (C 340) 173, 238; 37 I.L.M. 79, 108.

Nevertheless, there are two positive meanings in this amendment. First, this can be perceived as a European version of the US fast track competence for the new trade issues. Although it strictly limits the Commission's room of competence by an *ad hoc* unanimous voting in the Council, the scope of Common Commercial Policy can be extended from goods to negotiations on services and intellectual property. It helped at least practically to modify the so-called "division of powers between the EC and its Member States" in areas of trade in services and intellectual property rights stipulated by the ECJ 1994 ruling. This modification was interpreted by some observers as an indication for further exclusive competence in these new issues (Leal-Arcas, Rafael2007).

Second, from a practical point of view, this modification offered the possibility to modify Art. 133 autonomously in the future. This doesn't need to involve IGC negotiations and domestic ratification procedures of member states (Krenzler and Pitschas 2001, 291). Although the *ad hoc* transfer of competence in these new issues under the unanimous vote was viewed as a high threshold, the negotiation and conclusion procedure would not have required a unanimous decision by the Council anymore. Also, there would not have been need to ratify the agreement by domestic legislature. In this sense, the often criticized interpretation of Article 133 was corrected practically by this modification.[82] It was thus a small step forward compared with the 1994 ECJ ruling.

[82] For the criticism of ECJ 1994 Ruling, see Bourgeois (1995, 763); Hilf (1995, 245); Maunu (1995, 115); Tridimas (2000, 48).

6.3 Agent still kept in line, principals still in cautiousness

6.3.1 Interpretation: one small step forward—the 'fast-track' competence

The "fast-track" competence was a small step forward for the Commission, as at least it could have exclusive competence based on an *ad hoc* condition to conduct international negotiations. Compared to the ongoing service negotiation where the member states have shared competence, the exclusive competence can now be extended to new issues without having to go through a formal revision of the Treaty. This is a significant gain for the Commission to satisfy its concern of efficiency in trade negotiations (Meunier and Nicolaïdis 1999, 496). It also underlines the Member states' efficiency concern facing on-going international trade negotiation. Furthermore, this policy equilibrium could be broken by further revisions of Art. 133. From the legal front, the Commission could also wish the Court to review its opinion under changed political auspices.

According to the new Art.133, the trade competence in service and intellectual property right will be discussed and delegated by the member states before the negotiation. The final agreement will be rarified on a qualified majority basis. This is a very practical solution to the on-going political debate: considering the on-going service sector negotiations, the member states agreed to take very pragmatic measures to guarantee its own interests. Compared with a permanent delegation of exclusive competence, this new provision may give greater flexibility to the Council, allowing it to revisit past decisions if necessary (Meunier and Nicolaïdis 1999, 496). And some authors point out that this flexibility may make it more acceptable to delegate power to the Commission in the first place (Coglianese and Nicolaïdis, 1998).

However, this institutional amendment is obviously a temporary measure. This policy equilibrium in Amsterdam Treaty is unlikely to be sustainable in the face of three

approaching challenges “the prospect of re-launching WTO negotiations, the possible shift in the balance of power between the EU’s institutional actors as a result of the enlargement of the Community to include its eastern neighbors, and the advent of monetary union and the need to address issues of external representation of the euro” (Meunier and Nicolaïdis 1999, 498). Also, given the high heterogeneity of the member states’ interests, some commentators even speak of unanimity as dictatorship in EU policy making (Leal-Acras, 2007, 360). The direct pressure comes from the coming round of international trade negotiation which will cover all the new trade issues. This European version of fast-track trade competence is not efficient enough to satisfy the institutional change in the international level. This institutional arrangement is nothing but a temporary tactic, as it was unable to balance the twin requirements of state sovereignty and international efficiency.

The 1996 IGC did not extend the scope of EC powers in the field of external trade policy (Cremona 1999, 225). Nevertheless, they did lay the foundations for a broader scope of EC powers in this field (Krenzler and da Fonseca-Wollheim 1998, 223). Thus the EU continues to face some difficulties in creating a coherent commercial policy. The result in Amsterdam Treaty implies the suspicion of the member states on the one side, and the increasing pressure for functional purposes of the Commission on the other. Based on the default position of sovereignty concerns, however, the member states need more sufficient reasons to delegate power to the community. The dramatic changes in international trade regime and slow wake-up of the domestic interests had begun to have influence on the preference formation of the member states. But the influence obviously did not suffice.

6.3.2 Principals’ compromise: cautiousness but practical move

The cautiousness of the principals was interpreted as a long-term trend towards

reclaiming national sovereignty over the increasingly sensitive trade issues (Meunier and Nicolaïdis 1999). This stand was explained in the last chapter as the default point of national sovereignty. Because all modern nation states are sovereign by nature, they would reject naturally the delegation of trade competence to the supranational level. This default point could be changed based on functional purposes, as is explained by the PA framework. Besides, when the principals delegated its power to the supranational agent, it always conducts strict oversight procedures to make sure that the agent doesn't cross the line (Pollack 1996, 1997, 1999).

The principals responded reluctantly to the challenges that were used by the agent as excuse for more power. The first one was the concern about the efficiency of the Community action in international negotiations. The second was the changed structure of the international political economy. Both should exert enough functional pressure to call for greater community competence in trade relations. But in reality, the member states' reaction to these two challenges was surprisingly slow. Although the EU countries are internationally competitive service providers, they were not convinced to use that advantage and delegate more power to the community. One should have expected them to support an institutional arrangement more likely to bring about international services liberalization. Similarly, one should have expected them to make further transfer of competence happen, after the new international trade regime was founded in 1995.

A move from the member states to the Community is only possible when the inter-governmental approach fails to address the objectives. This is in line with Moravcsik's argument that state develop preferences based on sector-specific concerns about policy externalities and choose to delegate sovereignty to supranational institutions where necessary (Moravcsik and Nicolaïdis 1999, 82). Sometimes the lack of trade preferences was because of the low level of issue awareness in the sector, as was the case

for service sectors in the early 1990s. As was shown in the above analysis, the business preferences had a turning point in 1996. Before that time point, there were no clear business preferences in service sectors in terms of international negotiation at all (Woll 2004, 2008; Mazey and Richardson 1997). The current literature of competence delegation generally ignores the macro level analysis of the real interests and preferences of the service providers. This study argues that it was the lack of business interaction that led to the member states' reluctance to delegate.

LI presumes that member states' preferences are stable and the strategies can shift during the IGC negotiation (Moravcsik and Nicolaïdis 1999). But in terms of the new trade issues, there are no well developed preferences to the member states when the domestic actors are not involved. When this was the case, the principals would usually stick firmly to its default sovereignty position. During the IGC negotiations where the game is institutionally clear-cut, it is very suitable to use the PA framework to analyze the bargaining among principles and agents on transferring further competence. It is important to remember that it is the principals that have maximum power in this kind of IGCs. The Commission's power depends merely on its ability to shape policies through agenda setting and by acting as process manager (Pierson 1996, p133), which can be easily rejected by the member states when there is lack of functional pressure. This is most evident in the bargaining of trade competence in the 1996 IGC.

But the last move made by the member states was rather practical and symbolic. It was practical because this fast track competence guarantees a *de facto* exclusive competence of the new trade issues in international negotiations, although this is limited by *an ad* hoc unanimous voting in the Council. The council has not been authorized to create a general competence for the EU to conclude international agreements on services and intellectual property matters. The Article 133 (5) of the Treaty of Amsterdam also made clear

reference to the “international negotiations and agreements”. This gave the new competence only an external application, unlike the general competence of the EC under Article 133 EC, which is exercisable both internally and externally. This extension came obviously from the pressure of international trade negotiations. But on the other hand, there are different oversight procedures in order to control delegated powers (Pollack 1999). This unanimity consensus is in this sense a strong oversight procedure which reflects the principals’ cautiousness for more power delegation.

It was symbolic because it indicated a small step toward the preference of the Commission. Although the competence debate was not fundamentally resolved in this 1996 IGC, it solved the legal chaos made by ECJ 1994 Ruling and gave legal basis for *de facto* competence in the commercial policy by a fast-track version of competence delegation. A temporary extension of competence satisfies the Commission’s claim about efficiency in trade negotiations. Also, the final agreement is not required to be ratified t by domestic legislature. This makes the sovereign aspect of the shared competence in the new procedure less obvious. The changes in Amsterdam Treaty had symbolic meanings for the Commission as a first move towards more exclusive competence was made, although only on a fast-track basis.

Both the member states and the Commission were not satisfied with this temporary equilibrium, as it was by no means stable under this new procedure (Moravcsik and Nicolaïdis 1999). To explain this temporary equilibrium, some observers refer it to the reflection and test of a large ideological battle over European integration (Moravcsik and Nicolaïdis 1999, 479), or draw the ideational factors as complementary to the argument of economic interests (Moravcsik and Nicolaïdis 1999), or even refer to the lack of cooperation between Franco-German leadership from the side of the principals. Nonetheless, the default sovereign point of the member state, especially those big ones,

was not surprising at all. Its cautiousness and practical move are not controversial. Only when the pressure from the external and internal side mounted to a certain degree, their preferences with competence delegation are expected to change.

6.3.3 Agent didn't get what it wanted: there is no free lunch

Although the Commission wanted to seek its own preference and get more power from the principals, its real negotiating power was very limited. During the negotiations, the role of the Commission as an agent was small: it is a party in the negotiating table, but it was the member states that took the charge (Petite 1998). Thus the entrepreneurial function of the Commission (initiation, mediation and mobilization) was proved little in the real negotiations. Moravcsik argues that "it is difficult to find evidence that the Commission has provided either initiatives or compromise proposals that were unique and altered the outcomes of the negotiations" (Moravcsik 1997, 69).

It is useful to track the rationales for the delegation of power from the principals to the agent, so as to understand the agent's persuasion for more delegated power (Pollack 1997, 1999, 2003). In terms of external trade competence, three functional purposes are decisive in competence delegation. First, more power is delegated to the agent in order to solve complicated tasks. When there was no clear preference from the domestic service providers, it was difficult to persuade the principals that the tasks at stake are complicated. Second, the agent's role of agenda setting is helpful to avoid the problem of "endless circle" in legislation. The Commission's proposal is proved to be more liberal than that of the member states. This liberal position, however, needs the support from domestic interests to justify its preferences. In these two aspects, the domestic economic interests play an important role to determine the Commission's success.

The third purpose is the Commission's monitoring role to guarantee the compliance of

the principals and to solve incomplete contracting. In terms of trade competence, this monitoring role is reflected on the Community's involvement in international trade regime. It is a function of both how often member states stay away from the international regulations and how is that accepted by the other parties. In terms of incomplete contracting, the agent is better prepared to take initiative. This is partly due to the historical path in which the Commission is used to represent the member states, for example, both in international trade negotiations and the legal disputes of WTO.

Compared with the time period before 1994 ECJ ruling, the business actors in service sectors began to wake up in order to catch up with the external changes. But this learning process doesn't happen overnight. It was after 1996 that the service providers began to have clear preferences of what their stakes are in international service negotiations. But the initial preferences of the business actors were not strong enough to influence the political actors because of three reasons: First, the initial evolved preferences of the business operators were not significant in the beginning. Second, business lobbying not only needs economic and political resources, it also needs time. Third, there was no organized form of business preferences among the business actors.

The initial phase of the business preferences didn't provoke responding political reaction. As they began to undergo dramatic changes in the mid-1990s, they don't even go to the national arena for political lobbying. There was very low level of economic lobbying both at the GATS negotiations and 1996 IGC (Mazey and Richardson 1997, Moravcsik and Nicolaïdis 1999). Thus the evolution of business in the initial phase doesn't help to change the default position of the national sovereignty, even most of the member states appeared to have competitive advantage in service trade in general. There was also no chance for the Commission to grasp the domestic support on the community level for institutional change, as happened in the late 1990s.

The lack of business response was thus a major reason for the Commission's failure in not getting what it wanted. Without the support from domestic business actors, it had to concentrate primarily on formal and informal agenda setting alongside other actors (Elsig 2002, 126). That is why the Commission's position was viewed as weak as it lacks real leadership or agenda setting power. Thus it was no wonder that the principals were not prepared to retreat from its default position of national sovereignty:

"intergovernmental conferences are only one step in an on-going sequence of principal agent interactions, in which the hand of the member governments is strongest and that of the EU supranational organizations is weakest(Pollack 1999, 16)"

But on the other side, there are signs that the principals have difficulty in taking back its delegated power. It is an interesting modification to the P-A framework, which asserts that the principals can take back their delegated power if they want. For example, in the last-minute draft, some member states wanted more tightened control mechanism on the commission but failed. The historical institutionalism helps to explain this problem. There are institutional rules that make such attempts to cut-back the agent's powers difficult. These rules were historically made and make the member states follow a certain path (Pierson 1996; Hall 2004). It is thus very difficult to use the nuclear option to punish the agent through withdrawal of an existing mandate (Elsig 2002, 127). This nature of path dependence adds argument that the agent can gain more weight with self-consciousness and preferences in the PA relationship.

This point is very important because the Commission's shirking of preferences also depends on the principals monitoring effect. During the negotiations, there is no wonder that the principals have effective methods to control the agent. If the agent misjudges his

ability to sell the outcome of the negotiations to the ratification body or if he strongly pursues personal goals without fearing the "controlling hand" of the principals, it will differ substantially from the preferences defined by the principals and pursue persistently its own interests. For example, the Commission has previously attempted to get more competence with the help of ECJ which was seen as an offensive attack on the sovereignty of the member states. When it enjoys the advantage from the historical path, it will have strong incentive to pursue persistently its own preferences.

6.3.4 Conclusion

The analysis leads to the consideration of the role of the agent in negotiation with its principals. It shows evidence more than the grand theory of integration either in the realist ground in which states are always opposed to transfer of sovereignty, or in the functional type that integration will happen automatically on a spill-over model. Instead, the principals are cautious about their powers and are also prepared to delegate it on functional purposes. This was proved by the practical "code of conduct" for the on-going sector-specific negotiations. This default sovereign point was not well noticed in the literature. Some noted in a similar direction that it was the difficulty in ratifying Maastricht Treaty that increased the reluctance of the member states to grant more competence to the Commission (Szukala and Wessels 1997; Lausen 1997), or the repercussions of the ideological change (Meunier and Nicolaïdis 1999). There were few arguments focusing on the increasing external embeddedness and the evolution of domestic preferences.

The Commission persistently used efficiency and credibility for its argument for more exclusive competence in the new trade issues. But this functional argument was not echoed by the domestic preferences. When the domestic preferences were not strong enough, the evolution of the EU delegation's position clearly depended to a much larger

degree on the coordination of the two EU levels of governance than on lobbying of domestic business actors. The Commission could make good focal points based on its functional purpose, as was shown in its persistence for exclusive competence in 1996 IGC. But because of its weak position compared with the strong principals in nature, it was not surprising that its functional purpose for more competence was easily ignored by the principals in the IGC. Regarding the modification of Art. 133, there was no doubt that the member states were significantly influenced by the institutional debate. But lacking the support from the domestic service providers, it was very difficult for the Commission to realize its initiatives. The principals were still in good control of the game.

Thus the primary lesson for Amsterdam is that "no amount of institutional facilitation or political entrepreneurship, supranational or otherwise can overcome underlying divergence or ambivalence of national interests (Moravcsik and Nicolaïdis 1999, 83)." When the domestic service providers were undergoing dramatic changes in the mid-1990s, they were learning hard to find their real preferences. This learning process was also reflected in the swift of the national positions with respect to exclusive competence in new trade issues. From the 1994 ECJ ruling to Amsterdam, there were clears hints to trace the evolution of the national positions. But it still needs some time for the breaking-through point.

The competence battle has thus served as a proxy for redefinition of the mechanisms of delegation to the Commission in all of the common commercial policy and the controlling mechanism. On the one side, there was increasing pressure from both the external and internal changes. On the other, the increased autonomy of the Commission in international negotiations makes the member states unsure of their delegated power. They have thus wanted more scrutinized control of the Commission's conduct and on the

new trade issues. The Amsterdam solution didn't find a good balance between the two factors, because neither the trade authority nor the procedures whereby it is granted were clearly defined. It was neither a victory for the sovereign camp nor a setback fro the expansionist. This represents among several examples of hybrid decision-making procedures introduced at Amsterdam falling in between classical community delegation and pure intergovernmental approaches (Moravcsik and Nicolaïdis 1999, 497-99). This temporary equilibrium is not sustainable at all. Substantial changes are to be waited in Nice.

CHAPTER 7

From Nice to Lisbon

Real Change Happens

This chapter examines the further development of the two explaining variables: the increasing embeddedness of the EU in international trade regime and the evolution of domestic preferences. After Amsterdam Treaty, there were two IGC important to the analysis: the Nice IGC in 2000 and the 2003 IGC about the Constitutional Treaty. Behind the two important IGCs is the consensus trying to reform the Commission and European Council before enlargement. The Nice Treaty expands for the first time the exclusive competence of the Commission to the new trade issues, although with some notable exceptions. It was in the 2003 IGC to Constitutional Treaty that this political dispute was finally settled. The 2009 Lisbon Treaty adopts the original CCP text of Constitutional Treaty almost unchanged, thus it is to analyze the 2000 IGC and the 2003 IGC to check the development of the competence issues in this chapter.

7.1 Increasing Embeddedness in international trade regime

As shown in previous chapter, the strengthening of the institutional framework of the WTO had an important impact on the balance of power within EC when it comes to trade policy. The including of the new trade issues into WTO framework had given the Commission a first impulse to claim its legal authority on those trade issues. The strengthened institutional framework of the dispute settlement system favored the position of the commission vis-à-vis the member states regarding new trade issues. After

Amsterdam Treaty, the Commission's international embeddedness can be analyzed in two aspects: its representing role in international trade negotiations and its binding role in the dispute settlement body of WTO.

7.1.1 External environment, big ambition for service liberalization in Doha

a. Chaos of competence issue in Seattle: the way ahead to Doha

The sector-specific negotiations in services from 1995 to 1997 were far from satisfying to most of the countries. From 1996, there were initiatives to start a new round of multinational trade negotiation. The Commission had played a very active role in its preparation. For example, in 1996, trade Commissioner Sir Leon Brittan proposed a multitude of negotiation issues for the upcoming negotiations on service and agriculture scheduled to begin no late than 2000, naming it the "Millennium Round". Also, for the preparation of the Seattle summit to launch the new round, the Commission set the agenda to outline the issues for the coming round (Commission 1998). It opted for a single undertaking, in which numerous sectors and issues to be tackled in parallel. In order to maintain more room of maneuver facing the complexity of the broadest issue topics, the Council had approved a rather general mandate of the Commission for the Seattle conference. But the core problem of competence distribution was not clearly tackled (Elsig 2002, 148).

But the ambiguity of the mandate resulted in direct conflict between the Commission and the member states during the Seattle bargaining. For example, the Commission's proposal regarding the area of biotechnology was attacked fiercely for overstepping its mandate by the member states (Elsig 2002, 154). This was a topic where the Community has exclusive competence. And as to the new trade issues, the representatives of the member states didn't trust the Commission at all. As was noted that "some of them felt

humiliated to only sit there and listen to the Commission's briefing, thus if the word 'mixed competence' came up, 15 hands rose immediately and everybody wanted to talk on behalf of the community" (Elsig 2002, 148).

The internal institutional debate was thus easily reflected on the international arena. In order to exert their influence on the Commission's positions, the diplomats from the member states were highly interested in attending the 133 meeting. As noted by Elsig (2002, 154), there was a "pleasant chaos" between the meeting of 133 committees and the meeting of ministers (GAC). This was directly linked to the mixed competence problem in the Community, as those meeting were the only place where the ministers could actively try to shape the agenda. The divided competence had direct consequence on the Commission's authority and bargaining power in the Seattle Conference. The member states actively used these chances to influence the positions of the Commission. During the Seattle meeting, there was no much common position in the service and intellectual property at all, which showed "how thin the ice had become for the commission" (Elsig 2002, 154). Not surprising at all, the question was raised as to whether only the presidency should accompany the Commission in meetings on services and intellectual property, and it was finally interpreted that all those concerned could accompany the company.

b. The real challenge in Doha: the most complex trade negotiation in history

After Seattle, the EU only had two years before the next WTO Ministerial Conference in Doha. Facing the chaotic internal dispute in Seattle and the strong opposition from developing countries, the Commission has decided not to ask for a new negotiating mandate from the Council after Seattle. Thus, from a legal perspective, the EU's position did not change from Seattle to Doha. The Commission took a very active role after the

failure of Seattle Conference. The Commissioner Lamy highlighted two major problems and begin to propose a policy shift that contradicted the interests of the EU in WTO negotiations (Van de Hoven 2004, 266). By allying the agricultural Commissioner Fishler with the "Development Round" rhetoric, Lamy got the support of the developing countries to strengthen the role of the EU in the new round of trade negotiations (Van de Hoven 2004, 269). Thus compared with Seattle, the new positions declared at Doha reflected the shirking of preferences of the Commission, although the mandate remained the same.[83]

It is necessary to note that negotiations in services and agriculture had already begun in January 2000 according to the build-in agenda of Uruguay Round. They were latterly merged into the Doha Round after it was started in November 2001. The Doha agenda includes three types of different trade policies: traditional trade policy of at-the-border measures; commercial policy of competition-focused behind the-border measures; and social trade policy, dealing with market-failure focused behind-the-border measures (Young 2007, 807). The EU wants to gain concessions in services and investment liberalization in exchange for opening its agricultural and textiles markets to foreign competition. From an economic perspective, this comprehensive agenda corresponds to Europe's comparative advantage in services and it allows the EU to project its ever-stricter regulatory structure at the international level.[84]

The complexity and diversity of trade issues at the international trade negotiations help the Commission to strengthen its authority vis-à-vis the member states. This is attributed to the nature of GATT/WTO agreements which are usually a result of cross-sector bargaining between trading partners with side payments. For the purpose of efficiency,

[83] Most of the changes favor the "development issue" in the new round, the EU has softened its positions in many respects in order to get the support of the developing countries in Doha Round. See Van de Hoven (2004).

[84] For example, the EU's preferences on social trade policy to protect its "EU Model" of welfare state.

the EU needs to negotiate like a single actor across all trade issues regardless of its legal competence. Thus by promoting a comprehensive round at the WTO, the Commission is also weakening member state control over trade policy, although most of the new trade issues do not fall under the EU's exclusive competence. On the other hand, the member states had to admit the Commission's *de facto* competence in those external negotiations. Consequently, as noted by Young "the member governments are, as they did in the Uruguay Round, negotiating (in the WTO) as if all of the issues fell within the EU's exclusive competence" (Young et al. 2000, 5).

This *de facto* competence helped the Commission to pursue a certain degree of preferences shirking based on the negotiation mandate. In terms of TRIPs, for example, the Doha declaration included a statement on TRIPs that allows developing states to override the agreement in cases of national health emergencies. This is in line with the preferences of the Commission who provided assistance to developing countries to get out of the health crisis (Van den Hoven 2004, 270). It sets the precedent that health ministries should have the right to override intellectual property rights in cases of national health emergencies. Although this case still reflects the internal conflicts in terms of the new trade issues, the change of the position from Seattle to Doha had indicated the Commission's shirking of preference from the member states. It is the window opportunity of international negotiations that allow the agent to maximize their autonomy by shirking their preferences from the principal (Pollack 1997).

This shirking of preferences, however, was only in the initiative stage. During the real trade negotiations, the member states monitor the Commission's negotiating activities strictly through the Article 133 (formerly 113) Committee or the Special Committee on Agriculture and at WTO meetings. The Commission also needs the support of the Council to conduct credible negotiations with its trade partners. "It was only where the

EU's regime was more progressive than the international regime, which was in the vast majority of service sectors and thus where the negotiations would not require internal liberalization, that the EU took an ambitious stance"(Young 2007, 802). During the whole negotiations process, it is not surprising to see member states dissatisfaction and critics with the trade Commissioner's bargaining in Doha (Leal-Arcas 2008). For many cases, member states Criticize the commission's bargaining in order to change the blame-shift of domestic interests or to gain more side-payments.

To sum up, the challenge of the Doha Round compared with the previous rounds was enormous. It covers not only the issues of trade in services, intellectual property right and investment, it but also includes trade and environment, the reform of DSB, trade and development into the broad agenda (WTO 2001). It is far more complicated than its three multilateral predecessors (the Kennedy, Tokyo, and Uruguay Rounds). Most of the remaining barriers to trade are the new trade issues, or the so called non tariff barriers, which are very domestically sensitive. The tackling of national regulations and standards raise more complex issues than do traditional tariffs and quotas in Doha.

Besides the complexity in negotiation issues, the consensus-decision rule means that all of them must accept the outcome of discussions, and now a larger and more diverse group of developing nations has veto power at every stage of the process. Considering the large issue diversity and the number of participants (148 members at present), the task of reaching a successful agreement is more challenging than the previous rounds. Therefore, the Commission is more likely to suffer from a "credibility gap" if member states refuse to support its position in the WTO. The challenges in Doha Round functioned as a window of opportunity to the Commission, as it not only gets the *de facto* competence for the vast trade issues during the negotiation, it can also use it as a convincing reason, to win the competence battle in the internal ground.

7.1.2 Binding DSB procedure: de facto competence of the Commission

a. The strengthened position vis-à-vis the member states in DSB

As elaborated in the second chapter, the new DSB system has established a court-like system of mediation between the disputing parties in the WTO. Also, the new DSB procedure shows patterns of high complexity in terms of legal practice. The new legal procedure entails more professionalism and shows a highly technical nature involving complex scientific fact-finding and assessments. This strengthened legal procedure in WTO favors the Commission's position vis-à-vis member states, and lead to its *de facto* competence in the external trade disputes (Billiet 2006, 913).

Two factors put the Commission in a stronger position in the DSB system of WTO. First, the Commission benefited from the "path dependence" as the representative of the Community facing the strengthened legal procedure in WTO, although it did not have exclusive competence in the new trade issues. For the dispute issues falling under "shared competence", the member states still have great incentive to le the community defend their interests because of the greater negotiating power. The same applies also to the sanction mechanism in WTO, when facing the choice of retaliation or sanction against its trade partner. Even for the new trade issues where they don't want to loosen their control, it is more effective and less harmful when initiated by EC. Furthermore, the increasing complexity of the legal procedures also requires more administrative resources to ensure a quick and professional management of dispute settlement, which favors the commission because it has established more expertise in the past cases.

Second, the new legal procedure has strengthened the direct linkage between enterprises or industry associations and the Commission. The Commission has a monopoly to decide

whether or not to initiate certain proceedings in the WTO for the traditional trade matters, according to its internal rule.[85] Under the new TBR which is directly influenced by the legal procedure of WTO (Knodt 2004), single firms can directly go to the Commission lodge formal complaints and to request that the Commission investigate third-country practices. This has strengthened the direct linkage between enterprises or industry associations and the Commission, as they don't need to go to the national government to do lobbying any more. This direct linkage between the industry and commission has in practice opened the backdoor of the national interests lobbying, especially when the domestic business actors have developed clear preferences after the evolution.

With regard to the disputes in the new trade issues, it is thus the Commission that is involved in WTO legal procedure, despite not having exclusive competence over this issue area. From 1995 to 2005, all offensive WTO disputes from the EU side concerning the EC and/or (some of) the Member States have been initiated by "the European Communities and their Member States."[86] None of the member States has initiated a dispute concerning the new trade issues from 1995 to 2005 (see also, Billiet 2006). Thus despite the cautiousness from the member states, the Commission succeeds in gaining power and influence in this case. Nonetheless, there is a request for consultations "by the European Communities and their Member States" (WTO 1999). The implication of this joint action is that there is a clear need for co-ordination of positions and expertise, favoring the Commission.

b. The Commission's role in legal disputes in the new trade issues

The primacy of the Commission in offensive disputes can be illustrated by looking at

[85] Art. 133 of EEC
[86] DSB cases see: http://trade.ec.europa.eu/wtodispute/search.cfm?code=1

specific disputes. For example, the first case concerning the new issues was submitted by EC in 1996 against Japan, concerning the intellectual property protection of sound recordings (WT/DS/40). On 7 November 1997, both parties notified a mutually agreed solution without panel report. Another high-profile case was initiated by EC against India concerning patent protection for pharmaceutical and agricultural chemical products (WT/DS79). After initial consultation period, DSB established a panel at its meeting on 16 October 1997 responding to the EC's second request. The panel report was delivered in August 1998, supporting the EC's complaint that India has not complied with its obligations under TRIPS.

It is the permanent delegation of the European Commission that was taking charge of that dispute in TRIPS from the beginning. For example, in EC's first request of establishing a panel on September 7 1997, it began with "My authorities have asked me to submit the following request on behalf of the European Communities and their Member States for consideration at the next meeting of the Dispute Settlement Body" (WT/DS79). It is clearly the permanent delegation of the Commission that took in charge of the whole legal process of the disputes concerning new trade issues. Also all the subsequent communications concerning this dispute (the request for establishment of a panel and the notification of appeal) stem from the Commission's delegation. Similarly, the panel report is also circulated to the delegation of the Commission, regardless of the "shared competence" nature of the disputed issue.

The only indication for "shared competence" in the legal dispute is the wording of "the European Communities and their Member States". But apart from that, there is no indication that the member states actually play an important role. Thus different to the WTO negotiations where the member states with highest stakes would take the leading role, this is not the case in formal WTO proceedings. No "enhanced co-operation"

situation where the affected member states also count significantly in "shared competence" occurs in the legal procedure of WTO. It is the delegation of the Commission that is actively involved in dealing with the case at hand from the beginning to the end (see also, Billiet 2006).

This is also confirmed by the officials in DG trade.[87] They confirmed that the Commission takes charge of the legal dispute throughout the whole legal procedure, from the consultation stage to the request to establish the panel and the appeal of the panel decision. Even though they need to circulate the draft form to the 133 committee, it was only to "take the political temperature and identify fundamental objections that some Member States might have at an early stage". The impact of the special committee and the member states on the Commission's position is not as influential as in trade negotiations. Even though there are fundamental objections from the member states, it needs to form a blocking minority to change the commission's position. Otherwise, the Commission has enough room to play in order to explain the rationale of that decision and to convince a qualified majority of member states.

The same also applies to other disputes concerning new trade issues. From 1997 to 2005, there are other cases initiated by the EC and the member states against its trade partners[88]: WT/DS114 against Canada regarding patent protection of pharmaceutical products(1997-2000), WT/DS117 consultation request with Canada in respect of Canada's alleged measures affecting film distribution services(1998), WT/DS160 against US regarding the Section 110(5) of the US Copyright Act(1999-2000), WT/DS176 against the US in respect of Section 211 of the US Omnibus Appropriations Act(1999-2001), WT/DS186 against the US regarding Section 337 of the Tariff Act of

[87] Interviews by Billiet (2006)
[88] For the legal discussion of some of the cases and the effect of "mixity" on the EC's position in the WTO, see Heliskosi (1999)

1930(2000). Even in cases where stakes at hand are highly concentrated in a particular member state, it is the Commission that plays the leading role. The Commission has the *de facto* competence in all the disputes issues including services and intellectual property. Also, according to the DG Trade officials and officials from the Commission's legal service dealing with WTO disputes, there is no real difference in how disputes that concern shared competences and those concerning exclusive competences are dealt with. In both cases, it is the delegation of the Commission that is fully in charge of.

On the other hand, some trade partners of EU have immediately explored this internal division of competence debate and issued several disputes against individual Member States and the Commission separately. For example, , a dispute dealing with an Irish infringement on providing copyright and neighboring rights (cases WT/DS82 against Ireland and WT/DS115 against the EC(1997-2002)), the dispute dealing with the enforcement of intellectual property rights for films and television programs in Greece (cases WT/DS124 against the EC and WT/DS125 against Greece(1998-2001)), or a dispute concerning the measures relating to the development of a flight management system(cases WT/DS172 against EC and WT/DS173 against France(1999)). In the Irish case, for example, the chairmen of DSB proposed to merge these cases together. The representative of the EC replied that "this procedure was also appropriate from the Communities' standpoint as it corresponded to the internal organization of the Communities and their Member States regarding the subject matter under the review, namely the TRIPS Agreement"(WTO 1998, 5). The final mutually agreed solution was delivered in the name of "Permanent Mission of Ireland, the Permanent Delegation of the European Commission and the Permanent Mission of the United States" to the Chairman of the Dispute Settlement Body (WT/DS82). But there was no presence of the Irish representative during the consultation stage, and "nowhere in the minutes of this meeting is there a record of the Irish representative taking the floor" (Billiet 2006, 906). It was

the Commission that took the major role to represent the community and the member states during all of the legal procedures.

There are several other cases where the US issued against the specific member state. For example, the case in WT/DS83(1997) and WT/DS86(1997), dealing with enforcement of intellectual property rights in Denmark and Sweden respectively, and the case WT/DS80 against Belgium dealing with measures affecting commercial telephone directory services(1997). However, even though the request for consultations was directed only to the “Permanent Mission of Denmark” and the “Permanent Mission of Sweden”, the notification of a mutually agreed solution was distributed by the Permanent Mission of the US and Denmark or Sweden and the Permanent Delegation of the European Commission (WT/DS86). All the other WTO documents have consistently referred to “the European Communities – Denmark”, “the European Communities – Sweden”, etc.. It is obvious that the legal framework of WTO has put the Commission on an advantageous position, even if the dispute is only targeted at individual state.

The advantageous position of the commission has internal indications to the member states. For the Danish and Swedish cases, for example, member states are used to follow the historical path and rely heavily on the Commission and its delegation in Geneva for dealing with WTO disputes, even if the disputes are issued to amend their national legislation to comply with TRIPS. The commission enjoyed de facto exclusive competence in the DSB framework of WTO, despite the dispute of shared competence internally. The legal procedure of WTO thus have “repercussions internally (vis-à-vis the Member States) as well as externally (with regard to other WTO members)” (Billiet 2006, 913). The commission can exploit the international “externalities”7 from the DSB framework and proceeds with its claim for more exclusive competence internally, despite the strong opposition from the member states.

In short, by the end of the 1990s, there was an obvious increasing of the international embeddedness in the external trade regime. The preparation of launching the most complicated new round, as well as the peaking of the legal disputes of new trade issues from 1997 to 2000, has given the Commission more leeway to persuade the member states to transfer more competence. It has explored that external change and used it against the sovereignty concern of the member states. Although its "shirking of preferences" was clearly rebuffed by the 1994 ECJ ruling and the Amsterdam Treaty, it didn't stop its pace. While the member states, despite their concern about domestic sovereignty, are used to the historical path of reliance on the Commission in the trade negotiation and the dispute settlement system of WTO. When that external advantage was echoed by the domestic development, there was no surprise to see the member states for the first time to lift their curfew concerning the new trade issues in the 2000 IGC.

7.2 Evolution of business preferences : service, not a strange word any more

7.2.1 Evolution to specific liberalization preferences

Along with the internal privatization process, the former national monopolies began go more and more international since the late 1990s. They first went out of the national boundaries and seek more opportunities in other EU countries under the forthcoming EU telecommunication regime (Elixmann and Hermann 1996). By the time of 2000, for example, all the main European telecommunication providers had established wholly-owned subsidiaries in other countries (Figure 7-1). France Telecom has declared Europe as its "new home market" and established offices in Austria, Belgium, Denmark, Germany, Italy, the Netherlands, Portugal, Spain and the UK.[89] It had worldwide

[89] France Telecom, "France Telecom International Development' (2000), available at http://www.francetelecomna.com.

Figure 7-1: The European service operators expanding business after the middle 1990s

	Nationality	Form of operation	Year
Deutsch Telecom	Austria	Mobile operation	1996
	Italy	Joint venture with ENEL	1997
	Italy	New lience, with ENEL	1998
Telecom Italia	France	Joint venture, Bouygues	1996
	Spain	Spain, fixed line, with Ensdesa	1997
	Austria	Strategic partner Austria Mobilcom	1997
France Telecom	Belgium	Construction with Telinfo	1995
	Netherlands	Acquisition of cable operator	1997
	Norway	Cable TV MOU with EITele	1997
	Denmark	License, with Telia Denmark Mobilix	1998
	Netherlands	License of GSM,	1998
British Telecom	Spain	Joint venture with Banco	1994
	Germany	Joint venture with Viag	1995
	Italy	Joint venture	1995
	Netherlands	Joint venture with Spoorwegen	1996
Vodafone	Greece	Construction mobile	1993
	Netherland	Construction mobile	1995
Orange	Belgium	New license, KPN Orange	1998
	Switzerland	New license, with Swissphone	1998

operations in 75 countries. Deutsch Telecom and British Telecom had also wholly-owned or joint ventures in other parts of EU or the world.[90] Deutsche Telekom had representative offices, affiliated companies and joint ventures in over 65 countries. BT had subsidiaries, joint ventures and associates in 18 countries (Woll 2004, 231).

From the waking-up point since 1996, most of the telecom companies support the liberalization goal through WTO. The internationalization objective translated into political support for the GBT talks. This support came largely from the big telecommunication service providers who had already gained a clear idea of what there preferences are in more liberalization. This was a significant difference compared with the ambiguity of preference before 1996. This support is not exclusive for all the domestic service providers, of course. But as noted by Woll, the opposition course didn't find a channel to express themselves, as they are carried either by small operators who did not mobilize, or by large companies that didn't frame their political activities in a way that would have opposed liberalization (Woll 2004, 231).

The former national telecommunication providers thus underwent a dramatic process of preference evolution. These preferences had changed so fast that some commentators viewed it with doubt (Billiet 2006, 911) or others deem it difficult to define, because consequences are difficult to evaluate (Woll 2004, 231). The preferences of the service operators came as a result of the interaction with the political actors, especially at the community level. As indicated in chapter four, the domestic telecommunication providers respond to the changes on the regional and international level, as they learnt to build upon beliefs about the future rather than precise pay-off calculations. They have gradually developed clear preferences for more liberalization and market access in the

[90] British Telecommunications, 2000 Annual Report and Form 20F (2000), available at http://www.bt.co.uk. Deutsche Telekom, 1999 Annual Report (2000)

global market, while not excluding the importance of the home market.

7.2.2 Channels through associations, working hard with the Commission

After the service providers developed clear preferences, the question is then how to get organized and participate in the political process. For the former monopoly providers, there had been a close tie between the company and the domestic government. Traditionally, they were usually well represented in the national level. But this picture has changed rapidly as internal liberalization and external trade negotiation went on. Besides the traditional relationship with the national government, most big national service providers began to get organized on the community level and to work with the Commission.

The European service operators get organized to guarantee their interest representation along the lines of a multilevel system of competence division. Because all political activities always necessitate resources, this multilevel approach was costly and cumbersome. The telecommunication network operators were organized trans-nationally by establishing the European Telecommunications Operators Association (ETNO) in 1992, and afterward by European Service Forum (ESF) in 1999. Many service providers began to form business representation both at the national and the community level. Taking Deutsch Telecom for example, it has been the direct member of the national employers' association BDI (Bundesverband der deutschen Industrie) after the domestic reform. It was then indirectly represented through BDI by the Union of Industrial and Employers' Confederations of Europe on the community level.[91] But Concerning GATS-related issues, they work through the ESF, but their government affairs branch offices in Bonn and Brussels allow them to keep in direct contact. About the same

[91] Also the European Information & Communications Technology Industry Association through BITKOM, a German information technology association.

strategy applies for other European network providers.

The business mobilization at the community level has led to changes to supranational lobbying. During the Uruguay Round, ETNO was unable to develop a common stance prior to the internal telecommunication reform, because the domestic telecommunication providers were not ready to support the multilateral talks. There was lack of supranational lobbying on the association level. And in 1996, the network operators began to develop clear preferences and decided to profit from the global market. But most of them were still in close contact with the national government, in order to make sure that their domestic market will not be endangered by the liberalization process. Later on, they began to lobby for reciprocal liberalization of basic telecommunication services through ETNO and ESF in WTO. After 2000, most EU service companies cite the ESF as one of the most important ways of voicing their concerns about GATS-related issues.[92] At the same time, they were also seeking to maintain advantages and restrictions on foreign market access through their national government. There was an obvious two-way logic of lobbying (Woll 2004, 2006).

7.2.3 Reversed business lobbying: the interaction between business actors and the Commission

But the business mobilization didn't go to political interaction automatically. It was the Commission that took the initiative to bridge this gap through a top-down process (Woll 2006). In 1998, the Commission tried to include a broader range of interest groups by instituting a Civil Society Dialogue on the upcoming round of negotiations to promote the involvement of societal interests in its policy making (Van den Hoven 2002). The European Commission has made a concerted effort to integrate firms and other private actors into the trade policy-making process in order to gain bargaining leverage not

[92] Interview with ESF officials.

simply vis-à-vis third countries, but also over its own member states (Van den Hoven 2002; Woll 2006).

This reversed lobbying had two major consequences. First, it helped to involve the business actors more actively into the political interaction at the supranational level. The Firms thus had an opportunity to experience a learning process during interactions and develop their clear-cut preferences. When the firms didn't have any idea what was at stake for them for further liberalization in this sector, it was through this kind of political participation that they began to learn the stakes at hand and express their own concerns and requests. The firms then had to make a choice between the different levels of the European polity structure in terms of trade policy. Traditionally, European business actors go through the national door, lobbying to protection or liberalization by affecting the government's position in the Council of Ministers. But after the corporate actors have a very good chance of working closely with the European Commission, they have another opportunity to put forward their preferences. Firms thus began to face a trade-off between choosing the traditional national door or going to the supranational level for business lobbying.

This reversed lobbying process is to a large extent attributed to the ever enlarging internal competence of the Commission since the Single European Act (Schmidt 2009). When more and more internal regulatory competence is concentrated on the community level, it is a natural choice for the business actors to switch their lobbying platform from national level to the supranational level. As for the Commission, it has more liberalization oriented or pan-European oriented preferences based on its institutional setting. Thus the preferences of the service providers are also influenced by that of the Commission in the interaction process. If they want to propose either trade liberalization or EU-wide regulatory restrictions on trade, it is more effective to go to the supranational

level for lobbying (Woll 2006). Reversely, if they want to maintain contacts with the European Commission and hope to integrate precise demands in the details of trade regulation, it would be better for them to respond to the Commission's preferences and develop EU-wide preferences (Young 2004). In the case of European service industries, it is liberalization through new global regulation that constitutes a pan-European policy after the middle 1990s.

The second consequence of the reversed lobbying is the strengthened position of the Commission vis-à-vis the member states. When firms increasingly want to seize the opportunities available to them at the supranational level, the Commission can deliberately choose the firms whose preferences are close to their own (Van den Hoven 2002). In this way, the business actors have to face the trade-off of pressing for their immediate advantages and responding to the interests of the European Commission, which promises them access to the policy-making process (Broscheid and Coen 2003). European Commission has made a concerted effort to integrate firms and other private actors into the trade policy-making process in order to gain bargaining leverage not simply vis-à-vis third countries, but also over its own member states (Van den Hoven 2002). The participation of interests groups can help to increase the legitimacy of the Commission on external trade issues.

Nevertheless, it is necessary to note that this supranational lobbying doesn't mean the end of national lobbying. On the one side, business access is not automatic; it depends on the degree to which private actors can offer the elements the Commission is interested in. Business lobbying on trade is thus marked by a particular exchange logic, where firms provide expertise and support in order to gain access to the policy process (Bouwen 2002; Mahoney 2007). In reality, the delegation nature of trade policy determines that lobbying on trade policy still concentrates on the interchange between the Commission and

member governments. The individual groups have few means of putting direct pressure on the Commission to ensure that their demands will be taken into account. Within each member state, they can try to lobby their governments to affect the consensus between member states and the Commission during all phases of the policy cycle.

7.2.4 Firms active lobbying in form of well organized platforms.

The interaction process between the Commission and the business actors favors systematically the interests of the big service providers promoting global liberalization. In selecting private partners, the Commission follows two objectives: first, it needs technical expertise for its policy proposals (Bouwen 2002); second, it is interested in finding pan-European solutions to prevent disputes between the member states that would risk stalling trade negotiations (Shaffer 2003, 78-79). Since the middle 1990s, there is evidence of the strongly organized service industries doing lobbying on the community level.

For example, the European telecommunication firms was gradually involved in negotiations not so much on their own initiative but, most importantly, in response to the active encouragement of the European Commission, which was looking for business support for the difficult service talks in the 1990s. Solicited by the European Commission, European operators therefore adopted a pro-liberalization stance in the mid-1990s, which allowed them to follow and influence the content of the multilateral negotiation in the WTO while still maintaining close ties to their home governments in order to defend national interests on specific issues. Since 1996, ETNO began to show its political support to the multilateral negotiations and helped the Commission negotiate the Basic Telecom Agreement in 1997. Most operators affirm having been in support of the 1997 agreement and having engaged actively through their European association throughout the talks (Woll 2004). What's more, most service providers take part in the

European Service Forum which ensures continued support for the liberalization of service industries and consequentially benefits from privileged access to trade policy-making at the supranational level.

The two-logic lobbying was also evident in the lobbying process of the telecommunications in the last phase of GBT negotiation in 1997. ETNO was at that time lobbying for reciprocal liberalization of basic telecommunication services through the WTO and stood besides the Commission. But the national operators were seeking to maintain regulatory advantages, i.e. restrictions to foreign market access, through their national governments (Woll 2006). For example, the Spanish operator Telefónica insisted on restricting non-EC investment to the Spanish market, despite the fact that it had become an important overseas investor in Latin America (Niemann 2004, 399). Other national networks also tried to guarantee national privileges through the implementation of the EC regulatory framework (Woll 2004, 2006). Member states and their regulatory agencies enjoyed immense freedom to determine interconnection terms and tariffs between networks or to impose universal service conditions (Thatcher 1999a).

To sum up, the business actors began to get involved in the trade negotiations since 1996. The Commission played a very important role in bringing these business interests into the negotiation process, in order to get a stronger position vis-à-vis the member states and the negotiations partner. The great change is that the service providers now have the second channel to conduct lobbying. Most of service providers are more apt to go to the supranational level with a liberalization oriented plan. At the same time, the protectionist preferences still use national legislative actors to conduct effective lobbying, for example, to maintain their advantage in the domestic market. In an extreme case, the service providers then need to decide between lobbying for their immediate advantage at the risk of being ignored and framing their demands in terms of a pan-European interest even if

they are not certain of obtaining an advantage. As a result, more and more service providers choose to conduct lobbying on the Community base. The Commission now has more leeway from the domestic actors to put forward its competence issue.

7.3 Commission facing the member states in 2000 IGC and 2003 IGC

7.3.1 Nice: Commission's preferences and minority report from France

a. The Commission's preference of trade competence in Nice

The 2000 IGC to Nice was understood as immediate response to the eastern enlargement. Under the French presidency, the wide-scale attempt in IGC 2000 was made to identify solutions to the unresolved questions of Amsterdam: the future size and composition of the Commission, the re-weighting of voting power in the council and the expansion of QMV into other areas. There are endeavors to construct a clear delimitation of powers between different levels of the Union. Under this background, it is not so surprising to see that the Nice Agenda included the topic of external trade policy. The Commission thus continued to propose to extend the exclusive competence to the new trade issues. Compared with the 1996 IGC, the Commission had more confidence based on the its *de facto* competence in international trade disputes relating to the new trade issues. For example, it has confirmed the *de facto* daily competence of the Commission in 2000:

"Questions relating to trade in goods, but only parts of investment, services, and intellectual property are already included in the day-to-day EU trade activity. Since the Treaty of Amsterdam, the rest is in an intermediate position: essentially an EU competence, but only to be used when the Council decides so by unanimity"(Commission 2000a).

The Commission wanted far more than the simple change of applying QMV to the external trade. During the 2000 IGC, the European Commission had clearly expressed that that any change in voting procedures to Article 133 (5) EC would not be the best option. Rather, it had proposed to include in Article 133 (1) EC, trade in goods, as well as services, investment, and intellectual property rights: “The Commission would prefer a substantial amendment of the scope of Article 133 by extending it to services, investment and intellectual property rights” (Commission 2000b).

The Commission’s argument was in line with its argument in 1994 ECJ and 1996 IGC. Since there was a need to find adequate and efficient negotiating mechanisms in the framework of the WTO, a reform of Article 133 EC was imminent at Nice (Smith and Woolcock 1999). For the same logic, facing the on-going international negotiations, it was also “in the best interest of the EC to benefit from an IGC to improve the EC’s ability to take international action” (Leal-Arcas 2007, 366). Thus it was decided in June 2000 by the European Council to include the external trade policy on the agenda of the Nice IGC (Council 2000). There, the Portuguese presidency argued that Article 133 (5) EC was part of those provisions where decision by unanimity in the Council should be replaced by qualified-majority voting with regard to the transfer of competence from the national to supranational level.

Another argument was based on the reference to the internal market where the decision procedure concerning services is already QMV. Thus in the preparation of the IGC it has clearly stated that “trade issues at this [Nice] IGC essentially concern the replacement of the unanimity rule by qualified majority” (Commission 2000b). It wanted to thus to “align the decision-making mechanism for trade negotiations on internal decision-making: in the area of services for example, it is illogical that decisions are

taken by qualified majority on internal Market directives, but trade negotiations on the very same subject fall under a rule of consensus (effectively requiring unanimity)" (Commission 2000c).

The Commission's Opinion on the IGC in January 2000 also suggested the extension of co-decision to the common commercial policy. The co-decision procedure was introduced in Maastricht Treaty and simplified in Amsterdam Treaty. Before then, the co-decision procedure is only applied to internal EC legislation and not for international agreements, thus the EP had no substantial power in external trade policies. The Commission wanted to enhance the power of the Parliament, in order to counter the power of the national parliaments. It had thus proposed that commercial policy should come under the co-decision procedure. This proposal was refused by the Council by the principle of parallelism. To the Commission, this failure to increase the role of the European Parliament in EU decision-making under Article 133 EC is "regrettable for the democratic accountability of the Union's trade policy" (Commission 2000b, supra note 11). In short, the preferences of the Commission in 2000 IGC was clear to follow. It was in line with its proposals since the early 1990s, wanting to extend exclusive competence (thus QMV) rule to the domain of services, intellectual property and investment measures.

b. Member states

Despite the interest of the Commission to extend exclusive competence to the new trade issues, some member states attempted to reflect as much as possible the current situation with regard to distribution of competence in order to preserve the existing EU's decision-making *modus operandi*. For example, when the Portuguese presidency supported the commission's proposal to include external trade into the Nice agenda,

some Member States thought that it was not necessary to deal with this same issue in Nice since it had already been addressed in the Amsterdam Summit agenda.[93]

The different positions of each member states can be traced back to their position papers for the 2000 IGC. The former sovereign camp had shrunk to a minimum four years after 1996 IGC. Most of the member states took side on the integration side this time, and expressed their position under the topic of extension QMV to trade policy. For example, the Benelux countries remained pro-integration and wanted the extension of QMV to the area of trade policy,[94] thus supporting the Commission's proposal for exclusive competence in this domain. Austria even called for a reduction of unanimity to a minimum facing the enlargement.[95] Denmark and Italy also supported the extension of exclusive competence to the new trade issues and the QMV rule.[96] Finland followed its position in 1996 IGC and favored the extension of QMV to Community policies (industry, culture and the environment) and trade policy (services, intellectual property).[97] Ireland was firmly at the side of the commission by supporting the role of the EU to strengthen WTO, promoting further liberalization of trade in goods and services. Germany had switched its position in the 1996 IGC and wanted further simplifying of the decision making by "requiring unanimous voting should in principle

[93] Mainly referring to France, Leal-Arcas (2007, 366)
[94] Benelux in agreement on joint contribution to Nice European Summit, http://www.minaz.nl/english/News/Speeches/2000/09/Benelux_in_agreement_on_joint_contribution_to_Nice_European_Summit. The Netherlands favors extending QMV, except for provisions on constitutional matters or which are intergovernmental in character, processes requiring national ratification and provisions allowing exceptions to internal market. IGC 2000:Contribution from the Dutch Government: An agenda for internal reforms in the European Union, 6/3/2000 CONFER 4720/00 http://www.unizar.es/euroconstitucion/Treaties/Treaty_Nice_Neg.htm
[95] Basic principles of Austria's position, 15/2/2000 CONFER 4712/00. http://www.unizar.es/euroconstitucion/Treaties/Treaty_Nice_Neg.htm
[96] IGC 2000: Contribution from the Danish Government:- Basis for negotiations, 7/3/2000 CONFER 4722/00 . http://www.unizar.es/euroconstitucion/Treaties/Treaty_Nice_Neg.htm . QMV should be the rule, with certain exceptions, and with co-decision used for all new QMV areas. 2000 IGC:- Italy's position, 3/3/2000 CONFER 4717/00 http://www.unizar.es/euroconstitucion/Treaties/Treaty_Nice_Neg.htm.
[97] Background and objectives in the IGC 2000, 7 March 2000, http://ec.europa.eu/archives/igc2000/offdoc/memberstates/finland/index_en.htm

be a qualified-majority voting".[98] UK had in essence agreed with the Commission's proposal to extend competence, and retaining competence in areas of key national interest.[99] However, there are indications of a split between those Member States which are willing to give up their right of veto in all but a few areas and those wanting to retain most of the present areas of unanimity. A significant extension to QMV is supported by the governments of Germany, France, Italy and the Benelux countries, while the UK, Spain, Austria and the Scandinavian countries would like to retain unanimity in several areas

There was thus only one member state left with a clear conservative opinion. The French government had a most explicit preference concerning the common commercial policy. But compared to its strong opposition to competence transfer in the past, its position was softened a lot in 2000 IGC. It had retreated from the strong sovereign position and only insisted the specific exception for trade in cultural and audio-visual services (the so-called spécificité culturelle). The final deal was to allow trade in services to be decided by qualified-majority voting, but only after accepting exemptions for France in culture and audiovisual services. The French and other delegations of EU Member States negotiated long hours to come up with the new Article 133 of the Nice Treaty.

For the member states, the stake at hand was directly influenced by the external trade negotiation during the 2000 IGC. Thus the question was only a choice between two options: whether the EC's exclusive trade competence should be broadened to include issues such as services and intellectual property rights, where competence is shared between the EC and its Member States, or whether the catalogue of exceptions to the

[98] IGC 2000 Policy document of the Federal Republic of Germany on the Intergovernmental Conference on institutional reform
http://ec.europa.eu/archives/igc2000/offdoc/memberstates/germany/index_en.htm
[99] Such as taxation, border controls, social security, defense and "Own Resources", The British Approach to the Intergovernmental Conference 2000 - February 2000.
http://ec.europa.eu/archives/igc2000/offdoc/memberstates/uk/index_en.htm

EC's exclusive trade competence (such as investment, services, and intellectual property rights) should remain. It turned out that the final answer was somewhere in between these two positions.

As mentioned above, many member states proposed a case-by-case approach to QMV. Whereas the Commission, rallying some member states, wanted a general rule of QMV with limited exceptions listed exhaustively. However, the case by case approach prevailed (Neuhold 2006, 351). Also, in the Nice negotiations all proposals to include an express mention of "direct investment" alongside "trade in services" to paragraph 5 were rejected by the member states (Heliskoski 2002). It is pertinent to mention that the draft Treaty presented at the beginning of the Nice Summit in December 2000 included a Protocol on the participation of the EC and its Member States in the framework of the WTO under Article 133(4).This text made an effort at better defining the roles of the EC and its Member States in areas of shared competence. Yet, this useful text was unfortunately not included in the final draft.

c. The changes in Nice Treaty

In Nice Treaty, there are two main changes in terms of Art. 133. First, Paragraph 5(so-called fast track provision in Amsterdam Treaty) is replaced by new paragraphs 5-7 of Article 133 EC. Replacing the fast-track provision in Amsterdam Treaty, the new paragraph 5 states:

"*Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, in so far as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6.*"

So with respect to trade in services, the EC's competence has been enlarged from the "cross-border" services to all four types of services. Trade in services and the commercial aspects of intellectual property finally find their legal basis in paragraph 5 and 6. The restriction to commercial aspects of intellectual property stays almost the same as in the Amsterdam Treaty. But for the part of intellectual property not covered by paragraph 5, the Council can extend exclusive competence based on an *ad hoc* basis to the Commission after consultation with EP (Elsig 2002, 132). But paragraph 6 further enumerates special services as exception. For cultural and audiovisual services, educational services, and social and human health services, it still requires both a Community decision and the Member States' consensus (Heliskoski 2002). This means that the competence is shared between the EC and its Member States in those exception cases (Krenzler and Pitschas 2001). Those agreements on issues mentioned in Article 133(6)(2) EC will be concluded jointly by the EC and its Member States as mixed agreements.

The second major modification was made to paragraph 3 of Art. 133. It was added that "the council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal community policies and rules". Furthermore, paragraph 3 was extended to include "the commission shall report regularly to the special committee on the progress of the negotiations". It is obviously the codifying of a well-established practice in the negotiation process.

So under the revised article 133, it reiterates the Commission's legal right to negotiate on behalf of the member states with third countries on issues including trade in goods and trade in services(with a few exceptions), whether in WTO or in bilateral agreements. For the conduct of negotiations concerning new trade issues, the Commission has gained

exclusive competence as the trade in goods. Qualified majority is need in the authorization and ratification stage by the council. No ratification at the domestic parliament is further required by the new 133 Article. Agreements in the exception fields must be concluded as mixed agreements requiring both Community's decision and the Member states' consensus. They can only enter into force after ratification by all national parliaments. It is in this way that the competence in trade in services and commercial aspects of intellectual property finally found their legal basis in the Nice treaty.[100]

As to the modifications in paragraph 3, the word "shared competence" appears for the first time in the treaty text. Thus the *de facto* existence of shared competence was codified in the formal treaty text to define the relationship between the Community's powers and those of the Member States. Article 133 (5)(4) EC as amended by the Nice Treaty gives Member States the right to "maintain and conclude agreements with third countries or international organizations insofar as such agreements comply with Community law and other relevant international agreements." Thus, EC competence does not stop the continuation of Member States competence in these fields. Besides, the revisions show the willingness to balance the internal integration and the external presence. The principle of in *foro interno , in foro externo* was explicitly restated in the paragraph 6, which ruled out any agreement which "go beyond the Community's internal powers, in particular by leading to harmonization of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonization". This strong linkage between internal and external competences reverses the ERTA judgment before the 1/94 ECJ ruling.

To sum up, the Art. 133 in Nice Treaty underwent the most substantial changes since

[100] There are authors who didn't see it as an expansion of exclusive competence, arguing the trade negotiations still need to be jointly conducted by the commission and the member states, because the trade agenda usually include the shared competence issues, see, for example, Leal-Arcas (2007).

Treaty of Rome. After a long period of political bargaining, the Commission finally got exclusive competence in trade in services and commercial aspects of intellectual property. Although there are exceptions and unanimity requirements for those exceptions, it is still a victory for the Commission. Thus the Commission considered the modifications a step in the right direction in its first assessment of the results, although it is far from perfect (Commission 2000c, supra note 11).

7.3.2 Commission facing the member states in 2003-2004 IGC, changes in Lisbon Treaty

After the adoption of the Nice Treaty, most EU leaders were eager to take further institutional changes to get prepared for the eastern enlargement. In December 2001, a Convention on the Future of Europe was launched by the European council after the Laeken Declaration. The aim of the European convention was to develop a European constitution, which was finished and presented to the Italian Presidency in July 2003. Based on the draft constitution, the member states started the IGC on 4 October 2003 and "confined itself to the most important questions, with the result that it did not have to renegotiate the entire text produced by the Convention".[101] The IGC was officially finished on 29 October 2004 when the constitution was signed by the member states. But this Constitutional Treaty didn't come into force because of the refusal of Irish and French referendum. Following a subsequent IGC in 2007, this Constitution was revised under the name of Lisbon Treaty, which came into force on 1 December 2009. As for the Common Commercial policy, the Reformed Treaty of Lisbon preserves the original text of the Constitutional Treaty almost unchanged. Thus this part focuses on the 2003-2004 IGC to analyze the preferences of the Commission and the member states.

[101] Work of IGC 2003/2004, see http://europa.eu/scadplus/cig2004/index_en.htm

a. Commission and member states: consensus for exclusive competence

The 2000 IGC had discussed the risk of blocking the efficiency of EU institutions by unanimity voting. It was the European Convention's task to reduce the maximum number of areas over which EU Member States retain their veto power, such as taxation in the case of the U.K. or education in France (Cremona 2003). Under this environment, the main focus during the 2003-2004 IGC mainly fell on the overall institutional changes, which include the changes to improve the current situation on trade issues created by the Nice IGC. The common commercial policy was a minor topic compared with the common foreign and security policy in the European convention and the Constitutional treaty (Leal-Arcas 2007, 389). Article III-217 (1) of the Convention's draft treaty stipulated that the "common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."

The Commission's main focus was to reduce the unanimity voting to a minimum and to increase its own legislative and executive power (Commission 2003). In terms of trade competence, the Commission has emphasized the further centralization of trade competence, in order to guarantee an efficient and speedy decision-making "not just with a single voice, but through a single mouth" in global trade negotiations. For example, the trade commissioner Lamy had reiterated the importance of the commission's exclusive competence:

"the Commission should have competence, as in trade, to negotiate on all matters pertaining to the management of globalization (e.g., environment, transport, energy negotiations, commodity organizations, OECD, FATF, WHO, FAO, etc.), and this under the full control as well as scrutiny of both the European Parliament and Member States"(Lamy 2002b).

As seen in 2000 IGC, the preferences of the member states in terms of trade competence had evolved significantly. By the time of 2003-2004 IGC all of the member states agreed upon the further extension of QMV as a general rule, only with difference on the extent and exceptions.[102] The Benelux countries stayed pro-integration and criticized the extension of QMV and Co-decision in the draft constitution "does not go far enough".[103] For example, the Dutch government expressed clearly its support to extend exclusive competence to "all trade in services, with no exceptions for cultural and audiovisual service".[104] Austria, Denmark, Ireland, Italy and Portugal had expressed similar opinions in terms of extending QMV to the full scope of trade policies. Finland supported the objective of the Commission to further reform the common commercial policy in order to meet the new structures of international trade, but wanted to retain the decision-making regarding public basic services at the national level.[105]

There was also significant change from the French position. The analysis had attributed France to the core of the sovereignty camp opposing further transfer of exclusive competence in the middle 1990s (Meunier and Nicolaïdis, 1999). But this was contradicted by the direct change of wind in 2003. In a common declaration with Dutch Government, France had explicitly wanted the extension of the monopoly role of the

[102] For example, UK wanted to retain unanimity rule in areas of vital national interest such as tax, social security, defence, key areas of criminal procedural law and the system of own resources. See, "A Constitutional Treaty for the EU - the UK's Approach", statement by Jack Straw, Britain's Foreign Secretary, to the House of Commons - London, 09/09/2003, http://ec.europa.eu/archives/futurum/congov_en.htm

[103] Mémorandum du Benelux : "Un cadre institutionnel équilibré pour une Union élargie plus efficace et plus transparente', 04/12/2002, http://ec.europa.eu/archives/futurum/documents/press/oth041202_fr.htm. Position of the Belgian Government on the draft Constitution for the European Union - Brussels, 19/06/2003, http://ec.europa.eu/archives/futurum/congov_en.htm.

[104] Government memorandum Dutch contribution to the IGC on a Constitutional Treaty for the Union, 16/09/2003 http://ec.europa.eu/archives/futurum/congov_en.htm

[105] It has also supported a even larger extent of QMV rule, but oppose the a longer-term President to the European Council. Report by the Finnish Government to the Parliament on the outcome of the work of the European Convention and defining Finland's objectives in the Intergovernmental Conference starting on 4th October 2003 - press release Helsinki, 29/08/200

commission in legislation. It even proposed to loosen the control mechanism on the Commission : "*afin de renforcer le rôle central de la Commission en matière d'exécution, il conviendrait d'assouplir les règles de comitologie, selon des modalités qui doivent être précisées par la Convention*.[106] A similar statement to simplify the comitology procedure was also shared by the German government.[107] UK expressed its cautiousness and wanted a case by case discussion in terms of the extension of the community's competence to "energy, intellectual property, sport and administrative cooperation".[108] UK and Spain had proposed to improve oversight of implementing legislation via a "call back" mechanism for "delegated acts" in order to hold the Commission to account.[109]

Thus compared with the positions in 2000 IGC, there was no obvious opposition to the extension of exclusive competence in the new trade issues any more. Even France had abandoned its strong ideological bias and supported further integration and a greater role of the Commission. It was no wonder to see that in the final text of constitutional treaty in 2004, the community is to be given exclusive competence in all the trade matters.

b. The changes in Constitutional Treaty and Lisbon Treaty

After a long negotiating process, the failed constitutional Treaty finally came into force under the name of Lisbon Treaty in December, 2009. The Lisbon Treaty included common commercial policy in its article 188 B, C and N (Article Articles III-314 -315 and -325 of the Constitution Treaty). Most of the contents remain the same in Lisbon

[106] "Strengthening the role of the Commission", Franco-Dutch contribution to the Convention, 25/03/2003, http://ec.europa.eu/archives/futurum/congov_en.htm
[107] the Franco-German declaration - Nantes (Bundesregierung / Présidence de la République), 23/11/2001 http://ec.europa.eu/archives/futurum/congov_en.htm
[108] A Constitutional Treaty for the EU - the UK's Approach", statement by Jack Straw, Britain's Foreign Secretary, to the House of Commons - London, 09/09/2003 http://ec.europa.eu/archives/futurum/congov_en.ht
[109] Contribution by Ana Palacio and Peter Hain, members of the Convention:"The Union institutions" - 28/02/2003 http://ec.europa.eu/archives/futurum/congov_en.ht

Treaty compared to Constitution Treaty, excepted about some minor changes. There are three main changes with respect to competence debate in new trade issues.

First, the community has gained exclusive competence of all the new trade issues in the common external economic relations. All key aspects of trade have come under the exclusive competence of the Community, thus bringing to an end of the long standing debate on competence in these fields.[110] It is the new article 188 B-1 that specifies the scope of the common commercial policy and explicitly extend its scope to services, commercial aspects of intellectual property rights and even foreign direct investment:

"the common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies."

It is thus clear that trade in services, commercial aspects of intellectual property rights and foreign direct investment will be covered by the exclusive external and internal competence of the union. Compared to Nice Treaty, The Lisbon text does not provide for an explicit exception from the exclusive competence, as Article 133(6) of Nice Treaty text does for some services. The Lisbon Treaty excludes harmonization, for instance, in fields such as occupation, social policy, health, industry or culture.[111] Article 188B-2 holds: 'European laws shall establish the measures defining the framework for

[110] Some exceptions, As for the aim of preserving the Union's 'linguistic and cultural diversity', Lisbon Treaty provides for unanimity in the negotiation and conclusion of agreements in the fields of culture and audio visual services. The same applies to the social services, educational and health services which are covered by Art. 207(4).

[111] An international trade agreement containing provisions addressing one of these aspects will qualify as a mixed agreement

implementing the common commercial policy'. The community (commission) thus gets not only the external competence to conclude international trade agreements, but also the he implementation of these agreements (internal competence). Trade in services and commercial aspects of intellectual property rights will be covered by the exclusive external and internal competence of the Union.

The second major change in Lisbon Treaty is the inclusion of foreign direct investment into the EU competence. In 2000 IGC, there were proposals trying to include an express mention of "direct investment" alongside "trade in services" to paragraph 5, which were finally rejected (Heliskoski 2002). Before Lisbon Treaty, bilateral investment treaties remained within the competence of the Member States. The extension of the common commercial policy to foreign direct investment therefore raises the question whether the Lisbon Treaty intends to give the EU the exclusive competence to negotiate and conclude investment agreements. In reality, although FDI accounts for two thirds of the world's money and against one third of trade, it is less possible to conduct a multinational framework for FDI. Currently most states preferred the spaghetti bowl of bilateral investment agreements.[112]

Third, the European Parliament has gained an increasing role in the decision making process of the common commercial policy. This is a great improvement compared with the Treaty of Nice, where The European Parliament was formerly excluded from decision-making under Article 133 EC (Herrman 2006). It is consulted for the conclusion of agreements that go beyond trade policy and has to give its assent for a number of other issues (Association Agreements, agreements setting up institutional frameworks etc). According to Lisbon treaty, the EP is required to give its assent to conclude trade

[112] In the WTO framework it was possible to agree only on limited aspects related to investments, namely the TRIMS Agreement. For details see Matsushita et al, 2006.

agreement. Art. 290 gives the EP scrutiny powers extending to a right to veto the entry into force of delegated acts, thus gaining shared power with the Council in deciding trade mandate. This veto power has increased the role of the EP in trade policy making substantially.

The Lisbon Treaty had a clear-cut definition of exclusive competence of the community. According to Lisbon Treaty, when certain competence is transferred to the Community, it precludes the prerogatives of member states in that sector. The community has exclusive powers to conduct internal legislation and external negotiations in all sectors where it has exclusive competence. Article 2 A of the Lisbon Treaty makes it clear that in areas of exclusive competence Member States are precluded to overlap Union's prerogatives:

"When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts."

The Lisbon Treaty also repeats the Commission's representative role in dispute settlement of trade agreements. Based on its exclusive competence in CCP issues, the Commission will stand always on behalf of member states both as complainant or defendant. All WTO-related actions- consultations, panel and Appellate Body proceedings and DSB meetings will continue to fit in the job description of the Commission. Member States are informed on the developments on dispute settlement during the 133 Committee meetings and the INTA committee of the EP will continue to be briefed on latest evolutions. Under the current practice the Commission circulates once a month a detailed report on dispute settlement proceedings involving the Community to Directors-General of Trade Ministries of the Member States. The *de facto*

competence of the commission before Lisbon treaty is thus legally confirmed by this new codification.

The changes in Lisbon Treaty in terms of the scope of exclusive are significant compared with the former cases. The Commission gains exclusive competence in all the new trade issues including in FDI. The Union (more specifically the Commission) will replace the member states in all international level dealing with foreign commercial issues (WTO, UNCTAD, OECD). Also, in terms of the Community's role in dispute settlement, the Lisbon Treaty has given a clear text about the job profile of the Commission. The increased EC competence has important repercussions on the ratification process of trade agreements. According to Lisbon Treaty, the role of domestic parliament is minimized. It removes any shared competence in trade policy and grants the Commission exclusive competence in all areas concerning the WTO negotiations. It precludes national parliaments from ratifying any future WTO agreements. This increases thus significantly the role of the Commission in external trade negotiations, while reducing the influence of national parliaments on trade policy.

7.3.3 Explaining the exclusive competence of the Commission: converged international and domestic preferences from Nice to Lisbon

The European Commission had campaigned over 10 years to obtain exclusive competence in the new trade issues. The final compromise was the extension of the Commission's exclusive competence in all WTO trade issues. There is a clear thread to follow in Nice and Lisbon in terms of the expansion of EC exclusive competence in the new trade issues. In Nice Treaty, many negative aspects of Opinion 1/94 have been codified by the new Article 133, which represents a small step forward in strengthening the EC's capacity to act on the international sphere. The Commission finally got an expansion of exclusive competence on a legal basis, although many negotiation and

conclusion of international agreements are still subject to the unanimous decision within the council and the ratification by the member states. It was then completely redefined in the Lisbon Treaty (Constitutional Treaty) to give the Commission exclusive competence in all the new trade issues including investment measures. This represents a significant strengthening of the supranational role in international trade issues. This development is attributed to the two explaining variables in this study: the increasing international embeddedness and the evolution of domestic preferences.

a. Responding to the external change:

The institutional development of EU can not be separated from its external environment. Starting from the end of Uruguay Round, the European community had to face the pressure from the development of the international trade system. The European Commission, because of its direct embeddedness in international trade institution, took the initiative and brought the competence debate to the fore. The member states, however, were only responding very slowly to this change because of their sovereign concern on those domestic-sensitive issues. In the 1996 IGC, responding to the on-going GATS negotiation, some member states had changed their positions and turned the sovereign camp to a minority. The internal dispute was reflected on the pragmatic design of granting the community a “fast track competence” with *de facto* exclusive authority and autonomy.

As indicated above, the community’s international embeddedness further developed after the 1996 IGC. This was reflected on two fronts. On the one hand, there were continuous political endeavors to initiate a new round of international trade negotiation, which was witnessed from WTO 1996 Singapore conference through the 1999 Seattle Conference to the 2001 Doha conference. Especially the starting of the “build-in agenda” on service

negotiation in early 2000 and the official starting of the Doha Round in 2001 had given enormous pressure on the internal dispute of trade competence inside EU. On the other hand, the Commission had benefited from the strengthening of institutional setting after the founding of WTO in 1995. As is shown above, the Commission was favored by the new legal procedure of WTO. Despite the internal dispute, the commission enjoyed a *de facto* exclusive representation and competence in the trade disputes concerning the new trade issues. There was a peak of legal disputes concerning the new trade issues from 1997 to 2000, which has given the Commission more leeway to persistent its own preferences and to persuade the member states to transfer more competence.

The concern of external pressure is reflected clearly in the Treaty changes. Starting from Amsterdam Treaty, the EC has been trying to adapt itself to institutional changes in accordance with today's international relations reality. The Amsterdam Treaty was to prepare EU itself for the coming millennium, although it postponed major EC institutional reforms in the final text. The institutional reforms in Nice Treaty were seen to be adopted in order to be able to survive and maintain credibility as an international actor (Meunier and Nicolaïdis 2001). The Lisbon Treaty need to guarantee the efficient working of the EU with 27-30 member states which will not be homogeneous since they will not all be on the same macroeconomic level. This is also the case of trade policy, even if it is one of the most integrated policies within the EC. The external factor (Doha Round) was in this sense especially important to the EU member states. It provided the background of the 2000 IGC and the Convention on the Future of Europe in 2003. It functions as a reminder to EU Member States of the need for efficient and speedy decision-making if the EC was to make a major contribution to global trade negotiations.

For example, the fast track competence in Amsterdam Treaty was to put aside the temporary dispute and to guarantee the Commission's efficiency in international trade

negotiations. The development in Nice Treaty was in direct response to the built-in agenda of the WTO negotiations which states that the new trade areas should be reviewed for further liberalization every five years. This external pressure is also obvious in the Lisbon treaty. There is a clear trend of greater centralization of trade policy and the reduction of the member states' influence in trade policy in Lisbon Treaty. The Art. 181 provides legal basis for a comprehensive external competence, without even providing the union with full internal competence to adopt legislation to implement trade agreements. This is a contradiction of the traditional "*foro interno, in foro externo*" principal (See: Emiliou and O'Keefe 1996, 38). This is for the purpose of assuring the unitary representation of the Community within WTO. The only explanation is to adapt itself for the sake of efficiency and authority in international trade negotiations where the EU has been wishing to take a leading role.

Some might argue that the centralization of common commercial policy in the supranational level was part of a general response to the coming eastern enlargement. Yes, the enlargement was perceived as a rationale for greater centralization of decision-making in the supranational institution, as there was fear that the twenty-five veto powers would paralyze the EU. But in terms of the trade competence concerning the new trade issues, it was the Doha Round that was the background both to the 2000 Intergovernmental Conference and to the Convention on the Future of Europe (2003-2004 IGC). For example, the Commission had tried to bring FDI into its broad comprehension of CCP competence in the early 1990s. But this was only possible in the draft of Constitutional Treaty when the Commission was trying very hard to get the issue of investment on to the agenda Doha Round. The external embeddedness helps the Commission to continue its preference shirking on the one hand, and remind the member states of the need for efficient and speedy decision-making if the EU wants to take a leading role in global trade negotiations on the other.

The pressure from EU's increasing embeddedness not only resulted to the external trade competence, it also had direct impact on the domestic legislature of member states. According the Lisbon Treaty, the negotiation and implementation of these agreements would be more unified and centralized than before, although the Union would need to coordinate with EU Member States before trade agreements could be concluded. The implementation of an international agreement by the Union will put direct political pressure on EU Member States, which will result in the change of domestic legislation. Since EU Member States will only have a formal competence to implement international agreements (Leal-Arcas 2007, 390), the Commission is further favored by its increasing embeddedness in international trade system.

b. Evolution of domestic preferences

The external pressure, however, does not function alone without the impact of domestic preferences. According to the classic trade theory, international trade agreement will have distribution effect on the domestic constituencies, which will lead to the different lobbying groups with protection or liberalization orientation (Rodric 1994). If there were strong opposition from domestic service industries to oppose further liberalization, then it is better to main the status quo and let the member states have firm control on the relating trade matters. On the contrary, if there is strong liberalization support from domestic service providers, that preference might accumulate on the community level and help to persuade the member states to transfer its competence to the supranational institution.

As indicated in last chapter, the business service providers experienced a turning point in 1996 and learnt to develop their clear-cut preferences supporting global liberalization.

Former monopolies with important home markets abandoned their earlier calls for subsidies and protectionism and joined competitive multinationals in the demand for global markets. This trend was further strengthened in the late 1990s. Most of the domestic service providers began to adopt a trans-national and international strategy to prepare itself for the global liberalization. This change of preferences was a response to the dramatic internal and external change. Internally, taking telecommunications as example, about 80 per cent of member States bound to the 1 January 1998 deadline had transposed most of the new legislative framework (Holmes and Young 2002). There was then full competition of regulation reform in most of the member states and more concentration of authority in the Community. The reversed lobbying process initiated by the Commission had pushed the large service providers to embrace liberalization preferences. This development had dragged the business actors into direct play on the supranational level and opened a back door on the national level of lobbying. The constraints of the multi-level decision making and the gradual concentration of executive power in the commission, has influenced the preference evolution of the domestic service providers, as they turn more and more liberalization-oriented and go to the community level with pan-European or liberalization proposals (see also, Woll, 2008; Van de Hoven, 2002).

Externally, the first GATS Agreement in 1997 and the build-in agenda of service negotiation in 2000 had opened great window opportunity to the internal service providers to consider a global strategy. For example, until the GATS agreement on basic telecommunications services (WTO, 1997), rules for the multilateral liberalization of telecommunications services has been completely lacking. This vacuum motivated the need for TNCs to pressure States to act in their interests, thus taking part in the lobbying process (Stopford, 1994). The formal coming into force of the GATS agreement on market access on 5 February 1998 greatly assists new entrants, especially *de novo* firms

that might not otherwise have the leverage to be able to secure market access on fair terms.

This external influence was also witnessed by the parallel timetable of the internal reform in telecommunications and the external negotiations. Facing the external changes, the Commission and Council's preferred means of achieving the reform objective is via multilaterally agreed liberalization (Council 1994; Commission 1993). This had direct influence on the lobbying habit of the service providers and led them to put more resources on the community level to influence the position of the Commission. The big service providers thus tend to get organized on the Community level and express their liberalization preferences. This was especially witnessed by the lobbying effort of ESF which had direct contact with the senior trade officials in the Commission and had issued intensive proposals with explicit preferences of more service liberalization.[113]

The external regime evolution has shaped the preference of the domestic actors and led to the emergence of a great number of transnational companies after the 1995. There was an obvious international expansion of telecommunications services in the late 1990s. Similar trend can also be found in financial service and other service sectors. Thus from the late 1990s, there was pressure from domestic service providers for more liberalization and more competence in the community level. Compared with the 1990s when they had no influence on the political process, they can exert more direct influence in the late 1990s. For example, the ESF had been viewed as the most important representative for the European service industries concerning GATS negotiations.

By the end of the 1990s, the pressure from the international trade embeddedness was echoed by this domestic development. The evolution of domestic preferences had thus

[113] See, ESF website: www.esf.bl.

opened a back door on the national level and pushed the member states to give up their sovereignty concern. The Commission finally can find very useful leeway inside the member state to persuade them to give up their sovereignty concern in the new trade issues. The member states, in contrary, were confronted by the waking of the big domestic service providers, who want more market share in the global liberalization. Less national control and more community competence in external trade negotiation is better for that purpose. The principals thus found itself in the middle of nowhere and had to face not only the preference shirking from the Commission, but also the pressure from domestic business actors who can circumvent the national government and directly lobby in the Commission. Facing that kind of change, there is no other choice but to delegate more power and competence to the supranational institutions.

7.4 Less principal control and more supra-nationalism?

7.4.1 Principals don't let their hands go: oversight procedures in Nice and Lisbon

a. The pragmatism of the principals

From the very beginning, the member states have adopted a pragmatic attitude toward the exclusive competence of the new trade issues. The internal dispute, for example, did not prevent the EU and its member governments from participating collectively in multilateral services negotiations, from Uruguay to Doha. During the Uruguay Round, the Commission and member governments agreed to negotiate collectively on all service issues, and disagreed about whether the EU or its member states could conclude international services agreements. Subsequently (in November 1994), after the ECJ ruled shared competence, there was a special code of conduct for the sectors specific negotiations on financial services and telecommunications from 1995 to 1997. This code of conduct requires a "close cooperation" between the member states and the

Commission. This pragmatism was continued in the revision of Art. 133 in Amsterdam treaty, with the design of a “fast-track competence” to the commission.

This pragmatism is rooted in the consideration for efficient negotiation and bargaining. In international trade negotiations, services were only part of a much wider set of topics in which the “package deal” is the usual form. The member states were well aware of the increased negotiating power of speaking with “one voice”. Thus, although they didn’t agree to transfer more competence to the Commission in the beginning, they cannot ignore the need for efficiency in the international trade negotiations. The Commission had also continuously used this as an argument trying to persuade the member states for further competence transfer. This is in line with one of the core statements of PA framework that the principals delegate their power for functional reasons (Pollack 1997, 1999). According to PA, the principals should have effective control mechanism on the delegated power to prevent preference shirking of the agent. It is now necessary to look at the control mechanism in Nice and Lisbon Treaty and to examine the level of control of the principals after more power was delegated.

b. The member states oversight procedure in Nice:

In the time of 2000 IGC, most member states had changed their position to support the Commission’s exclusive competence of the new trade issues. This development was the result of a slow response to the changes both in the international level and the domestic level. For the sake of efficiency in international trade negotiations, they have agreed in principal to delegate more competence to the community. But there is still the sovereignty concern which was reflected in the oversight procedures. The member states were cautious to find a balance point between the international performance and the sovereignty concern, which was well reflected by the Nice Treaty.

For example, the Nice Treaty has for the first time used the word "shared competence" to refer to a situation where EC competence in respect of a given matter exists but is not exclusive.[114] Thus the *de facto* existence of shared competence was finally codified in the formal treaty text. Also, there was attempt to draw a clear line between the exclusive and shared competence between the community and the member states. Although the common commercial policy has traditionally been regarded as one of the areas of exclusive external EC competence, the new subparagraph (5)(4) of Article 133 of the Nice Treaty makes an exception to this principle by preserving the member states' right to "maintain and conclude agreements with third countries or international organizations insofar as such agreements comply with Community law and other relevant international agreements". This was to guarantee the member states authority on issues where there is no common interest to justify action by the European Community. It also means that the centralization of EC competence does not stop the continuation of member states competence in these fields under certain circumstances.

The role of comitology procedure was also strengthened in the Nice Treaty. In the two-tire delegation model, the 133 committee has always been briefed and consulted by the Commission as a buffer between the commission and the council. But historically, there were efforts from both sides (agent and principal) to decrease or increase the extent of oversight control. For example, during the IGC leading to TEU, the Commission wanted to conduct negotiation without constant information exchange with member state representatives, thus to reduce the principal's control. And in 2000 IGC to Nice, the French wanted to include a provision to make the council presidency as a negotiator alongside the Commission, to strengthen the principal's control (Elsig 2002, 132). Both didn't find their way into the final version of the treaty modification. The compromise in

[114] Art. 133, subparagraph (6)(2)

Nice Treaty was in the paragraph 3 of Art. 133, asking the Commission to report regularly to the special committee on the progress of the negotiations. The codifying of the well-known practice into the Treaty text is an evidence of the principals' desire to put the agent under control. This shows again that the struggle for national representation in the EC institutions is "a sign of Member States' mistrust of supranational decision-making procedures in general".[115]

The main issue at stake in Nice was the division of responsibilities between the EU and its Member States.[116] In the words of the European Council, Nice was about "how to establish and monitor a more precise delimitation of powers between the EU and its Member States reflecting the principle of subsidiarity".[117] In the case of CCP, because of the exceptions clauses (cultural and audio services, etc.) in the Art. 133 of Nice Treaty, the enigma of EC trade policy on issues of trade in services and intellectual property rights continues to stand up in reality (Cremona 2003). There was need for unanimity if only one of the services sectors or intellectual property rights covered by the agreement comes under Article 133(5)(2) EC. In that case, the national parliament would be still in control, as the agreement covering one of the exception sectors would need a national ratification. In real negotiations, there might be strong control from the member states in terms of GATS and TRIPs matters, as the exceptions clause cannot be separated from the whole negotiation agenda.[118] In this sense, the member states have not loosened their control, even if they had delegated exclusive competence to the Commission.

This controversy reflects the member states' anxiety facing the pressure for more efficiency while not willing to let go the full national control. Thus although it was a big step forward more exclusive competence for the community, the result in Nice was not a

[115] Yataganas, supra note 1.
[116] Yataganas, supra note 1
[117] See <http://ue.eu.int/cigdocs/en/cig2000-EN.pdf>.
[118] Article 133 (5) of the Nice Treaty.

stable equilibrium. There is great possibility that the EU representation in international arena will be split by double authorities, considering the exclusive scope of negotiation agenda. This will still impair the EC's efficiency and enable the negotiating partners to play off the EC negotiators against each other (Krenzler and Pitschas 2001). In this sense, the states need to loosen more of their control on the agent, which was latterly realized in the revised text of Lisbon Treaty.

c. Oversight and control procedures in Lisbon

The Lisbon treaty continued to clarify the power distribution between the community and member states. It specified a threefold classification of competence: exclusive competence, shared competence, and supporting action.[119] In terms of trace policy making, the community gains a comprehensive external competence, thereby covering all fields of the world trading system. The Art. 181 of Lisbon Treaty has removed any shared competence in EC trade policy. The direct consequence of that is the decreasing role of the member states in the process of policy making. Since the member states only have a formal competence to implement international agreements, national parliaments are excluded from ratifying any future WTO agreements. The control of the principals on the making of trade policy was thus further decreased in Lisbon Treaty.

There is further transfer of exclusive competence to the supranational level compared with Nice Treaty. The scope is increased in two aspects. First, the "shared competence" concerning cultural and audiovisual services, educational services, and social and human health services is removed. Second, investment is included in the scope of the common

[119] The EU can legislate alone and adopt legally binding acts in areas of exclusive competence. In areas of competences shared between the EU and its Member States, both can intervene. In areas of support, the legally binding acts adopted by the Union (law, framework law, regulation and decision) on the basis of provisions specific to these areas, may not entail harmonization of Member States' laws or regulations

commercial policy. More competences have been given to the Commission, in order to facilitate EU's leading role in international trade negotiations. The transfer of areas of decision-making to the supranational level clearly weakens the national interests in the various EU Member States. Nevertheless, there is clear indication Provision of Art. 2. that the enlarged external competence should not penetrate the internal competence, making sure that one cannot harmonize internally by means of an external policy.

"The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonization of legislative or regulatory provisions of the Member States insofar as the Treaties exclude such harmonization."

The principal's control on trade policy making is further reduced in Lisbon Treaty. This was already reflected by the attitudes of some member states during 2003-2004 IGC. Both France and Germany had proposed to simplify the comitology procedure and extend the monopoly role of the Commission in legislation in 2003 IGC. The French government even proposed to loosen the control mechanism on the commission. Although this proposal didn't see the light in the final treaty text because of the opposition of some member states (e.g. UK and Spain), it still shows dramatic changes from the member states concerning the delegation of power. This trend, however, is clearly reflected in the strengthening of the EP's power in trade policy making. The Lisbon Treaty has given significant power to the EP in the decision making process of the common commercial policy. The empowering of another supranational institution in the trade policy, compared with the decreasing control of the member states, shows an interesting picture of delegation and control concerning the trade politics of EU.

7.4.2 The tension between the member states and the new institutional setting: more supra-nationalism?

The changes in Lisbon Treaty have made the Union's external trade policy more federal. Not only the Commission gets exclusive competence in all the trade topics in WTO, the European Parliament is also empowered with substantial power in the making of trade policies. In contrast, the national competence is further decreasing while national parliaments don't take part in the ratification of trade agreements any more. There is a clear centralization of trade policy making in the supranational institution. This development had important implications for the revision of the principal agent approach. It shows evidence that the agent can effectively take advantage of international embeddedness and domestic preferences to push the principal to transfer more competence. This is also in line with the IPE argument that the changes on the international level have important impact on the domestic level. Considering the EU practice, the member states are not only "delegating" their competence, they are actually "giving up" their competence to the supranational institutions, in order to adapt itself to the pace of globalization process.

This trend was confirmed by the changes in Nice treaty and Lisbon treaty, as most of the policy areas adopt the QMV rule. In the 2003-2004 IGC, even the French government had proposed to increase the monopoly role of the Commission and to decrease the role played by the comitology. Responding to the evolution of external trade system, the Lisbon Treaty grants the community with exclusive competence even in areas where they have internally shared competence. This is an obvious strengthening of the role of supranational institutional vis-à-vis the member states. But on the other hand, it might also cause institutional conflicts between the two levels, as the member states still have the domestic competence to legislate over matters pertaining to the internal market

concerning the new trade issues. The negotiated trade agreement might directly influence the domestic legislation, while the measures taken in the domestic level might also be incompatible with the WTO agreements (Leal-Arcas 2007, 396). This might lead to constitutional conflicts between the EC and its Member States in trade policy with regard to services trade and the commercial aspects of intellectual property rights (Antoniadis 2004, 337).

The new institutional balance between the community and member states provides a real case for the revision of PA framework in its application to EU. Following the PA analysis, the focus is on the form of different kinds of delegation and the principals' adoption of oversight procedures to control the agents' preference shirking. The core assertion of PA framework is that the principals have "close watch" on their delegated powers, or they can even take back their delegated powers whenever wanted. Following this logic, the question raises as to ask if the commission can really "take a life of its own" (Pollack 1996, 1997). The PA framework denies this possibility and emphasizes the strong control mechanism of the principal in order to prevent the agent from seeking its own preference. But when the political system evolves towards a multi-level polity where there is clear competence distribution defined by the Treaty, it is necessary to ask if the Commission is JUST an agent or it can develop (in fact, it has) stable preferences.

Thus the PA framework needs to be improved by the extension of multi-level political bargaining. In the EU case, for example, there is an obvious institutional bias favoring the community in its international involvement. Although theoretically, each member states of EU is still the member of WTO and remain their own right, it is the European Commission that has been representing the member states and negotiating in international trade talks. Even there was internal dispute on trade competence concerning the new trade issues, it is still the Commission that is favored in the institutional setting

and enjoys *de facto* competence. On the other hand, there are many situations in which national interests can be pursued only through the role of the EU, which is especially the case after the EU enlargement with 27-30 member states. The risk of a Member State using its veto to prevent the Community from adopting a common position must be reduced to a minimum, in order to guarantee the EU's leading role in international political economy. In short, the Commission's agent status is favored by the external institutions which make it a "permanent" agent of the Community. The delegation within EU has also more or less a "permanent nature" of power transfer, which gives the "agent" more leeway to develop its own preferences.

On the side of the principals, they have to face the challenges of that new political reality. For example, the Commission's concentration of internal competence and the advantageous institutional position have attracted the domestic constituencies to circumvent the national government for business lobbying. The opening of the "back-door" and direct interaction on the community level have further weakened the member states in the distribution of power within EU. This development leads to the loss of functionality of the modern state, and adds more supranational features in the multi-level polities of EU. The Commission is further favored by this structural change and thus continues to seek more power on its own. Thus it exploits factors from international institutions and domestic development to strengthen its position vis-à-vis the threat of member states to use oversight mechanisms. As analyzed in this study, the development of the competence issue shows an obvious trend toward more supra-nationalism within EU, proved by the centralization of trade competence and the loosening of principal control.

CHAPTER 8

Conclusion

8.1 Going back to the research question

After the ECJ's 1994 ruling, there is a clear thread in treaty revisions to follow the changes of the Commission's extent of competence in external trade. In Amsterdam Treaty, Art. 133 was amended so that the Council could expand the exclusive competence for the new issues with a unanimous vote. This "fast-track-competence" was a practical move to lowering the barriers for bringing services and intellectual property rights under Art. 133 and thus increased the *de facto* power of the Commission. The changes in Nice Treaty moved further in the direction of the Commission's preferred outcome. Art. 133(5) under Nice categorizes trade in services and the commercial aspects of intellectual property rights as exclusive EC competences(with exceptions in culture and audiovisual services), although unanimity is still required if the voting rule to adopt internal rules is unanimity or if the EC has not yet exercised its powers internally. In Lisbon Treaty, the changes of Art. 133 reflect completely the broader interpretation of the Commission's trade competence in the early 1990s. The Commission has a legal base for exclusive competence in all WTO trade issues, including foreign direct investment. It is surprising to see that the Commission's "preference shirking" for more competence has been gradually realized by the treaty revisions.

The aim of this study is thus to explain why the Commission gets exclusive competence

in the new trade issues. Looking back into the development of trade competence, the question arises as to ask why the Commission has been able to gain exclusive competence in a field where many Member States tried so hard to push it back and where even the Commission's natural ally within the EU, the Court, has refused to support it. After the 1994 ECJ ruling, the Commission has persistently carried its proposals for exclusive competence into the following IGCs. The development from Amsterdam Treaty to Lisbon Treaty has witnessed a gradual enlargement of the Commission's exclusive competence in the new trade issues. It is thus interesting to ask how has the Commission been able to gain powers in a hostile environment, faced with stiff resistance and hostility by the Member States?

8.2 Summarizing the argument of the study

Starting from the PA framework, this study has analyzed the preferences of the Commission and that of the member states concerning the exclusive competence in new trade issues. It is argued that the Commission is more than a simple agent of the member states and has its clear preferences as an independent actor. It explores well the development in international trade regime and develops its preferences for more exclusive power in external trade matters, which was first strongly opposed by the member states. The domestic service providers have undergone a dramatic process of preference evolution in the 1990s, which turn to the Community level for business lobbying and thus support the Commission's exclusive competence. The Commission has explored these two factors and pushed the member states to give up its sovereignty concern and delegate more power. The inclusion of the international embeddedness and the domestic preferences adds some revision to the application of the PA framework in EU's trade politics. It is argued that there is a "permanent delegation" nature within EU which favors the Commission and gives it more room for "preference shirking". The

changes have shown an obvious trend toward more supra-nationalism within EU, indicated by the centralization of trade competence in the Commission and the loosening of principal control. This provides a new perspective to understand the conventional principal-agent nature of the power delegation inside EU.

The preferences of the Commission

It is argued that the Commission is more than a "simple agent" of the member states. It can deprive its own preferences from three sources. First, in external trade, the Commission is the only representative of the Community that has legitimacy to advocate the interests of the EC. This institutional setting requires enough credibility and autonomy in order to conduct successful negotiations. In trade negotiations, the Commission can provide the focal point at which the preferences of member states converge, or it try to find a compromise solution between its original proposal and what is feasible to reach agreement in the council. In other words, it has room for "preference shirking" during the negotiations. Second, the Commission is more liberalization-oriented than the member states. By using its agenda-setting power, the Commission can explore the different positions among the member states and bind them together with its own liberalization-oriented proposal. The agenda setting power thus makes the Commission a dedicated advocate for trade liberalization in the international arena. Third, the Commission is a bureaucratic actor with rational considerations to maximize its own power. In the literature, it is believed that the general interest of the Commission is to strengthen and deepen the European integration process. It enjoys the historical continuity, expertise and informational asymmetry vis-à-vis the member states. This bureaucratic nature leads to the desire to get more power, which can be achieved by more integration or the transfer of competence to the supranational level.

The analysis of the expanded European multi-level system has shown that the Commission is not only able to play the role of a moderator and engine of integration but also acts in its own interests. The Commission thus has a preference-maximizing nature and has persistently pursed its own preference for exclusive competence in the new trade issues. It has expressed explicitly its preference for more trade authority by the end of Uruguay Round, in the 1994 ECJ ruling, and in different IGCs from Amsterdam to Lisbon. It is this bureaucratic nature that wants to increase its external trade authority to a maximum.

The preferences of the member states

There are two points concerning the preferences of the member states in external trade competence. First, the delegated power of external trade competence in Rome Treaty has the nature of a "permanent delegation". This means that it is difficult or almost impossible for the member states to reverse the integration process and take back their delegated trade authority. Although they can exert significant control mechanism through the comitology procedure, the Commission thus enjoys a "lock-in" position in external trade politics and can explore the differences among member states. Second, as to the trade policy concerning the new trade issues, the member states have a "default point" of sovereignty concern, which means that they need to be convinced by functional purposes for more sovereignty transfer. From the PA perspective, the principals are not ready to make a transfer of sovereignty in its domestic sensitive domain, unless there are enough pressures from the domestic interests or other functional purposes.

Thus when the Commission first raised its proposal at the end of Uruguay Round, most of the member states were opposing to the Commission's reasoning, with the exception of Italy, Belgium and Ireland on the side of the Commission. The "sovereignty camp"

includes some traditionally pro-integration countries such as Germany. All of the three big powers (France, Germany, UK) opposed the further transfer of trade competence in the new trade issues. The positions of the member states, however, have changed dramatically after the 1994 ECJ ruling. The German position was changed to support the Commission in the 1996 IGC when the "sovereignty camp" only enjoyed a small majority. In 2000 IGC, the "sovereignty camp" became the minority with the persistence of France on the retaining of national competence on cultural and audiovisual services. By the time of European constitution and Lisbon Treaty, almost all of the member states turn to the side of the Commission and support an exclusive competence of all trade issues in the Community. Their policy positions in different IGCs showed a trend of gradually giving up their "sovereignty concern" on the new trade issues.

The increasing embeddedness in international trade regime

It is argued in this study that the Community's increasing embeddedness in international trade regime is mainly responsible to the Commission's preference shirking of getting more exclusive competence. The more embeddedness of EU in the international trade regime, the more inclined the Commission to acquire exclusive competence in related trade issues. After the early 1990s, there is clear strengthening of the institutional framework in international trade regime. On the one hand, there was incorporation of new trade issues into the international trade agenda. On the other, there was a much strengthened legal procedure of WTO (dispute settlement body). This development has caused the tendency of the Commission for more centralization of authority in trade issues.

After the founding of WTO in 1995, the Community's embeddedness in the trade regime was deepened both technically and institutionally. Technically, the sector-specific service

negotiations in telecommunications and finance from 1995-1997 have significant pressure on the internal dispute of distribution of competence. The build-in agenda in service negotiations was initiated in 2000 and later merged into the Doha Round. The necessity to negotiate the new trade issues within WTO influences directly the Commission's preferences for complete and exclusive authority. For the sake of more reduced transaction costs and a credible representation with sufficient authority, the Commission deprives its preferences from its increasing embeddedness in international trade regime. In the new auspice of WTO, the Commission can take advantage of the historical paths and continue to represent the member states to negotiate the new trade issues.

Institutionally, the strengthened legal system of WTO put the Commission at an advantageous position vis-à-vis the member states. The simplified legal procedure requires expertise, efficiency and authority in the legal disputes. It is thus the "Community method" of decision-making that applies and the Commission has a monopoly on the initiative or represents the Community to respond complaints. Even in the new trade issues, the Commission enjoys *de facto* competence and can follow its "historical path" and continue to represent the member states. The analysis has shown that in the late 1990s, there was a peak of legal disputes concerning the EU in the new trade issues. Despite the shared competence status, however, it was the Commission that represented the Community and the member states and took part in the legal procedures. The strengthening of the legal procedure thus increases the authority of the Commission and makes it enjoy a '*de facto competence*' in external legal disputes.

Besides, this development has strengthened the direct linkage between enterprises or industry associations and the Commission, and putting the member states at a less important role. The new TBR in 1994 gives Community enterprises and economic

interest representatives the ability to go directly to the Commission to lodge formal complaints or request for investigations. This trend became more obvious as the business actors developed clear-edged preferences for liberalization and choose to circumvent the member states and do business lobbying on the Community level.

The Commission had explored this "opportunity of window" from international development and developed clear preferences for exclusive competence in the new trade issues. Its basic argument for exclusive competence has been the credibility and efficiency to conduct successful negotiations within WTO. This argument was repeated in different IGCs and amounted enough functional pressure on the member states. One direct example of the influence of the "increasing embeddedness" is the issue of investment-related trade measures. During the Doha Round, it was the Commission's initiative to bring the investment measure into the broad agenda. This initiative was well reflected by the treaty revision in Constitutional Treaty and Lisbon Treaty which give exclusive Community competence in the investment measures. The strengthening of the institutional framework of the WTO had important impact on the balance of power within the EC when it comes to trade policy.

The evolution of domestic preferences

It is tried to bridge the gap between domestic preferences and the institutional setting of exclusive competence at the Community. Although there is no direct linkage between these two factors, there is obvious trend of the European service providers to go to the Commission and conduct supranational lobbying. This is a direct response to the Commission's centralization of policy competence. This leads them indirectly to support the exclusive competence of the Commission. Furthermore, following the institutional approach, it is revealed that the Commission is more capable to purse liberalization

oriented policies under exclusive competence than under shared competence. This is because that the exclusive excludes the domestic ratification and applies QMV rule in policy initiation, which makes the final position of the Community's common agenda or negotiated outcome further away from the most conservative position. In this sense, the liberalization preferences of the European service actors have direct incentive to support the Commission's exclusive competence in the new trade issues.

One core argument in this study is that the preferences of domestic service providers are defined and redefined in the political interaction process. Based on historical institutionalism, there is a learning process going on during the interaction process, because of the asymmetry of information or the biased influence of institutions. This was true when observing the preferences of European service providers throughout the 1990s. The traditional state-controlled monopolies in service industries, for example, have gone through a tremendous reform period. It is observed that most of the market operators have undergone a preference evolution process after the middle 1990s. This evolution process was a response to the interaction with international and regional changes. Taking telecommunications for example, the European regulatory integration leads to the evolution of the business actors' preferences towards more Europe wide solutions. The preferences turn to be more liberalization-oriented and achieve more market access in global markets. Second, the on-going international negotiations have added more liberalization-specific preferences to the European service providers. Facing the changes of international regime and the prospect of a more liberalized global market, the service providers have developed new type of global oriented preferences, which is based on the calculation of new factors, such as potential of scale economies, reduced unit costs, or competition in a global market. The once protective-oriented monopolies thus turn to be more liberalization-oriented and would like to achieve more market access in global markets.

This development has led to the change of lobbying effort of the domestic interests. When they find their preferences in line with that of the Commission, they would like to form business associations and go to the Commission to conduct business lobbying and thus circumvent the national state. Only the protectionist preferences would choose the national lobbying, because most of the protection preferences could not find the European base. Most of the service providers have taken part in ESF to express their liberalization preferences towards external trade. The evolution of domestic preferences thus constitutes another explaining variable which on the one hand wants to strengthen the Community's authority in external trade, while on the other hand circumvents the national government in trade policy making. It is this explaining variable that functions insides the member states and push the member states to give up their sovereignty concern over the new trade issues. When it was converged with the functional purposes from the international level, there is enough pressure for the member states to agree for more sovereignty transfer.

The strengthening of Commission's position vis-à-vis member states and reversed lobbying

The increasing embeddedness in international trade regime and the evolution of domestic preferences towards more liberalization, have favored the Commission vis-à-vis the member states. Following the PA framework, the Commission can explore these two factors and push the member states to delegate more power. The development of the two factors can be observed after the middle 1990s, which leads to gradual revisions of the treaty texts and the enlargement of the Commission's competence in external trade.

First of all, with the increasing embeddedness in international trade regime, the

Commission can take advantage of the historical paths and continue to represent the member states to negotiate the new trade issues. The institutional setting of Rome Treaty has put the Commission on an advantageous position against the member states in external trade. The Commission's successful representation in trade negotiations and legal disputes have lead to an acknowledgement by Member States that they national interests can be served better by the collective representation. This "lock-in" effect of the Commission's role in international trade negotiations has given the Commission first argument to pursue more formal transfer of competence from the member states.

Second, the Commission has taken an active role to seek the support of the domestic service actors. Since the middle 1990s, the Commission began to promote the involvement of societal interests in its policy making in order to increase its legitimacy. Under the name of civil society dialogue in 1998, for example, the Commission tried to formalize its consultation and include a broader range of interest groups by instituting a Civil Society Dialogue on the upcoming round of negotiations. It also called the founding of the most representative service association—European Service Forum-in 1999. These measures have helped the European Commission to integrate firms and other private actors into the trade policy-making process in order to gain bargaining leverage vis-à-vis the member states.

This political interaction functions as a "reversed lobbying" process in nature. In this scenario, the domestic actors no longer hold stable preferences and then go to the political arena for policy lobbying. It is the political actors that take the initiative and attract the domestic business actors into the political interaction process and can to a great extent influence their preference formation. There is thus a learning process taking place to the business actors, as was witnessed by the service industries during the 1990s. The Commission only responds well to those "pan-European" preferences, which in the

case of European service industries has led to the evolution of more liberalization oriented trade policies in the global market. The protectionist preferences have to go through the national door to object their voice, which is very rare in the case of European service industries.

The strengthening position of the Commission vis-à-vis the member states reflects the concentration of Community power because of globalization and its internal integration. The increasing embeddedness in strengthened international trade regime not only gives the Commission direct incentive to ask for more power, it also helps to bridge the gap between the domestic constituencies and the Community. The internal integration process also continues to weaken the role of the member states and strengthen that of the supranational institutions. The member states have gradually lost their ability to use national policy tools over sensitive sectors due to the legislative instruments available to the Commission in enforcing market integration. Taking the Telecommunication for example, as the internal competence is more and more concentrated to the community, the EU voting rules make it difficult to replace national policies with protectionism at the EU level. This institutional change is further used by the commission to attract the domestic support of its pan-European policy initiative. There is thus an obvious weakening of “functional role” of the member states and the strengthening of that role on the Community. It is because of this that the Commission can push the member states to give up their sovereignty concern and delegate more power to the Commission.

8.3 Theoretical indications

This study tries to describe a multi-polity nature of the EU and adds more dimensions to the PA framework in its EU application. The analysis has shown a permanent nature of delegation in EU trade policies and the centralization of trade authority in the

Commission. This contradicts the claims of the PA framework that the agent can only pursue a limited "preference shirking" and principals can take full control through different oversight procedures. The Commission can take advantage of the institutional setting and pursue its own preferences in external trade, rather than a "simple agent" of the member states. That tendency of more community authority and less principal control reflects more a functional need than pure ideological considerations, which underlines the core predictions of Neo-functionalism. This development however, also indicates the tension between national sovereignty and supranational power. In the EU institutions, the delegation is not only to fulfill functional purposes, it also has a *de facto* "permanent nature". The agent is favored a lot by the institutional setting and can thus explore wildly its own preferences, sometimes even "pushing" the principals to accept it. The principals, on the other hand, can only exert limited control as more and more competence is concentrated to the Community. By bringing other dimensions to the application of PA to European integration, it underlines the complexity of power delegation inside EU as well as the multi-polity nature of European integration.

The institutional advantage of the "agent"

According to the PA framework, the Member States are the principals that delegate certain functions to the Commission, the agent. The Commission, however, does not simply implement the Council's (member states) directions. It has its own preferences and will exert bureaucratic drift to effectuate them. In response or as prevention, the Council sets up control mechanisms to monitor and sanction the Commission. The question arises to ask if the member states can have effective control on the Commission, or if they can effectively sanction the Commission for its "bureaucratic drift".

This study has shown that the Commission is favored by the institutional setting both

internally and internationally against the member states. Internally, the Commission can explore the difference among member states through the QMV voting rules and develop its own preferences. Also, as a motor of European integration, the Commission has the power to make European wide initiatives and regulations, which leads to the concentration of internal competence to the Commission. Furthermore, it can take advantage of its regulative power and attract the domestic business actors to take part in the political interaction. This helps to further circumvent the member states and strengthen the power and legitimacy of the Commission.

Internationally, the Commission enjoys its "lock-in" position in its external representation. For the sake of greater bargaining power, the member states are used to have the Commission as their representative in international trade talks. As efficiency and credibility matter most to the Commission's external role, it enjoys a quasi *de facto* "exclusive competence" in trade talks and trade disputes, or at least the expectation of exclusive competence from the other negotiating parties. Although the member states were opposing to the Commission's proposal for more exclusive competence in the beginning, their "sovereignty concern" has to face the external institutional constraints. Thus despite the internal dispute, the member states have adopted the "code of conduct" for 1995-97 GATs negotiations, as well as the "fast-track-competence" in the Amsterdam Treaty. All these are very pragmatic moves that reflect the advantageous position of the Commission in the institutional setting.

Permanent delegation and wild agent

The advantageous role of the Commission is rooted in the "*permanent delegation*" within EU. The starting point of delegation from member states is for the purpose of European integration. Although theoretically each member state still has the legal right to

retreat from EU at any time, this is virtually an impossible option as the social and economic integration in each member state is almost irreversible. This has given the delegation a permanent nature and favors obviously the supranational institutions. The agent can then explore to a large degree the preferences which are not only influenced by that of the member states, but to a large extent, the preferences of its own. It is in this sense that there is actually a "wild agent" in terms of principal and agent relationship within EU, especially in the deeply institutionalized areas.

In external trade competence, for example, the wild agent has persistently behaved against the will of the member states. The Commission can explore the development in international trade regime as "window of opportunity" to push the member states to delegate more power. Later on, it has deliberately brought the societal interests into the political interaction and thus further strengthened its power vis-à-vis the member states. Different from a simple agent who just fulfills the goals of the principals and pursues only occasionally limited level of "preference shirking", the Commission has shown the "wild" nature of a permanent agent—having clear-edged preferences of its own. Thus the power distribution within EU is complemented by the "permanent nature" of delegation, which is strengthened by the institutional setting of EU. In external trade politics, the nature of competence is thus somewhere in between "delegation" and real "sovereignty transfer".

The tension between national sovereignty and supranational power

The changes in external trade competence have reflected the centralization of power in the Community in trade politics. Not only the Commission gets exclusive competence in all the trade topics in WTO, the European parliament is also empowered with substantial power in the making of trade policies. In contrast, the national competence is further

decreasing while national parliaments don't take part in the ratification of trade agreements any more. The delegation and control relationship obviously favors the role of the Commission, as it can take advantage of international embeddedness and domestic preferences to push the principals to transfer more competence to the supranational level.

The changes have shown an obvious trend toward more supra-nationalism within EU, proved by the centralization of trade competence and the loosening of principal control. This also underlines the IPE argument that the changes on the international level can increase the externality of the domestic power and thus lead to the dissolving of the national sovereignty. Considering the EU practice, there are many situations in which national interests can be pursued only through the role of the EU, which is especially the case after the EU enlargement with 27-30 member states. The member states are thus not only "delegating" their competence, they are actually "giving up" their competence to the supranational institutions, in order to adapt itself to the pace of globalization process.

The multi-polity nature of EU integration

This study tries to include the Community's external embeddedness and the evolution of domestic preferences into the PA relationship within EU. This underlines the multi-polity nature of EU integration, where delegation and control is only the starting point to understand the power distribution inside EU. Instead of a simple principal-agent dimension, there is a multi-polity nature of EU integration where different political actors fulfill different functional roles. The most important outcome of this study is to redefine the role of the Commission in the PA relationship. The Commission can explore the development from other dimensions and pursue consistently its own preferences.

There are implicitly four levels of analysis in this study: the level of domestic

preferences, the member states, the European Community and the International trade regime. The strengthened role of the Commission vis-à-vis the member states underlines the view that developments in international economy integration alter the choices to the national government and this in turn affects national competence. Within EU, the consequence is the strengthening of the Community's power and the weakening of member states. This trend is further consolidated by the direct linkage between the Commission and the societal interests who circumvent the national government and respond directly to the preferences of the Commission. The solicitation is based on the Commission's calculation of increasing its technical expertise, its legitimacy, its advantageous position against the member states and its leverage in trade negotiations. This, however, doesn't mean the real federalization of the trade policy making. As long as the Commission officials do not depend on re-election by constituency interests, firms cannot exert direct pressure on European officials to reinforce their demands. At the same time, when the member states' control is constrained by the institutional rule, there is more room for the Commission to pursue its own preferences. This is why the latest revision of trade competence in Lisbon Treaty also gives the European Parliament significant power in trade policy making. Within the multi-polity nature of EU, the conventional delegation and control between the principals and agent is partly replaced by a more complicated balance of power among the supranational institutions.

8.4 Limitations and further research points

Limitation of this study

This study tries to analyze the evolution of the community's external trade competence and get a better understanding of the power distribution between the member states and the supranational institutions. Analyzing the preferences of the Commission and that of

the different member states in different rounds of IGCs, this research explains the enlargement of the Community's external trade competence. Based on a principal-agent framework, the result of this study attributes two factors to the concentration of more Community power in trade issues: the increasing international embeddedness and the evolution of domestic preferences. The Commission, as a "permanent agent", explores well these two factors and successfully pushes the member states to delegate more power.

There are, however, some limitations of this study. The first comes in terms of methodology. The aim of the study is to explain why the Commission gets exclusive competence in services, intellectual property and investment measures. Nevertheless, it is not realistic to make an overall analysis of all the new trade issues in the case studies. Thus the analysis mainly focuses on the service trade, while taking European telecommunication services as an example. This is also partly because of the salience of services in all the new trade issues. Furthermore, the telecommunication services represent only part of the service industries, which might not deliver full explanation to the preference evolution of the service industries. Within the service sector, financial service is another good example to show the evolution of domestic preferences which would make the analysis more complete. But considering the complexity of financial regulation, as well as the length of this study, only telecommunication services are used for the case study. Similar arguments can also be found in the financial service industries in terms of preference evolution. This single "case" should not impair the explaining power of this research.

Second, the bargaining process among the Commission and the member states is neglected in the analysis. It is assumed that the member states bring each time relative stable preferences to the IGCs in terms of external trade competence, which can then be

reflected in the Treaty revisions. There is, however, the necessity to look into the detailed negotiation process and analyze how the preferences of different actors converge. It would be interesting to see which concrete strategies and tactics the European Commission and the member states follow, and which institutional rule influences the final result. This aspect, however, doesn't belong to the main focus of this study, as observations show that most member states sticks rather firmly to its position in terms of trade competence in each IGC.

Third, although there is analysis on the evolution of domestic preferences, there is no clear linkage to the changed position of the member states towards external trade competence. It is also very difficult to trace that linkage in each individual state, because it needs empirically a large amount of interviews to bridge that gap. Thus the analysis is made on a inference logic, namely to argue that the changes from the two dimensions force the national government to respond to the proposal of the Commission and delegate more power. The starting point is to assume that the member states have a default point of 'sovereignty concern' in terms of new delegation. There is need of sufficient pressure or functional purpose to convince the member states to delegate more trade competence.

Indications for further research

There is very limited study in the literature to explore the external and the domestic dimensions of the PA framework. This study has made a small step in this direction, while leaving many aspects unexplored. There are some aspects which might attract more academic interests. The first is the examination of the "permanent delegation" nature of the Commission in real trade negotiations. It would be interesting to see if the Commission actually conducts consistently "preference shirking" and pursue its own

preferences during the trade negotiations. This might require a lot of empirical research following the negotiation process, as most of the bargaining takes place behind closed doors. Second, there is also a lack of research on the role of individual member states in the formulation of EU trade policies, especially when the exclusive competence in all trade issues is in the level of the Community. More detailed research could study the extent to which economic interests can capture national bureaucracies, thus ensuring their influence on EU trade policies. Third, because of the reversed lobbying effect, it would be interesting to compare the two different lobbying scenarios in the community and in the national government. There is need to find more empirical support to the claim that the Community can take advantage of its institutional position and influence the preferences of domestic actors. Last but not least, because of the empowering of the European parliament in trade policy making in Lisbon Treaty, it is important to analyze the balance of power between the supranational institutions, while not abandoning the conventional principal-agent relationship of delegation and control. All these aspects indicate very promising prospect in the study of European integration and the international political economy.

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The Delegation of Exclusive Trade Competence in EU: Domestic Interests, Regional Competence and International Institutions

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Deutsche Zusammenfassung

Die vorliegende Arbeit versucht zu erklären, warum und inwiefern eine ausschließliche Befugnis- und Kompetenzübertragung in den ‘‘neuen Handelsthemen‘‘ auf die Europäische Kommission gelungen konnte.[1] Wenn man sich die Entwicklung der Handelskompetenz vergegenwärtigt, stellt sich die Frage, warum jene Kompetenzübertragung auf die EU-Kommission so erfolgreich war, obwohl viele Mitgliedstaaten versuchten diesen Prozess zurückzudrängen und auch der natürliche Verbündete der Kommission, der Gerichtshof, sich weigerte ihn zu unterstützen. Nach dem Urteil des Gerichtshofs von 1994 hat die Kommission in den folgenden Regierungskonferenzen beharrlich Anträge auf ihre ausschließliche Zuständigkeit in diesen neuen Handelsthemen vorgebracht. In den politischen Entwicklungen zwischen dem Vertrag von Amsterdam und dem Vertrag von Lissabon vollzog sich schrittweise der Übertragungsprozess der ausschließlichen Handelskompetenz auf die Kommission in den benannten neuen Handelsthemen. Es ist daher interessant zu fragen, wie die Kommission in der Lage war trotz des harten Widerstandes der Mitgliedsstaaten, Kräfte und Verbündete in einer opponierenden Umgebung zu gewinnen?

[1] Die neuen Handelsthemen sind: Dienstleistungshandel, geistiges Eigentum und Investitionen.

Diese Arbeit sucht zu argumentieren, dass vor allem zwei Faktoren für die Konzentration von mehr Befugnis und Kompetenz auf die EU-Kommission verantwortlich waren:

1. Die zunehmende Verankerung der EU im internationalen Handelssystem führte zu einer größeren funktionalen Notwendigkeit für eine ausschließliche Zuständigkeit. Ein umfassendes und institutionalisiertes, internationales Handelssystem übt Druck sowohl auf die Kommission, als auch auf die nationalen Regierungen aus. Die Aufnahme der neuen Handelsthemen in die Handelsagenda (GATS, TRIPS, TRIMS), sowie das effiziente Dispute Settlement Body (DSB) verstärken die Einbettung der EU im internationalen Handelssystem. Vor diesem Hintergrund bildete sich zunehmend eine funktionelle Notwendigkeit heraus die Befugnis und Handelskompetenz ausschließlich auf die EU-Kommission zu übertragen, um einen geschlossenen und kohärenten Auftritt der einzelnen Organe auf internationaler Ebene zu gewährleisten.

2. Aufgrund der Entwicklung der Handelspräferenzen der inländischen Wirtschaftsakteure versicherte sich die EU-Kommission der Unterstützung verwandter Branchen aus den Mitgliedstaaten, um sich somit mehr Befugnis von dem Prinzipal übertragen zu lassen. Hinsichtlich dieser beiden Faktoren konnte die Kommission als Agent die Entwicklungen der internationalen Institutionen und die Veränderung der Handelspräferenzen der inländischen Wirtschaftakteuren also dazu nutzen, um sich mehr Befugnis und Kompetenz übertragen zu lassen.

Ausgehend von dem Principal-Agent-Modell hat diese Studie die Präferenzen sowohl der Kommission als auch die der Mitgliedsstaaten analysiert. Es wird argumentiert, dass die Kommission mehr als ein „einfacher Agent“ der Mitgliedstaaten ist. Ihre eigenen Präferenzen lassen sich aus drei Quellen erschließen: Erstens, die Kommission ist im Außenhandel der einzige Vertreter der Gemeinschaft, der mit Legitimität die Interessen

aller Mitgliedstaaten vertreten kann. Diese institutionelle Einbettung erfordert eine ausreichende Unabhängigkeit und Glaubwürdigkeit seitens der Kommission, um internationale Verhandlungen erfolgreich führen zu können. Zweitens, die Kommission ist liberalisierungsorientierter als die Mitgliedstaaten. Als ein selbstständiger Akteur versucht dieses supranationale Organ seine Rolle als Agendasetter zu nutzen und die unterschiedlichen Positionen zwischen den Mitgliedstaaten zu beeinflussen, indem sie die in diesen auftretenden Präferenzunterschiede mit ihrem eigenen Liberalisierungsvorschlag zusammenbindet. Drittens, die Kommission funktioniert wie ein bürokratischer Akteur mit rationalen Überlegungen, dessen Interesse auf die eigene Machtmaximierung abzielt. Sie verfügt gegenüber den Mitgliedstaaten über historische Kontinuität, Expertise und Informationsasymmetrie. Das mit ihrer bürokratischen Struktur oder Natur einhergehende Machtstreben kann die EU-Kommission durch mehr Integration oder eben mit jener Befugnis- und Kompetenzübertragung auf die supranationale Ebene befriedigen.

Es lassen sich zwei wesentliche Punkte bezüglich der Präferenzen von den Mitgliedstaaten über die Befugnisübertragung der Handelskompetenz benennen: Erstens, die Übertragung der Handelskompetenz auf internationaler Ebene wurde in den Römischen Verträgen als sog. „Permanente Übertragung“ bezeichnet und festgelegt. Dies bedeutet, dass es für die Mitgliedstaaten sehr schwierig oder fast unmöglich ist, den Integrationsprozess umzukehren beziehungsweise die Kompetenzen, welche sie übertragen und delegiert haben, zurückzugewinnen. Obwohl die Mitgliedstaaten bezüglich ihrer übertragten Kompetenzen die Kommission allerlei Kontrollmechanismen (z.B. Komitologie) unterwerfen können, hat diese im Außenhandel eine „lock-in“ Position und kann die Unterschiede und Differenzen zwischen den Mitgliedstaaten zu ihrem Vorteil ausnutzen- wohingegen, zweitens, die Frage der Befugnisübertragung bei den Mitgliedstaaten vor allem eine Defaultposition gegenüber

diesem Souveränitätstransfer hervorruft. Nur bei nachweislichen wichtigen, funktionellen Zwecken sind die Mitgliedsstaaten bereit sich von diesem Souveränitätstransfer überzeugen zu lassen und somit von ihrer eingefahrenen Position abzukommen. Denn von der PA Perspektive ist der Principal im Allgemeinen nicht bereit, eine Übertragung der Souveränität in seinen innerstaatlichen sensiblen Bereichen zuzulassen und tut dies nur wenn dafür genügend funktionelle Zwecke vorliegen.

Es wird argumentiert, dass die zunehmende Einbettung der Gemeinschaft im internationalen Handelssystem hauptsächlich verantwortlich für das Verlangen der EU-Kommission nach mehr Kompetenzübertragung war. Je stärker die EU in die internationale Handelgemeinschaft eingebettet ist, desto stärker wird auch der Wunsch der Kommission eine ausschließliche Zuständigkeit für die neuen Handelsthemen zu erwerben. Auf der internationalen Ebene ist nach den frühen 1990er Jahren eine klare Verstärkung des institutionellen Rahmens des internationalen Handelssystems auszumachen. Auf der einen Seite werden die neuen Handelsthemen in die Agenda der Handelsgemeinschaft mitaufgenommen. Auf der anderen Seite gibt es neue starke rechtliche Handhaben seitens der WTO (Dispute Settlement Body). Diese institutionellen Entwicklungen führen dazu, dass die Kommission sich in einer vorteilhaften Position gegenüber den Mitgliedstaaten befindet und die Präferenz für eine verstärkte Zentralisierung der Handelskompetenz entwickelt.

Das zweite Argument bezieht sich auf die Entwicklung der Präferenz von inländischen Akteuren. Es wird versucht, die Lücke zwischen diesen Präferenzen und dem institutionellen Rahmen der Befugnisübertragung zu schließen. Zwar gibt es keine direkte Verknüpfung zwischen diesen beiden Faktoren, doch ist ein offensichtlicher Trend der europäischen Dienstleistungsakteure für mehr supranationales Lobbying zugunsten der Kommission deutlich zu erkennen. Dieser Umstand ist auf die

Auseinandersetzung der Kommission mit internationalen und regionalen, institutionellen Veränderungen zurückzuführen. Nimmt man die Telekommunikationsbranche als Beispiel, so führt die Entwicklung des europäischen Regulierungssystems dazu, dass die Präferenzen der Marktakteure sich zugunsten einer paneuropäischen Lösung annähern. Diese Präferenzen zeigen sich als viel liberalisierungsorientierter und verhelfen somit zu einem größeren Zugang zu den globalen Märkten. Die aktuellen, internationalen Verhandlungen über die Liberalisierung der Diensleistungsbranchen sind im Sinne der Liberalisierungspräferenzen der Europäischen Marktakteure. In diesem Zusammenhang entwickeln die Dienstleisungsakteure neue Präferenzen, die an einem globalen Markt ausgerichtet sind.

Diese Entwicklung hat zu der Änderung der Lobbyarbeit der inländischen Akteure geführt. Wenn sie ihre Präferenzen im Einklang mit der Kommission finden, bauen sie Wirtschaftsverbände auf und wenden sich für ihr Businesslobbying direkt an die Kommission, was eine tatsächliche Umgehung der nationalen Regierungen verursacht. Nur die protektionistischen Präferenzen, die keine europäische Basis finden, bleiben bei dem nationalen Lobbying, um ihren Einfluss zu maximieren. Die meisten großen europäischen Diensleistungsanbieter haben beispielsweise an dem European Service Forum (ESF) teilgenommen, um ihre Liberalisierungspräferenzen des Außenhandels zum Ausdruck zu bringen. Diese innerhalb der Mitgliedstaaten fungierende unabhängige Variable drängt die Mitgliedstaaten dazu, die Besorgnis über ihre eigene Souveränität aufzugeben und mehr Kompetenz auf supranationale Organe übertragen zu wollen.

Sowohl die zunehmende Einbettung im internationalen Handelssystem, als auch die Entwicklung der inländischen Präferenzen haben dazu geführt, dass die EU-Kommission eine günstige Position gegenüber den Mitgliedstaaten im Außenhandelsbereich erlangt hat. Unter dem Principal-Agent Modell kann die Kommission diese beiden Faktoren

nutzen um die Mitgliedstaaten zu weiteren Befugnisübertragungen zu bewegen. Vor allem mit der zunehmenden Einbettung im internationalen Handelssystem kann die Kommission den historischen Pfad zu ihrem Vorteil nutzen und auf der internationalen Ebene weiterhin die Mitgliedstaaten vertreten, um mit den neuen Handelsthemen zu operieren. Dies weist darauf hin, dass die Kommission in der Vertretung der Außenhandelsthemen, insbesondere im Hinblick auf das Rechtssystem der WTO über eine De-facto-Kompetenz verfügt, und dies trotz der nur mittelbar miteinbezogenen Mitgliedstaaten. Die institutionelle Rolle der Kommission in internationalen Handelsverhandlungen konstituiert einen sogenannten „lock-in“ Effekt, von dem die Kommission ihr Argument für mehr formale Kompetenzübertragung von den Mitgliedstaaten ziehen kann.

Desweiteren hat die Kommission eine aktive Rolle übernommen, um sich der Unterstützung der inländischen Wirtschaftsakteure zu versichern. Mitte der 1990er Jahren begann die Kommission ihren Versuch, die gesellschaftlichen Interessen in die politischen Auseinandersetzungen miteinzubeziehen, um damit ihre eigene Legitimität zu erhöhen. Unter dem Namen des ‚Civil Society Dialogue‘ aus dem Jahre 1998 hat die Kommission beispielsweise versucht, ihre Konsultationsverfahren zu formalisieren und bei der Einführung dieses Dialoges ein umfangreiches Spektrum von gesellschaftlichen Interessengruppen in den politischen Prozess einzubringen, um sich besser auf die jeweils folgende internationale Verhandlungsrunde vorzubereiten. Darüber hinaus hat die Kommission im Jahre 1999 in erster Linie die Gründung des repräsentativsten Dienstleistungsverbandes, des European Service Forum, angestoßen und befördert. Diese Maßnahmen haben dazu beigetragen, die Wirtschaftsakteure der Diensleistungsbranchen in den supranationalen Entscheidungsprozess zu integrieren, damit die Kommission einen größeren Leverage-Effekt gegenüber den Mitgliedstaaten gewinnen kann.

Diese politische Interaktion funktioniert wie ein „umgekehrtes Lobbying“, in dem die Kommission die Präferenzentwicklung der inländischen Wirtschaftsakteure beeinflussen kann. In diesem Szenario haben die inländischen Akteure nicht mehr endgültige, unantastbare Präferenzen, sondern bilden diese stattdessen auf internationaler Ebene beim Businesslobbying heraus. Die Europäische Kommission, die diese Initiative ergriffen und die inländischen Wirtschaftsakteure in den politischen Prozess miteinbezogen hat, kann darduch einen erheblichen Einfluss auf ihre Präferenzentwicklung ausüben. In dieser Hinsicht nehmen die Wirtschaftsakteure an einem Lernprozess teil und entwickeln ihre Präferenzen während der politischen Auseinandersetzung weiter, was bei den Dienstleistungsbranchen in den 1990er Jahren beobachtet werden konnte. Die Kommission reagiert nur aktiv auf die Wirtschaftsakteure, welche paneuropäische Präferenzen auf der supranationalen politischen Ebene miteinbringen. Diese Tatsache hat dazu beigetragen, dass sich bei den europäischen Dienstleistungsindustrien stets eine liberalisierungsorientierte Handelspolitik herausbilden konnte. Im Vergleich dazu bleiben die protektionistischen Präferenzen hauptsächtlich auf der nationalen Ebene, um ihren politischen Willen durchzusetzen, was aber nur selten bei den europäischen Dienstleistungsgesellschaften auftritt.

Diese zunehmende Konzentration der Handelskompetenzen auf der supranationalen Ebene spiegelt eine verstärkte Position der Kommission gegenüber den Mitgliedstaaten wider, die sowohl auf die Globalisierung als auch auf ihre interne Integration zurückzuführen ist. Mit der zunehmenden Einbettung der Europäischen Kommission im internationalen Handelssystem und der inländischen Unterstützung ihrer paneuropäischen politischen Initiative, würde sich die eingangs gestellte Hauptfrage dieser Dissertation klären lassen. Mit diesem Trend verlieren die Mitgliedstaaten allmählich ihre Fähigkeit zur nationalen, politischen Behandlung ihrer sensiblen Branchen, deren Handelskompetenz zunehmend der Kommission gutgeschrieben wird.

Die verstärkte Befugnisübertragung ausgehend vom Vertrag von Amsterdam, über den Vertrag von Nizza bis hin zum Lissabon Vertrag ist eine rechtliche und institutionelle Bestätigung für diese Entwicklung. Wenn es eine offensichtliche Schwächung der „Funktionalität“ der Mitgliedstaaten gibt, würde dies eine entsprechende Verstärkung der Rolle der Kommission nach sich ziehen, damit ein neues institutionelles Gleichgewicht bei der Kompetenzaufteilung innerhalb der EU erreicht werden kann.

Zusammenfassend versucht die vorliegende Studie eine Multi-Polity-Natur der EU zu beschreiben und die anderen Dimensionen der Anwendung des Principal-Agent-Modells auf die Europäische Integration zu beleuchten. Die Analyse zeigt eine „Permanente Befugnisübertragung“ in der EU-Außenhandelspolitik und eine Zentralisierung der Handelskompetenzen auf die supranationale Ebene auf. Das Ergebnis dieser Studie widerspricht gewissermaßen einer Hauptthese des Principal-Agent-Modells, nachdem der Agent sorgfältig von den Principals kontrolliert wird und nur über einen kleinen begrenzten Raum für seine eigenen Präferenzen verfügt. In der Literatur ist es wenig umstritten, dass der Principal seine Agenten immer gut kontrollieren kann. Diese Studie hat dennoch aufgezeigt, dass die Kommission als Agent gegebenfalls ihre vorteilhafte Position, resultierend aus dem institutionellen Zusammenhang, in das sie eingebettet ist, nutzen und weiterhin ihre eigenen Präferenzen im Außenhandel verfolgen kann, was einem „einfachen Agenten“ der Mitgliedstaaten nicht ohne Weiteres möglich sein würde.

An dieser Tendenz für mehr Autorität und Befugnis auf der supranationalen Ebene zeigt sich eher eine funktionale Notwendigkeit als reine ideologische Erwägungen, was die Kernbehauptungen der Neo-Funktionalismus unterstreicht. Die Entwicklung der Kompetenzübertragung im Außenhandel hat sich in einem spannenden Verhältnis zwischen nationaler Souveränität und supranationaler Macht herausgebildet. In den EU-Institutionen ist die Befugnisübertragung viel komplizierter als in einem Principal-

-Agent Verhältnis, in denen der Agent nur die funktionalen Zwecke des Principals zu erfüllen hat. Wie diese Studie aufgezeigt hat, wird der Agent von den internationalen oder regionalen, institutionellen Rahmenbedingungen deutlich begünstigt und kann seine eigenen Präferenzen entwickeln und verfolgen und sogar manchmal dem Principal eine größere Befugnisübertragung aufzwingen. Der Principal, im Vergleich, kann nur eine begrenzte Kontrolle ausüben, da er immer mehr Kompetenzen auf den Agenten übertragen hat. Dadurch, dass andere Dimensionen zu der Anwendung des Principal-Agent-Modells auf die Europäische Integration hinzugefügt werden, zeigt sich die Komplexität der Befugnisaufteilung innerhalb er EU sowie der Multi-Polity-Charakter der europäischen Integration.

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