

The Role of the European Parliament in the Post-Lisbon Common Commercial Policy

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Submitted to
Central European University
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In partial fulfillment of the requirements for the degree of Master of Arts

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Word count: 15850

Budapest, Hungary

2015

Abstract

Following the entry into force of the Treaty of Lisbon in 2009, the European Parliament has gained the right to veto international trade agreements negotiated by the European Commission. This thesis looks at whether or not this veto right is enough to make the Parliament into a principal of the Commission, as understood by the Principal Agent (PA) literature. A PA framework designed especially for the interpretation of the role of directly elected principals is applied, and tested on the European Parliament. This is done with the help of the ongoing debate surrounding the investor state dispute settlement clauses of the Comprehensive Trade and Economic Agreement (CETA) and the Transatlantic Trade and Investment Partnership (TTIP). The paper finds that although the Parliament does satisfy the stipulations of the frame – eliminating informational asymmetries, and channeling its arguments through its electorate – the Parliament is incapable of pressuring the Commission into policy change. Several possible reasons for this are mentioned. By exploring the dynamics of voter enfranchisement the paper also calls attention to the quality of arguments being presented by vocal civil society groups, which in turn make their way into the arguments of some MEPs.

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List of Abbreviations

In order of appearance

EC – European Commission

EU – European Union

WTO – World Trade Organization

CETA – Comprehensive Trade and Economic Agreement

TTIP – Transatlantic Trade and Investment Partnership

ISDS – Investor State Dispute Settlement

EP – European Parliament

PA – Principal-Agent

BITs – bilateral investment treaties

S&D – Progressive Alliance of Socialists and Democrats in the European Parliament
[*political group in the EP*]

EPP – European People’s Party [*political group in the EP*]

MEP – Member of European Parliament

DG – Directorate General [of the European Commission]

GUE/NGL – European United Left – Nordic Green Left [*political group in the EP*]

ALDE – Alliance of Liberals and Democrats for Europe [*political group in the EP*]

INTA – European Parliament Committee on International Trade

ICSID – International Center for Settlement of Investment Disputes

CSIS – Center for Strategic and International Studies

EFDD –Europe of Freedom and Direct Democracy [*political group in the EP*]

ECR – European Conservatives and Reformists [*political group in the EP*]

TFEU – Treaty on the Functioning of the European Union

Introduction

International Trade Policy is one of the most important and one of the oldest common policy areas of the European Union. A highly technical and complex area of policymaking. It is a field where the European Commission (EC) has traditionally enjoyed a large degree of autonomy. With the continuous expansion of the EU, the Commission has had to adapt to service the interests of more and more member states – which has proven to be no small task. With the benefit of hindsight we can say that the Doha round of WTO negotiations failed in large part due to the difficulty of aggregating so many diverse member state interest into one common negotiating position. Notwithstanding, finding the common denominator in minor trade deals is easy enough, as illustrated by the large amount of successfully negotiated free trade agreements in force between the EU and third partners. The Doha round, however was ambitious. It aimed at dismantling free trade restrictions in agricultural products – the most protectionist segment of them all. Dismantling trade and investment restrictions between the United States and the EU, is an even taller order. As the Commission with regard to ongoing negotiations between the EU and US: “When negotiations are completed, this EU-US agreement would be the biggest bilateral trade deal ever negotiated – and it could add around 0.5% to the EU's annual economic output.”¹

With the entry into force of the Treaty of Lisbon on the 1st of December of 2009 the European Parliament gained the right to veto the adoption of international treaties negotiated by the European Commission. This marks a significant change in the rules of the decision-making process in negotiating international trade agreements: the European Parliament has become more involved in the policy discussions relating to trade. At present, nowhere is this more apparent than in the cases of the Comprehensive Trade and Economic Agreement

¹ European Commission. “Trade, Countries and Regions: United States” DG Trade web 25 April 2015
<http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/>

(CETA)² and the Transatlantic Trade and Investment Partnership (TTIP). Although these are two separate deals, the controversial issue of whether an Investor State Dispute Settlement (ISDS) clause is necessary in either of these agreements or not, has fused the discussions on CETA and TTIP. Although CETA is in a much more advanced state than TTIP, it also makes sense to discuss the ramifications of the two agreements together because of the large transnational presence of US corporations in Canada and vice versa. In practical terms, this means that the perceived dangers of ISDS would affect the EU even if only CETA would enter into force, and the more ambitious TTIP would fail, since in theory US corporations could invoke investor protection clauses against European States through their subsidiaries in Canada.

The debate over ISDS originated between certain political groups of the European Parliament (EP) and the European Commission. Subsequently some member state governments have bandwagoned on the objections of parliamentarians relating to ISDS. At present, no certain outcome may be predicted in relation to CETA or TTIP, although the former agreement has already been ‘initialed’³ by the European Commission and the Canadian Government. This raises the question of how much influence the EP actually wields in the post-Lisbon legal framework over influencing the trade policy formulation of the EU. Answering this question requires entering the realm of Principal-Agent (PA) theory, as expanded upon below.

By applying a specific parliamentary PA model, the paper also touches upon the qualitative assessment of the arguments presented by advocates and opponents of ISDS. This is done in an effort to understand some of the dynamics behind the relationship between the EP and the

² Between the European Union and Canada

³ This means that negotiations have been concluded, and a draft treaty has been put forward for ratification by Canada and the EU in accordance to the respective legal procedures of the two parties.

European electorate. McCubbins⁴ PA framework suggests, that the general public does have a role in controlling the policy decisions of the Commission. Seen as part and parcel of the Parliament's increased involvement in the policy area, parliamentarians are understood to be highly reactive to their electorates. This means that we must explore the subject matter of the debate itself. As a Commission Official I interviewed pointed out, practitioners of international trade are rather puzzled by the sudden public interest in the whole issue of ISDS, seeing that such clauses are nothing new. Member states of the European Union are currently party to approximately 1400 bilateral investment treaties (BITs) out of which: "...most include provisions for investor-state dispute settlement"⁵. This raises the question of just how well argued the claims of those opposing ISDS are. The paper ultimately finds evidence that MEPs have latched-on to the vocal, but poorly argued public resistance to ISDS. As a result, their arguments have become locked-in and populist. Interestingly enough, this is proof that the EP does satisfy one of the criteria of the McCubbins' framework for being considered a principal. Nonetheless, the fact that the EC shows unwillingness to seriously consider abandoning ISDS indicates that McCubbins' framework is insufficient to grasp the complexities of EU policymaking.

Exploring these questions is important in order to gain a more encompassing overview of the dynamics of policy formation of the EU when it comes to international trade. With the effective failure of the Doha round of the WTO, major international actors like the United States or the European Union have moved towards negotiating bilateral trade treaties. The CETA and TTIP agreements will undoubtedly not be the end of the line for Europe. Understanding some of the dynamics of the new EU legal framework through a case study on

⁴ McCubbins, Mathew D., Roger G. Noll, and Barry R. Weingast. "Administrative procedures as instruments of political control." *Journal of Law, Economics, & Organization* (1987): 243-277.

⁵ International Comparative Legal Guides "07 European Union Overview - International Arbitration 2014" web. 20 April 2015 <http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2014/european-union-overview>

ISDS will allow stakeholders wishing to influence the EU's trade policymaking process to understand some of the motivations and the overall importance of Parliament – the newest player on the block. Especially since it seems that there is a real possibility that CETA – heralded as a test case for TTIP – will not pass, thus jeopardizing TTIP and the related economic growth expected from it⁶. As it stands the 'Progressive Alliance of Socialists and Democrats in the European Parliament' (S&D) group seems to be determined to veto the CETA agreement if ISDS is not removed from it. Besides being publicly stated⁷ by the leader of the Party of European Socialists – the European umbrella party of S&D group members – this position has been confirmed by several MEPs publicly, and during the course of interviews conducted for this paper. Considering the adamant stance of the Greens, GUE/NGL and the Eurosceptics, this means that there is at least a 45.4%⁸ minority behind a possible veto. With less than 5% needed to achieve a veto, the unclear position of ALDE (8.9%), and the large number of unpredictable Non-Inscript Members (6.92%) could see the vote could go either way. Suffice is to say that the veto looms as over CETA as a very real option.

⁶ European Commission "TTIP's impact – benefits, concerns, myths" web 16 May 2015
<http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/#economic-benefits>

⁷ Group of the Progressive Alliance of Socialists and Democrats in the European Parliament "S&D Group President Gianni Pittella: "We oppose ISDS mechanism in EU-Canada trade deal"" *Press Release* (2014) web 11 May <http://www.socialistsanddemocrats.eu/newsroom/sd-group-president-gianni-pittella-we-oppose-isds-mechanism-eu-canada-trade-deal>

⁸ Calculated based on: European Parliament "Results of the 2014 Elections" web 19 May 2015
<http://www.europarl.europa.eu/elections2014-results/en/election-results-2014.html>

1. Theoretical Framework – PA models in general

Principal Agent Theories originate from the study of business administration in the United States in the 70s⁹, 80s¹⁰ and 90s¹¹. Subsequently they were applied to the U.S. political system starting in the late 80s¹² and 90s¹³ and started to develop in relation to the European Communities and later the European Union in the late 90s, thanks to the pioneering work of Pollack¹⁴ who presented a unified PA model building on the work of previous scholars who studied rational choice and the role of comitology procedures in relation to the European Communities. The work of Pollack highlighted the inadequacies of classical functionalist theories – originating from Haas^{15, 16} – in explaining the dynamics of agency delegation, and thus touching on the core issue of PA models: agency autonomy.

The basic assumptions of PA models – well summarized by Miller¹⁷ and Hawkins et. al¹⁸ – may be described as follows: executives (agents) of corporations or bureaucrats in public administration structures are supposed to follow the strategic guidelines and policy decisions of the owners of their companies, or political masters (principals). However, the interests of these two parties may not necessarily coincide, thus leading to what Miller terms a

⁹ Ross, Stephen A. "The economic theory of agency: The principal's problem." *The American Economic Review* (1973): pp. 134-139.

¹⁰ Guesnerie, Roger, and Jean-Jacques Laffont. "A complete solution to a class of principal-agent problems with an application to the control of a self-managed firm." *Journal of public Economics* 25.3 (1984): pp. 329-369.

¹¹ Garen, John E. "Executive compensation and principal-agent theory." *Journal of Political Economy* (1994): pp. 1175-1199.

¹² Weingast, Barry R. "The congressional-bureaucratic system: a principal agent perspective (with applications to the SEC)." *Public Choice* 44.1 (1984): pp. 147-191.

¹³ Shepsle, Kenneth A., and Barry R. Weingast. "Positive theories of congressional institutions." *Legislative Studies Quarterly* (1994): pp. 149-179.

¹⁴ Pollack, Mark A. "Delegation, agency, and agenda setting in the European Community." *International organization* 51.01 (1997): pp. 99-134.

¹⁵ Haas, Ernest B. *Beyond the Nation State: Functionalism and International Organization*, Stanford CA, Stanford University Press (1964) Print

¹⁶ Haas, Ernest B. "International Integration: The European and the Universal Process" in Deutch, Karl Wolfgang eds. *International Political Communities: An Anthology*, Garden City NJ, Anchor Books (1966) Print

¹⁷ Miller Gary J. "The Political Evolution of Principal-Agent Models" *Annual Review of Political Science* 8:1 (2005): pp. 203-225

¹⁸ Hawkins, Darren G., and Wade Jacoby. "How agents matter." in Hawkins, Lake et. al eds. *Delegation and Agency in International Organizations*. Cambridge UK, Cambridge University Press, (2006): pp. 199-228, Print

“preference asymmetry problem”¹⁹. When such a situation arises, the agents – who are in charge of implementing policy, and the day to day administration of the organization – may withhold information from their principals in order to give them a distorted picture of what is actually happening within the organization and thus stop them from taking action to remedy the slippage in accomplishing the set targets caused by agents. The dominance of agents over information flows is termed the “information asymmetry problem”²⁰. This may be conveniently used to cover-up the lack of implementation of policy on behalf of the agent: thus the agent impacts the actual outcomes of the business or political strategy envisioned by the principal. BBC’s iconic television series *Yes Minister* and *Yes Prime Minister* demonstrates the application of these asymmetries in a very tangible – although perhaps less scientific manner²¹ in relation to the British Civil Service (agents) and its resistance to obey the policy guidelines set out by politicians (principals). The following excerpt illustrates the point.

Sir Humphrey Appleby, the Permanent Secretary – chief civil servant in a given ministry – and Bernard Woolley – the minister’s private secretary – have a conversation about the difficulties caused by principals:

“- Sir Humphrey Appleby: Well, Bernard, have you enjoyed having your Minister away for a week?

- Bernard Woolley: Not very much. Makes things very difficult.

- Sir Humphrey Appleby: Ah, Bernard! A Minister's absence is a godsend! You can do the job properly for once. No silly questions, no bright ideas, no fussing about the papers. I think our Minister doesn't believe he exists unless he's in the papers. I'll bet

¹⁹ Miller Gary J. (2005): p.205

²⁰ Ibid.: p.205

²¹ In fact, a great deal of research went into the production of the series as noted by the Series’ creators in: Youtube.com “Comedy Connections: Yes Minister 1” web. 25 April 2015

<https://www.youtube.com/watch?v=Ir8hAnpDdco>

the first thing he says is, "Any reports on my Washington speech?"

- Bernard Woolley: How much?

- Sir Humphrey Appleby: A pound.

- Bernard Woolley: Done. He won't because he's already asked. In the car on the way back from Heathrow.

- Sir Humphrey Appleby: You're learning, Bernard. Sit down. See why a Minister's absence is a good thing?

- Bernard Woolley: Yes, but so much work piles up.

- Sir Humphrey Appleby: With a couple of days' briefing before he goes and debriefing after, he's out of our hair for a fortnight. If he complains of being uninformed, say it came up while he was away.

- Bernard Woolley: Hence so many summit conferences?

- Sir Humphrey Appleby: That's the only way the country works! Concentrate all the power at Number 10 then send the PM away to EEC summits, NATO summits, Commonwealth summits, anywhere! Then the Cabinet Secretary can run the country properly.”²²

It is worth noting that these features of bureaucratic entities, or agents as described so far, are also substantiated by the observations made by Graham T. Allison, and subsequent researchers building on his work – as described in his models^{23, 24} of *Bureaucratic Politics*.

Of course, principals have their means of fighting back or reining in agents. Thus “canonical PA models”²⁵ also operate under the following assumptions in relation to principals:

²² Internet Movie Database “Yes Minister: A Question of Loyalty (1981) Quotes” web. 25 April 2015
<http://www.imdb.com/title/tt0751806/quotes>

²³ Allison, Graham T. "Conceptual models and the Cuban missile crisis." *American political science review* 63.03 (1969): pp. 689-718.

²⁴ Allison, Graham T., and Morton H. Halperin. "Bureaucratic politics: A paradigm and some policy implications." *World Politics* 24.S1 (1972): pp. 40-79.

- “Initiative that lies with a unified principal. The principal acts rationally based on a coherent set of preferences, and is able to move first by offering a contract.
- Backward induction based on common knowledge. Principal and agent share knowledge about the structure of the game, effort costs, probability distribution of outcomes, and other parameters. Just as important, they share common knowledge of the agent’s rationality; both know that the agent will prefer any incentive package with an expected utility slightly more than the agent’s opportunity cost. This leads to backward induction by the principal.
- The principal can infer the agent’s best response function from known parameters and use backward induction to identify the best possible outcome, subject to that function.
- Ultimatum bargaining. The principal is presumed to be able to impose the best possible solution from the agent’s correctly inferred best response function. Or as Sappington (1991) says, “The principal is endowed with all of the bargaining power in this simple setting, and thus can make a ‘take-it-or leave-it’ offer to the agent” (p. 47).”²⁶

The principals’ reactions to the functioning of agents – as described by Miller above – infers a balance of power between the parties. In this formula, principals and agents share common knowledge about each other’s preferences, probable reactions to certain situations and other standard operating procedures. This model – termed by Miller as being the Canonical PA model – foresees a minister that is just as cunning as his civil servant. However, the practice of power delegation within international trade shows a different reality. Indeed, Miller

²⁵ Miller Gary J. (2005): pp.205-208

²⁶ Ibid.: p.206

himself points out, that "...political science applications [of the PA model] have relaxed one or more assumptions"²⁷.

An intriguing case study²⁸ on the policy entrepreneurship of the Commission during the Doha round demonstrates just how damning the lack of having a unified principal can be to policy outcomes. In the interpretation of da Conceição-Heldt, having a divide within the Council on the question of agricultural subsidies, gave the Commission more maneuvering room in making concessions towards negotiating partners: "a vague negotiating mandate and conflicting messages from principals all give the agent in international trade negotiations more discretion and thus a greater ability to secure package deals"²⁹. In essence what this demonstrates, is that even if there is no unified policy position among principals as to what the desired outcome should be, the agent in question will adopt and peruse a policy. This observation is already made by Pollack in a more general context when he writes: "[...] supranational agents may exploit differing preferences among the member states to avoid the imposition of sanctions against shirking and to "push through" legislative proposals via their formal agenda-setting power [...]"³⁰. Returning to the case of the Doha round: the Commission's proposals to unilaterally cut back EU agricultural subsidies³¹ lead to the withdrawal of the EU from the negotiations, with the Council establishing that the Commission had overstepped its negotiating mandate. In other words, the slippage of the

²⁷ Miller Gary J. (2005): p. 206

²⁸ da Conceição-Heldt, Eugénia. "Variation in EU member states' preferences and the Commission's discretion in the Doha Round." *Journal of European Public Policy* 18.3 (2011): 403-419.

²⁹ Ibid.: p.403

³⁰ Pollack, Mark A. (1997): p.129

³¹ In this particular case, the EC countered a proposal made by the U.S. by offering even more concessions: In October 2005, the US presented a new negotiating stance calling for a complete elimination of all export subsidies over a 15-year period and for the reduction of blue box domestic support by 50 per cent. The Commission, now with Peter Mandelson (from the UK) in charge of trade and Marian Fischer Boel (from Denmark) at agriculture, reacted to this new proposal by circulating a new negotiating proposal of their own. This offered to reduce domestic support by 70 per cent, to accept higher cuts for higher tariff rates and to remove all export subsidies (Agence Europe, 11 October 2005). However, this concession led to a virulent reaction from EU member states with a defensive position on agricultural trade liberalization." da Conceição-Heldt, Eugénia (2011): p.411

agent was extreme, and went unnoticed by the principal because of the information asymmetry problem. In the end this jeopardized the goal, of concluding the Doha round.

Perhaps it is the complexity of the EU's structures, and legal procedures that ultimately lead to such a scenario as described above, or perhaps it is the sensitivity of agricultural production in particular. In fact, one may find many more successes than failures, when looking at international trade deals. The EC has successfully negotiated dozens of free trade agreements with partners from all over the globe. Nevertheless, CETA and TTIP have already blown-up into two non-routine negotiations, and they offer many interesting possibilities to test the applicability of the PA framework to the post-Lisbon legal structure of trade negotiations.

1.1 Formulating a PA model for the post-Lisbon environment

The involvement of the European Parliament in the process of policy formulation complicates the already complex inter-institutional relationship between the classical principal and agent in trade policy – Council and Commission. Indeed, although some research³² into the post-Lisbon role of the EP suggests that a rich informal culture of cooperation and information sharing has emerged between the Commission and the Parliament, the question of whether the Parliament has become a co-Principal of the Commission or not has not yet been answered. This is the central issue of this thesis – in relation to the specific case study of ISDS. In order to be able to formulate and test proper hypotheses a concrete PA model has to be put forward: something that goes beyond the general observations of relationships between principals and agents and accounts for some of the special qualities related to legislative bodies. Since the focus of PA models in relation to the EU have largely ignored the

³² Osteikoetxea, Eguzki. "EU Trade Actors after Lisbon: Enhanced Negotiations or Business as Usual?" *Brugges Political Research Paper No. 32*, November 2013." (2013) web. 25 April 2015
https://www.coleurope.eu/sites/default/files/research-paper/wp32_osteikoetxea.pdf

Parliament, and since PA theories have been regularly applied to examine institutional relationships in the U.S. political system, this paper will borrow the theoretical framework proposed by McCubbins *et al.*³³

McCubbins' framework was developed in an effort to further the understanding of how the United States Congress asserts political control over various federal agencies, over which it practices congressional oversight. The core assumptions of this frame, is that for the elected representatives of Congress, it is important to "channel agency policy choices in favor of constituents"³⁴ in order to strengthen their legitimacy. In other words, Congressional principals want to see an outcome where their agents listen to popular demand, channeled through a democratically elected institution – or themselves. This is achieved most effectively through the employment of an array of administrative procedures, and monitoring activities. While these tools do not mean the elimination of the opportunity to use the threat of sanctions and the promise of rewards towards agents, the administrative procedures have the added benefit of "affecting the institutional environment in which agencies make decisions and thereby limit an agency's range of feasible policy actions"³⁵. In other words, administrative procedures go beyond intangible and questionable threats and promises, they create more concrete confines for the agent.

These confines are created by involving the public in the policymaking process by providing more transparent information. McCubbins' writes: "...elected officials can design procedures to solve two prototypical problems of political control. First, procedures can be used to mitigate informational disadvantages faced by politicians in dealing with agencies. Second, procedures can be used to enfranchise important constituents in agency decision making

³³ McCubbins, Mathew D., Roger G. Noll, and Barry R. Weingast. "Administrative procedures as instruments of political control." *Journal of Law, Economics, & Organization* (1987): pp. 243-277.

³⁴ Ibid: p.274

³⁵ Ibid: p.244

processes, thereby assuring that agencies are responsive to their interests”³⁶. The more concrete confines of the agent is created by the enfranchisement of the public. Involving civil society through this form of delegation also has the added benefit of decreasing the opportunity costs of elected officials – by doing so, politicians will have more free time to spend on “other politically relevant purposes”³⁷. In other words, the involvement of the public also serves as a method for burden sharing, thus eliminating some of the problems associated with the limited institutional capacities of MEPs, as newcomers to the game. As Osteikoetxea writes: “(...) to the misfortune of the EP, a newcomer’s problem exists since the INTA committee does not have the resources, the technical expertise or the adequate time to closely monitor negotiations. INTA committee meetings are held only once a month whilst their new tasks require more time to comprehend complex trade technicalities. Taking into account that there are more than 700 EU trade documents a year³⁸ (...)”³⁹.

In light of the highly public nature of the CETA/TTIP and ISDS debate, the prospect of applying this frame seems convenient and logical. Substituting the European Parliament in place of the U.S. Congress as described by McCubbins, is simple enough. Although there are significant differences between the licenses held by the Parliament over the Commission and Congress over federal agencies, McCubbins’ emphasis is not explicitly on threats made by the principal in the direction of the agent, but rather on the shared knowledge between the two. In this frame, the existence of punishment mechanisms at the disposal of the principal count as shared knowledge. The real threat – in the eyes of the agent – is that owing to the introduction of administrative procedures by the principal, the principal will be in a better position to judge if applying the sanction in question is necessary. In other words, by

³⁶ Ibid: p.244

³⁷ Ibid: p.247

³⁸ De Sarnez, Marielle, MEP (ALDE) Member of the INTA Committee, Interview with Parliamentary Assistants, European Parliament, Brussels, 10 April 2013

³⁹ Osteikoetxea (2013): P. 9

eliminating the informational asymmetries between the two parties, the possibility for the principal to use punishment mechanisms becomes more of a reality, since its elected officials are not ‘in the dark’ anymore.

If this paper can establish the elimination of informational asymmetries between the EC and the EP, than that will mark a significant change to the practices of the past. A senior parliamentary researcher interviewed⁴⁰ for this paper also chaired a high level working group in the Council in the early 2000s that was working on a South-American free trade agreement. While doing so, she intended to involve the Members of Parliament in the deliberations of the working group. While mentioning the notion to a very senior DG Trade Official – and a personal acquaintance – the trade official said, that she should refrain from doing so, since giving the Parliament information would create a dangerous precedent.

A key element of McCubbins’ frame, is the presence of a loud audience. By considering the role of the public, this frame moves away from the initial one-sided understanding of PA models, which emphasized the dominance of agent over principals: “[administrative procedures] ameliorate the problem of asymmetric information [because] they reduce the informational costs of following agency activities and especially facilitate “fire-alarm” monitoring through constituencies affected by an agency’s policies. They also sharpen decisions to punish by facilitating the assessment of the extent and importance of noncompliance. Thus, by lowering the costs of monitoring and sharpening sanctions, administrative procedures produce an equilibrium in which compliance is greater than otherwise would be”.⁴¹

⁴⁰ Senior parliamentary researcher (European Parliament) researcher of the European Parliamentary Research Service, Interview, European Parliament, Brussels, 14 April 2015

⁴¹ Ibid: p.273

From this point of view, it does not matter that the Parliament has only a limited role in the decision making process in the form of an up or down veto. The only point of contention is, whether the Parliament can achieve a change in the agent's behavior – get it to comply to its wishes – with the help of a European public opinion. The threat of the veto is sufficient to worry the Commission, since it has been applied before⁴², and it cannot be 'overridden' in Council, or by national legislatures. The heavy controversy around CETA makes it a good test-case for a preliminary application of this framework to the relationship between the EP, the European public and the Commission.

1.2 Formulating Hypotheses

My first hypothesis [H1] is that the Parliament has become a principal of the Commission. Upon looking at the rhetoric and political communications of INTA parliamentarians, there is a strong indication that MEPs involved in international trade feel that they are owed an equal say in trade negotiations. This is due to the EP's strong perception that their involvement is key for the democratic accountability of the negotiation process. The fact of the matter is that a new set of formal and information sharing procedures have emergence between the Parliament's INTA Committee and the Commission. By all accounts, these have facilitated much more transparency in relation to TTIP, and related discussions about CETA and have given the EP the chance to become more and more involved in the discussions. By relying on the European electorate's voice, MEPs can satisfy their sense of working for democratic accountability. The fact that these informal procedures have become so embedded into the everyday relationship between the EP and the EC that it is impossible to imagine conducting

⁴² The Parliament's veto of ACTA in 2012 is one memorable instance. See: Euobserver.com "ACTA in Tatters After MEPs Wield Veto" web 25 May 25, 2015 <https://euobserver.com/political/116866>

business in any other manner,⁴³ adds a sense of normalcy to MEPs when it comes to ‘being kept in the loop’. In other words, the perception of the current status quo is that it cannot evolve back into a state where the Commission is the gatekeeper of information, and the EP is left in the dark. These two changes are the two fundamental requirements that McCubbins’ framework identifies to consider an elected body a principal in a decision making process.

My second hypothesis is related to the role of trade policy as a facilitator of more publicity for MEPs in their own constituencies. Since European Parliamentary elections are still largely second-order national elections, EP members – as rational politicians – are keen to exploit topics that are capable of capturing the interest of wider audiences in order to gain more public presence, and ultimately legitimacy. CETA and TTIP, and the issue of ISDS have very much permeated the agenda of civil society organizations, and national political parties all over the EU. This cannot be said of many other policy areas where the EP is involved. Nonetheless, it is hard not to notice that the protesters, and MEP’s that have taken it upon themselves to oppose ISDS, present seemingly very simple and shallow arguments against ISDS – a complex and technical issue. Thus this hypothesis [H2] is that the quality of arguments presented by MESP’s opposing ISDS are oversimplified and populist and [H2/a] are being fueled by public discourse and voter pressure. If [H1] and [H2 + H2/a] prove to be correct, than this will imply that a key element in the Parliament’s arsenal to act as a principal of the Commission will be based on populism rather than expertise. While on the one hand this might lead to jeopardizing a good ISDS clause between the parties (US – EU, and Canada – EU) on the other hand it might also foreshadow an improvement in the public perception of the legitimacy of the EP. Following the discussion of these two hypotheses, I

⁴³ Osteikoetxea, Eguzki. "EU Trade Actors after Lisbon: Enhanced Negotiations or Business as Usual?" Brugges Political Research Paper No. 32, November 2013." (2013) web. 25 April 2015 https://www.coleurope.eu/sites/default/files/research-paper/wp32_osteikoetxea.pdf

move on to evaluate the theoretical framework in light of the findings of my research. I finish off the paper with a summary and a conclusion.

1.3 Methodology

I wish to test the above enumerated two hypotheses by applying the above outlined McCubbins' PA model to a case study of the ISDS issue in order to see if the predictions of the model fit the empirical realities in this particular case. The process of reviewing the empirical realities and testing them against the theoretical framework will provide an answer to [H1]. The quality and the ramifications of the arguments actually presented by the parties involved [H2] + [H2/a] will be addressed second.

In order to understand the perceptions of parliamentarians, the attitude of the Commission, and the technical questions behind ISDS I have conducted a series of elite interviews with those that are intimately involved with the subject matter. I conducted in-person interviews with four members of the European Parliament, and one parliamentary assistant of a member between the 12th and 15th of April in Brussels, Belgium. Three of my subjects are members of the Progressive Alliance of Socialists and Democrats (Jörg Leichtfried, Joachim Schuster, Tibor Szanyi), the parliamentary assistant works for a member of the Alliance of Liberals and Democrats for Europe (Marietje Schaake), and lastly one interviewee is a member of the European People's Party (Gyula Winkler). With the exception of one of my subjects, all Members (MEPs) are regular members of the International Trade Committee (INTA). Although Mr. Szanyi is not a regular member, he is tasked with following trade related matters for the Hungarian Socialist delegation. I also conducted an in-person interview with a senior associate of the European Parliamentary Research Service who wished to remain

anonymous⁴⁴ – an in-house think tank – currently working in the field of International Trade, with several decades of experience in providing policy analysis for the Council, the Commission and the Parliament in questions of trade. My final subject, is a Deputy Head of Unit at DG Trade⁴⁵ who I interviewed on the 17th of April, via phone – he also wished to remain anonymous. I also solicited interviews from other MEPs, but I either received no response after several emails, or I received flat-out rejection. This was the case both with Green and GUE members of the INTA Committee. Besides these primary sources of information, I also rely on document analysis of official Commission and EP papers, political press releases etc... Insights of academic research into the field of EP-EC relations, with a specific focus on international trade are also considered.

Finally it is important to highlight, that the lines between CETA and TTIP are somewhat blurred, with regards to the issue of ISDS. The CETA treaty contains a clause that will allow for revisions of the ISDS clause further down the line. It is widely understood by all stakeholders of the two agreements, that the ISDS clause of TTIP – one that is being negotiated under the pressure of more public scrutiny and with more transparency – may be transplanted into CETA, in the future⁴⁶. In light of this, the Parliament may be able to effectively influence the outcome of CETA and TTIP by focusing on only the latter. This is why the two agreements are treated as being parts of a larger whole in the case study of this paper.

⁴⁴ Referred to as: ‘Senior Parliamentary Researcher’

⁴⁵ Referred to as: ‘DG Trade official’

⁴⁶ Group of the Progressive Alliance of Socialists and Democrats in the European Parliament “S&D Position Paper on Investor-state dispute settlement mechanisms in ongoing trade negotiations” *Position Paper* (2015) web 13 May 2015
http://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.bernd-lange.de%2Fimperia%2Fmd%2Fcontent%2Fbezirkhannover%2Fberndlange%2F2015%2Fsd_position_paper_on_isds_march_4_2015.pdf&ei=SCVWVfryIoH7sgHd_oEw&usq=AFQjCNFqf4MS1EndYASavbwV2KJb-V9xew&sig=2g5yxqMontEj3ZnFTEhGxJw&bvm=bv.93564037,d.bGg

2. The European Parliament: an Exigency for More Power

For anyone that spends a significant amount of time working in the EP⁴⁷ it quickly becomes apparent that there is an overarching sense of self-importance among the majority of parliamentarians when it comes to perceiving their own role within the process of European legislation in general. While at first, this may seem self-apparent, or even trivial – given the fact that the EP now enjoys co-decision powers in 83 different areas [ordinary legislative procedure]⁴⁸ – this sense of self-importance is more importune than anything else. The EP – as an institutional body – regularly strides to expand its involvement in areas of decision-making where it finds that it should be more involved.

To take a recent, high-profile example: the processes surrounding the ‘spitzencandidaten’ during the last European elections highlights the EP’s stride to spill-over into fields of decision making where it does not necessarily have a clear legal mandate. The Economist, for instance consistently interpreted the various EP political groups’ nominations of ‘spitzencandidaten’ – or top candidates – to lead the next European Commission as an institutional attempt at power-expansion based on “a clause smuggled into the Lisbon treaty of 2009”.⁴⁹ The European Parliament’s institutional argument was that the nomination of such candidates would help decrease the gap between voters and the executive, and that the candidates represented a step towards eliminating some of the democratic deficit faced by the EU. The Parliament’s intent to be included as a constituent element in the traditionally obscure process of selection that surrounds Commission Presidents, was clear. The question of why Chancellor Merkel eventually embraced the parliamentary initiative may be argued,

⁴⁷ The author of this paper spent 10 months interning in the EP from November of 2012 to August of 2013.

⁴⁸ European Commission “Ordinary Legislative Procedure ‘Step by Step’” web 2015 May 26
http://ec.europa.eu/codecision/stepbystep/text/index_en.htm

⁴⁹ The Economist “Elected, yet strangely unaccountable” web 13 May 2015
<http://www.economist.com/news/briefing/21602200-european-elections-will-neither-lend-new-credibility-european-parliament-nor-give>

however the EP's actions in that particular case may clearly be interpreted as part of a bid for re-allocation of institutional powers in favor of MEPs – as described by Rittberger.⁵⁰ This process is one where the Parliament tries to syphon away powers from the Commission or the Council through the effective utilization of formal and informal powers:

“Institutional change comprises those instances whereby existing decision-making rules are modified, as a result of which decision-making competencies and powers are being redistributed among the key decision-making actors in the EU. Focusing on the EP, inter-institutional bargaining is one central explanation to account for the dynamics and outcomes of institutional change affecting the distribution of decision-making powers between the EP and the other legislative actors – most notably the Council. Instances of institutional change feature prominently in the literature on the EP's empowerment. Explanations that emphasize the regulative quality of institutions explore those treaty-based formal rules as well as informal rules, such as inter-institutional agreements, that confer rights and obligations on the EP and its constituent individual or collective actors, such as MEPs and party groups.”⁵¹ The basis for the Parliament's claims that it should be a constituent member in the inter-institutional bargaining surrounding the nomination of the next Commission President, was that of democratization of the process. The organization of televised debates by the ‘Spitzencandidaten’ – in auditoriums filled to the brim with eager university students – helped generate the image of public involvement and public ownership of the entire ‘nomination process’.

Indeed, as Ritterberger points out, there is an overarching tendency of parliamentarization within the EU, which goes beyond the observance of the formal legal requirements of the treaties, addressing the more constructivist question of attitudes towards the increased

⁵⁰ Rittberger, Berthold. "Institutionalizing representative democracy in the European Union: The case of the European Parliament." *JCMS: Journal of Common Market Studies* 50.s1 (2012): 18-37

⁵¹ Ibid.: p. 27

inclusion of the Parliament. “As the EU’s ‘constitutional settlement’ is said to have approached a state of ‘equilibrium’ and ‘maturity’ (Moravcsik, 2007)⁵², it hardly comes as a surprise that the study of processes of institutionalization should be instructive for our understanding of how constitutional principles have come to be taken-for-granted features of the EU. As I have argued, in the early decades of the EP’s existence its legitimacy was hotly contested. This was reflected not only by often-derogatory use of the label ‘assembly’, but also by highly contested debates over the powers it should or should not possess. In this context, proponents of the EP have come to successfully scandalize the lack of parliamentary democracy at the EU level and succeeded in ‘shaming’ recalcitrant policy-makers into compliance with the principle of representative democracy at the EU level. Over the decades, representative democracy has assumed the status of a constitutional principle in the EU, which – when evoked – triggered less and less contestation among Member State governments.”⁵³ Seeing that the initial starting point of this paper is the question of whether the European Parliament may be considered a principal of the Commission or not in light of the unfolding controversies surrounding the issue of ISDS, the evolutionary nature of parliamentary powers over the past decades is not irrelevant, as it highlights the EU’s capacity for institutional evolution.

The Parliament’s disposition towards its own role does matter. By channeling a debate that holds considerable public interest through the only democratically elected supranational institution of the EU, the Parliament may lay the groundwork for another wave of institutional evolution, which will see it becoming a more active participant in questions of international trade for instance. Without the will to expand its influence, the EC would surely

⁵² Moravcsik, Andrew. "The European constitutional settlement." *The World Economy* 31.1 (2008): pp. 158-183.

⁵³ Rittberger, Berthold. "Institutionalizing representative democracy in the European Union: The case of the European Parliament." *JCMS: Journal of Common Market Studies* 50.s1 (2012): p.33

not willingly concede information to the Parliament – according to the basic assumptions of PA models.

2.1 Informal Procedures as Administrative Procedures

Looking at the actual *modus operandi* of the relationship between the Commission and the INTA Committee, it seems that the Parliament's stride for more active involvement in trade deliberations are being taken into account by the EC. Osteikoetxea gives an extensive overview of the informal mechanisms that have emerged between the EC and INTA: "Moreover, the new monitoring power of the EP has encouraged a practical role for the INTA committee. In contrast to national parliaments, the EP enjoys more influence over the negotiation of trade agreements than many national parliaments enjoy over the activities of the executive outside their borders. Specifically, an unforeseen monitoring "acquis" has emerged. First, with the exception of the final mandate signed by the Council, the INTA committee receives all documents related to trade negotiations communicated to the Trade Policy Committee (TPC) at the Council. Second, the INTA committee invites chief negotiators from DG trade in order to receive updates on negotiations statuses. Even Commissioner for trade Karel De Gucht is called upon to give updates and answer questions. Third, through the platform named 'Technical Briefings' MEPs, assistants, and advisors for political parties have the chance to participate in dialogues with DG trade officials. Fourth, the INTA committee has created specific monitoring groups where MEPs acting as rapporteurs would regularly follow trade negotiations. Fifth, the INTA committee invites

high level officials to use the EP as a second forum of dialogue for trade-related aspects in a more dynamic and flexible manner than DG trade.”⁵⁴

The emergence of this informal monitoring *acquis* is not self-evident if one only looks at the treaties. Article 207 of the Treaty on the Functioning of the European Union states, that: “The Commission shall conduct these negotiations [international negotiations as laid down in Art. 207] in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly [sic!] to the special committee and to the European Parliament on the progress of negotiations.”⁵⁵ The manner of reporting activities is not specified, whereas the text makes it quite clear that the Commission is the agent of the Council, through the issuance of directives. By now, the manifestation of the reporting activities - as described above – toward parliament have become apparent, and routine like as confirmed by my interview subjects. Furthermore, none of the interviewees believed that these ‘informal *acquis*’ or procedures were temporary, or that they could be rolled back or abolished. Although the exact circumstances (who proposed what, and when) surrounding the emergence of this informal monitoring *acquis* is not evident, it is not relevant from the point of view of the application of McCubbin’s framework, where in light of the current status quo, we may substitute administrative procedures with the notion of the informal *acquis*: “(...) elected officials can design procedures to solve two prototypical problems of political control. First, procedures can be used to mitigate informational disadvantages faced by politicians in dealing with agencies. Second, procedures can be used to enfranchise important constituents

⁵⁴ Osteikoetxea, Eguzki. "EU Trade Actors after Lisbon: Enhanced Negotiations or Business as Usual?" *Brugges Political Research Paper No. 32*, November 2013." (2013) web. 25 April 2015 https://www.coleurope.eu/sites/default/files/research-paper/wp32_osteikoetxea.pdf :pp.9-10

⁵⁵ European Union “Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2008/C 115/01)” web 10 May 2015 <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2008:115:FULL&from=EN>

in agency decision making processes, thereby assuring that agencies are responsive to their interests”.⁵⁶

While in our case, it is uncertain whether these procedures were designed by MEPs or not, the fact that they are in place now does not subtract from the capability of the EP to satisfy the two stipulations of McCubbins’ framework in order to be considered a parliamentary principal: voter enfranchisement, and mitigation of informational asymmetries. As was described in the overview of the PA literature, mitigation of informational asymmetries is an absolute must in order to consider an actor a principle, thus let us start with the detailed analysis of this aspect of the framework.

2.1.2 Mitigating Informational Asymmetries

When asked about the demeanor of the Commission towards sharing information – including classified negotiating documents, MEPs were unanimous in claiming that they were satisfied with the current state of affairs. MEP Joachim Schuster said that: “we have no problems with the transparency”⁵⁷, while the assistant of MEP Marietje Schaake characterized the relationship between the EC and INTA as: “honest and open”⁵⁸. MEP Gyula Winkler said, that he believed that the Commission had: “accepted that the Parliament has a right to know what is going on”⁵⁹. Additionally, there seemed to be a general consensus between the Socialists, the EPP, and ALDE, that although the Commission was going beyond its treaty obligations in cooperating with INTA in such ways, this was nothing less than an expected minimum on behalf of parliamentarians.

⁵⁶ McCubbins et al. (1987): P.253

⁵⁷ Schuster, Joachim MEP (S&D) Member of the INTA Committee, Interview, European Parliament, Brussels, 13 April 2015

⁵⁸ Assistant of Schaake, Marietje MEP (ALDE) Member of the INTA Committee, Interview, European Parliament, Brussels, 14 April 2015

⁵⁹ Winkler, Gyula MEP (EPP) Member of the INTA Committee, Interview, European Parliament, Brussels, 13 April 2015

This attitude was substantiated by the DG Trade Official, when he said that “we strive to give the parliamentarians everything they ask for”⁶⁰ and that at DG Trade “we appreciate the input of parliamentarians, we have a very productive working cooperation [with them]”⁶¹. The senior parliamentary researcher claimed that the change in the attitude of DG Trade was tangible⁶². Referring back to the previous anecdote about a DG Trade official saying that sharing information with the Parliament would create a dangerous precedent, the researcher said that such attitudes could no longer be openly heard from EC officials, not even in corridor discussions.

These accounts seem to indicate that the Parliament has successfully mitigated the problem of informational asymmetries – a prerequisite for principldom – owing to the informal acquis that have emerged between the institutions. Having adequate information is also a prerequisite for the second quality that McCubbins attributes to a parliamentary principal: voter enfranchisement.

2.1.3 Voter enfranchisement in ISDS

Upon reading political documents of the various EP groups, and talking directly with MEPs it becomes apparent that one – if not the main – arguments for more EP involvement in the formulation of EU trade policy is the democratic legitimacy of the Parliament, whose members are directly elected and who see themselves as part and parcel of the process of democratic control. This observation fits nicely into the overall proliferation of the notion of parliamentarization as mentioned above. During the interviews Socialist MEPs talked about the “obligation towards their voters”⁶³ when asked about the importance of the parliament’s

⁶⁰ DG Trade Official (European Commission), Interview, via Phone, Budapest – Brussels, 17 April 2015

⁶¹ Ibid.

⁶² Senior parliamentary researcher (European Parliament) researcher of the European Parliamentary Research Service, Interview, European Parliament, Brussels, 14 April 2015

⁶³ Schuster, Joachim MEP (S&D) Member of the INTA Committee, Interview, European Parliament, Brussels, 13 April 2015

involvement. Add to this, the fact that civil society activism has been quite significant and persistent in relation to CETA/TTIP and ISDS, and it is easy to see how MEPs may be reinforced in their belief that they are acting as conduits for the democratic will of the European People. This is exactly what the term voter enfranchisement means. As highlighted in section 1.1, channeling arguments through the public increases legitimacy, according to the framework applied here. The public interest in this particular case is quite significant.

The first wave of public protests occurred in 2014 when “tens of thousands of people across Europe have protested against an EU-US trade deal. The protests rolled out across around 1,100 cities in Europe in a day of action against the Transatlantic Trade and Investment Partnership [...]”⁶⁴. More recently in April of 2015, these were followed by another wave, which was especially strong in Germany, where: “Thousands of people marched in Berlin, Munich and other German cities on Saturday in protest against a planned free trade deal between Europe and the United States.”⁶⁵ When asked about constituents’ interest in ISDS, all interviewees confirmed that there was a high level of interest coming from their electorates towards the topic. Joachim Schuster eagerly explained⁶⁶ that the issue of ISDS regularly emerges in most public forums held by him in his home country. All other MEPs interviewed made some mention of the existence of a strong public curiosity towards the subject either in forms of letters, or invites to participate in public forums and panel discussions.

The results of the public consultation held on ISDS are further evidence of the significance of the issue at hand. They also provide evidence to the reactive relationship between

⁶⁴ Euronews “Thousands protest against EU-US trade deal” web 18 May 2015

<http://www.euronews.com/2014/10/11/thousands-protest-against-ttip-in-europe/>

⁶⁵ Reuters “Thousands in Germany protest against Europe-U.S. trade deal” web 18 May 2015

<http://www.reuters.com/article/2015/04/18/us-trade-protests-germany-idUSKBN0N90LO20150418>

⁶⁶ Schuster, Joachim MEP (S&D) Member of the INTA Committee, Interview, European Parliament, Brussels, 13 April 2015

parliamentary opponents and members of the public. The mechanism of public consultations on European legislation is not specific to trade. It is a tool applied regularly by the EC in order to allow Europeans to “give us [the EC] your opinion on EU policies and influence their direction”.⁶⁷ The specific consultation⁶⁸ about ISDS, which lasted for 3 months from the end of March 2014 to the end of June 2014 yielded close to 150,000 responses: “one of the highest response rates ever for a Commission consultation”⁶⁹ according to a Commission spokesperson. According to the Commission report on the results of the consultation the responses fell into three categories:

- “(...) a first category of statements indicates opposition or concerns to TTIP in general.
- A second category indicates concerns or opposition with regard to investment protection/ ISDS in TTIP.
- A third category contains specific views in relation to the various aspects presented under each question, often accompanied by concrete suggestions for the way forward. (...) For instance, some respondents consider that the proposed EU approach is insufficient to address certain concerns related to the right to regulate”⁷⁰

In other words, none of the response categories expressed a general vote of confidence concerning TTIP. While some of the responses went into greater detail than others, the first group outright refused the entire idea of concluding a TTIP treaty, while respondents

⁶⁷ European Commission “Your voice in Europe” web 17 May 2015 http://ec.europa.eu/yourvoice/index_en.htm

⁶⁸ European Commission “Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)” web 17 May 2015 http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179

⁶⁹ Euractive “Commission swamped by 150,000 replies to TTIP consultation” web 15 May 2015 <http://www.euractiv.com/sections/trade-industry/commission-swamped-150000-replies-ttip-consultation-303681>

⁷⁰ European Commission “Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)” *Commission Staff Working Document* (2014) web 14 May 2015 http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf :pp.3-4

in the second group wanted ISDS scrapped from the treaty. Socialist MEPs that already opposed the notion of ISDS started incorporating the results as a point of reference in their arguments. Some examples:

David Martin S&D spokesperson on Trade:

- “The Commission has been clearly presented with citizens' concerns but it is still very slow to react. It launched a civil society consultation process on ISDS to which more than 150,000 stakeholders replied. Commissioner Malmström has rightly identified the problems of ISDS, but not yet provided adequate solutions.”⁷¹

Bernard Lange S&D, chair of the INTA Committee:

- “The results of the public consultation are in line with our demands: there is a need for a fundamental reform of the entire ISDS system, not just certain aspects of it”⁷²

As highlighted above, MEPs are aware of the persistent public interest in ISDS and TTIP – that manifest themselves during the public forums and panel discussion that MEPs participate in, in Brussels or their own constituencies. The strong public resistance becomes apparent through the persistent public protests and through the results of the public consultation. Although the Commission emphasizes that: “The vast majority, around 145,000 (or 97%), were submitted collectively through various on-line platforms containing pre-defined answers which respondents adhered to (...)”⁷³ – and thus implies the possibility of question leading – the Socialists have clearly interpreted the results as a strong signal to the ‘will of the people’.

⁷¹ Group of the Progressive Alliance of Socialists and Democrats in the European Parliament “TTIP: Commission must come up with alternatives to ISDS, say Labour MEPs” *Press Release* web 17 May 2015 <http://www.socialistsanddemocrats.eu/newsroom/ttip-commission-must-come-alternatives-isds-say-labour-meps>

⁷² Group of the Progressive Alliance of Socialists and Democrats in the European Parliament “S&Ds tell Commissioner Malmström: 'ISDS consultation has identified problems, now let's see solutions'” web 18 May 2015 <http://www.socialistsanddemocrats.eu/newsroom/sds-tell-commissioner-malmstr%C3%B6m-isds-consultation-has-identified-problems-now-lets-see>

⁷³ European Commission “Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)” *Commission Staff*

The question of how well argued the anti-ISDS claims of some MEPs are, is addressed in the third chapter. Nonetheless, the potential political gains that may be had from opposing ISDS are apparent. While the topic is complex, and highly technical and as such, is prone to oversimplification and false argumentation, scaremongering and grandstanding, in the interest of ‘the people’, and against corporations can be quite popular. Add to this the fact, that EP elections are still by and large second order national elections⁷⁴, and it is easy to see why MEPs would be eager to jump on any opportunity to gain more exposure and media presence. Nonetheless, after seeing the general disposition of the Parliament to expand its role in the European policy making process, and after having established that the EP has mitigated the informational asymmetries between itself and the EC in the specific case of trade, and having noted the link between civil society and MEPs that are opposed to ISDS, we can say that the parliament does consider its self to be a principal of the Commission: [H1] holds true.

Working Document (2014) web 14 May 2015

http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf :p.3

⁷⁴ A term coined in: Reif, Karlheinz and Hermann Schmitt “Nine Second-Order National Elections – A Conceptual Framework for the Analysis of European Election Results” *European Journal of Political Research*, 8.1 (1980): pp.3-44

3. Arguments Pro and Contra – A Case of Populism?

In order to assess the validity of the second hypothesis: ‘the quality of arguments presented by MESPs opposing ISDS are oversimplified and populist and [H2/a] are being fueled by public discourse and voter pressure’ we need to look at the actual arguments that the various parliamentary stakeholders are using to prove make their points. By addressing this issue, we will also touch upon the question of how preference formation occurs in the first place in the case of the European Parliament. As stipulated by McCubbins’ framework, and as emphasized earlier, besides the elimination of informational asymmetries, the other main precondition for the Parliament to be considered a principal, is the enfranchisement of the voters – the European electorate. As was already highlighted, the initial opposition to ISDS came from MEPs, however the resistance was reinforced by the increasing public interest. The demands made by protestors, and in the public consultations on the issue have been incorporated into the arguments of those parliamentarians that continue to oppose ISDS. These are present as elements that point to the importance of hearing the voice of the European voters. Seeing that the European Parliament is directly elected it is in a good position to advocate for its electorates’ perceived interests that have become apparent through the manifestations – disregarding the fact that these might be based in political demagoguery and not objective facts.

3.1 The Quality of Arguments Relating to ISDS

Investor State Dispute Settlement – or ISDS clauses are nothing new. There are over 3000 such clauses in active bi- and multilateral investment treaties.⁷⁵ Even so, tensions are soaring high among European policymakers. Socialist MEP's are quick to call the proposed clause in CETA – and presumably TTIP – an institutional guarantee intended to serve the interests of big U.S. corporations, while their Center-Right colleagues argue that the clause will most of all be beneficial for European small and medium enterprises (SME's) wishing to do business in the States and not mega corporations. One thing is for certain however: ISDS has the capacity to break the two investment and free trade deals – as explained in the introduction – thus the actual contents of the arguments surrounding it should be addressed. Additionally, since [H1] has proven to hold true, it is also crucial to judge the quality of arguments that MEPs wield. First the main concerns raised by opponents of the clause will be reviewed and then the counter arguments made by its supporters in an effort to prove [H2]. I argue that the claims made by those opposing ISDS are not well-enough argued, and are not supported by empirical evidence. These claims are more populist in their nature and have a better capacity to reach political constituents than withstand the scrutiny of a more thorough examination.

3.1.1 Opponents of ISDS

A 2015 briefing written for the members of the EP by the Parliamentary research service gives some brief history on ISDS, writing: “International investment agreements, and the ISDS mechanism, were originally created to protect investors from arbitrary expropriation and ensure non-discriminatory treatment for foreign investments, in countries considered risky. In such countries, with the judiciary not fully independent from government, arbitration

⁷⁵ International Institute for Sustainable Development “Investment Treaties” web 19 May 2015
<http://www.iisd.org/investment/law/treaties.aspx>

was considered a more neutral framework to ensure enforcement of the host state's obligations towards investors".⁷⁶ The S&D group have built their arguments on this angle, effectively opposing ISDS's existence both in CETA and TTIP claiming that such a clause is not necessary since the parties involved: "...fully respect the rule of law".⁷⁷ As such – goes this argument⁷⁸ – creating a supranational arbitration body would effectively disregard the role due process based on national justice systems and open the floodgates for corporations to bring lawsuits against national legislation that they deem to be in violation of the provision of providing fair and equitable treatment although such legislation might be serving the public interests. Effectively, ISDS would give the possibility of deciding what public interest is to international arbitrators that are perceived by this argument to be inherently less transparent than national courts. In other words, the Socialists take issue not with the right of corporations to receive fair and equitable treatment but with the forum for deciding what that is.

It is important to emphasize, that the resistance to ISDS on the above outlined basis is being made with reference to several specific topics, like shale-gas or GMO's – however these should not be confused as separate arguments. Take the case of shale-gas⁷⁹, one of the main

⁷⁶ European Parliament Research Service "Investor-State Dispute Settlement (ISDS) State of Play and Prospects for Reform" *European Parliament Briefing* (2014): p.1, web 17 May 2015

http://www.europarl.europa.eu/thinktank/hu/document.html?reference=EPRS_BRI%282015%29545736

⁷⁷ Group of the Progressive Alliance of Socialists and Democrats in the European Parliament "S&Ds want the investor-state dispute mechanism out of the EU-US trade and investment agreement (TTIP)" *Press Release* (2014): p.1, web 17 May 2015 <http://www.socialistsanddemocrats.eu/newsroom/sds-want-investor-state-dispute-mechanism-out-eu-us-trade-and-investment-agreement-ttip>

⁷⁸ Group of the Progressive Alliance of Socialists and Democrats in the European Parliament "S&D Position Paper on Investor-state dispute settlement mechanisms in ongoing trade negotiations" *Position Paper* (2015) web 13 May 2015

http://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.bernd-lange.de%2Fimperier%2Fmd%2Fcontent%2Fbezirkhannover%2Fberndlange%2F2015%2Fsd_position_paper_on_isds_march_4_2015.pdf&ei=SCVWVfryIoH7sgHd_oEw&usq=AFQjCNFqf4MS1EndYASavbwV2KJb-V9xew&sig2=g5yxqMontEj3ZnFTEhGxJw&bvm=bv.93564037,d.bGg

⁷⁹ Sierra Club "No fracking way: how the EU-US trade agreement risks expanding fracking" *Issue Brief* (2014) web 13 May 2015

<http://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCQFjAA&url=http%3A%2F%2Fwww.sierraclub.org%2Fno-fracking->

concerns of civil society organizations that are opposed to CETA and TTIP. The claim being made here from adversaries of shale-gas and ISDS, is that if the deal goes through, companies (mostly American companies) that lose profits or future profits due to a ban on hydraulic fracturing (the controversial extraction method of shale-gas) would be able to sue governments in non-transparent courts. Even the possibility of having to pay-up might adversely influence sovereign governments not to peruse public policies that they otherwise would – like the banning of hydraulic fracturing. Effectively, this would mean that deciding on the merits of shale-gas extraction in relation to the public interests, would become an issue for international arbitrators rather than national courts.

A recent S&D Group position paper writes: “In agreements with countries that have fully functioning legal systems and in which no risks of political interference in the judiciary or denial of justice have been identified, ISDS is not necessary.”⁸⁰ Upon searching through various position papers and press releases it becomes apparent, that no other substantial criticism has been made against the trade deals – an observation that was confirmed through interviews with S&D members.^{81, 82} Indeed, the opinion that free trade between the US-EU and Canada-EU is good in principal is reiterated in several of the documents otherwise critical towards ISDS. An S&D press release writes: “...[CETA] would be a positive agreement bringing opportunities for growth and jobs on both sides of the

[way&ei=hiVWVZmiLISLsAG_4HgBw&usg=AFQjCNH805d1aFYjd9S2fKiWbaCVYzxzHw&sig2=Dnq111sBRKekJDmvgxAg7w&bvm=bv.93564037,d.bGg](http://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.bernd-lange.de%2Fimperier%2Fmd%2Fcontent%2Fbezirkhannover%2Fberndlange%2F2015%2Fsd_position_paper_on_isds_march_4_2015.pdf&ei=SCVWVfryIoH7sgHd_oEw&usg=AFQjCNFqf4MS1EndYASavbwV2KJb-V9xew&sig2=g5yxqMontEj3ZnFTEhGxJw&bvm=bv.93564037,d.bGg)

⁸⁰ Group of the Progressive Alliance of Socialists and Democrats in the European Parliament “S&D Position Paper on Investor-state dispute settlement mechanisms in ongoing trade negotiations” *Position Paper* (2015) web 13 May 2015

http://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.bernd-lange.de%2Fimperier%2Fmd%2Fcontent%2Fbezirkhannover%2Fberndlange%2F2015%2Fsd_position_paper_on_isds_march_4_2015.pdf&ei=SCVWVfryIoH7sgHd_oEw&usg=AFQjCNFqf4MS1EndYASavbwV2KJb-V9xew&sig2=g5yxqMontEj3ZnFTEhGxJw&bvm=bv.93564037,d.bGg

⁸¹ Schuster, Joachim MEP (S&D) Member of the INTA Committee, Interview, European Parliament, Brussels, 13 April 2015

⁸² Leichtfried, Jörg MEP (S&D) Member of the INTA Committee, Interview, European Parliament, Brussels, 15 April 2015

Atlantic.”⁸³ It is also interesting to note, that while three socialists were available to my interview requests, neither of the two Green members, nor the two GUE/NGL members, nor the three Eurosceptic members of the Committee were available for personal, phone or email interviews.

The resistance from civil society actors relating to ISDS has been significant. In October of 2014, “some 400 activist groups marched all over Europe”⁸⁴ to demonstrate against the broader implications of ISDS in both CETA and TTIP. Many activist stakeholders and activist groups have produced blogs and opinion pieces^{85, 86, 87} in which they blast the Commission for not being transparent enough during the negotiations of CETA and for agreeing to a final ISDS chapter that they perceive as not guaranteeing the right of states to regulate in the name of public interest. Many of these documents go into detail of the specificities of the text and the caveats of the exact wording of the chapter. Such criticisms provide more in-depth analysis than the blanket opposition of the S&D and other EP political groups. The issues are wide ranging and rather technical relating to the exact wording of the text, and the lack of clear enough phrasings. However, many of these have been addressed during the so called ‘legal scrubbing’ of the agreement, as noted by the S&D policy document.⁸⁸ These changes come after Commissioner Malmström indicated that concerns

⁸³ Group of the Progressive Alliance of Socialists and Democrats in the European Parliament “S&D Group President Gianni Pittella: “We oppose ISDS mechanism in EU-Canada trade deal”” *Press Release* (2014) web 11 May <http://www.socialistsanddemocrats.eu/newsroom/sd-group-president-gianni-pittella-we-oppose-isds-mechanism-eu-canada-trade-deal>

⁸⁴ Euractive.com “Anti-TTIP demonstrations seize European capitals” web 11 May 2015

<http://www.euractiv.com/sections/trade-society/anti-ttip-demonstrations-seize-european-capitals-309119>

⁸⁵ Corporate Europe Observatory “Still Not Loving ISDS: 10 reasons to oppose Investors’ super-rights in EU trade deals” web 15 May 2015 <http://corporateeurope.org/international-trade/2014/04/still-not-loving-isds-10-reasons-oppose-investors-super-rights-eu-trade>

⁸⁶ European Trade Union Confederation “EU-Canada: CETA concludes with ETUC criticism about lack of transparency” web 15 May 2015 <http://www.etuc.org/press/eu-canada-ceta-concludes-etuc-criticism-about-lack-transparency#.VVcStfn-K00>

⁸⁷ Seattle to Brussels Network “Investment in CETA – A response to a lobby document by DG Trade” web 21 April 2015 http://eu-secretdeals.info/upload/2014/03/S2B-Marc-Maes-CETA-%20Investment_Response-to-DG-Trade-claims-March-7-2014_v2.pdf

⁸⁸ Group of the Progressive Alliance of Socialists and Democrats in the European Parliament “S&D Position Paper on Investor-state dispute settlement mechanisms in ongoing trade negotiations” *Position Paper* (2015)

relating to the exact wording of the ISDS chapter would be addressed during legal scrubbing.⁸⁹ These changes and their implications are discussed in detail in Chapter 4. Here it is enough to note, that these are not sufficient in the view of Parliamentary opponents of ISDS.

3.1.2 Supporters of ISDS

The range of actors supporting ISDS is far wider than those that are opposing it. Besides the European Commission, the majority of the member states, the EPP and the ECR and several distinguished university professors have come out in support of ISDS. While an argument for or against any issue is not in and of its self, made credible by the number of people supporting it, the fact is that the reasoning of the supporters of ISDS is far more detailed and complex than anything produced by the opposing side. The European People's party – and their members – are the strongest proponents of ISDS. During my interview with MEP Winkler⁹⁰ – a former trade minister – explained what he termed the ‘strategic vision’ behind CETA and TTIP, in terms of investor protection. As Mr. Winkler is the highest ranking EPP trade MEP (being a co-chair of INTA), I take his account as representative of the entire EPP argument.

In the context of a changing world where owing to the proliferation of global supply chains and the melting of borders, the old approach to trade and commercial policy are no longer adequate. The new approach entails moving from the bi- to the multilateral sphere in terms of

web 13 May 2015

http://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.bernd-lange.de%2Fimperier%2Fmd%2Fcontent%2Fbezirkhannover%2Fberndlange%2F2015%2Fsd_position_paper_on_isds_march_4_2015.pdf&ei=SCVWVfryIoH7sgHd_oEw&usq=AFQjCNFqf4MS1EndYASavbwV2KJb-V9xew&sig2=g5yxqMontEj3ZnFTEhGxJw&bvm=bv.93564037,d.bGg

⁸⁹ Euractive “Malmström: Only minor adjustments to ISDS in trade deal with Canada” web 16 May 2015
<http://www.euractiv.com/sections/trade-society/malmstrom-only-minor-adjustments-isds-trade-deal-canada-309906>

⁹⁰ Winkler, Gyula MEP (EPP) Member of the INTA Committee, Interview, European Parliament, Brussels, 13 April 2015

regulation. This is especially important, since the key benefactors of globalization in Europe, are small and medium sized companies (SMEs) – in the Western European sense (‘mittlestand’-s i.e.: “companies employing 500 people, and actively exporting all over the world”⁹¹ not to be confused with SMEs of Central and Eastern Europe). In order to provide them with a more stable environment, the EU has to stride towards unifying investor state dispute settlement rules with its partners. Those resisting ISDS today, in relation to CETA and TTIP, do not consider the fact, that if ISDS is successful in these cases, than this might be the prelude to an overarching European investment protection mechanism, phasing out the many hundreds of investor state dispute settlement mechanisms currently in force in bilateral treaties (BITS). The MEP also added, that although he thought most of his colleagues understood this, many of them have perused what he termed the ‘tabloidization’ of international trade related issues. According to his understanding, this process is one, where politicians make such simple, and easily understandable – even self-evident claims – that they divert attention from the complexities of the topic. According to him, this is exactly what is happening in the case of ISDS: “how can anyone sympathies with multinationals? Of course no one sympathizes with them”⁹². Although he did not explicitly term his colleagues as populists, the implication of this argument is clear. The opponents of ISDS are prone to demagoguery, and populism.

During a phone interview⁹³, DG Trade Official sketched-out the Commission’s standpoint relating to ISDS in both of the trade deals in question. Relating to CETA, he reiterated the Commission’s public stance: the issue is closed. Removing ISDS would imply reopening the entire draft treaty, and would give the Canadian Government the chance to table new issues as well. This would jeopardize the outcome of the entire deal. However, the minor changes

⁹¹ Ibid.

⁹² Ibid.

⁹³ DG Trade Deputy Head of Unit (European Commission) Phone Interview Budapest/Brussels, 17 April 2015

that the draft text has undergone during legal scrubbing, addresses some legitimate concerns on the transparency of the entire arbitration process. More important, however, the draft text contains a clause that will allow for a comprehensive review of the ISDS chapter down the line. According to the dominant view in DG Trade, this will mean that the ISDS chapter that will be tabled for TTIP, and which has the benefit of being proposed as the result of a lengthy and more transparent process of deliberations with the EP and direct communication with European citizens, may eventually be transplanted into CETA. This is why resistance to the Canadian agreement by some MEPs is seen as ‘strange’ in DG Trade. When asked about how transparent the EC was with regard to these plans, the official confirmed, that their intentions to revisit CETA were well known to MEPs.

3.2 ISDS Objectively

Perhaps the best way to approach the question of investor state dispute settlement, is by conducting a bit of ‘number gazing’ in the interest of number gazing. The International Center for Settlement of Investment Disputes (ICSID) is the World Bank Group’s international arbitration court, with 159 members which “As of June 30, 2014, [...] had registered 473 cases under the ICSID Convention and Additional Facility Rules”.⁹⁴ As the ICSID’s responses to the Commission’s public consultation on ISDS illustrate – and as the DG Trade official interviewed confirmed – the key elements of the proposed CETA ISDS clause were modeled off of the ICSID charter⁹⁵. Thus looking at the numbers relating to the two largest partners of the ICSID treaty can give us a good approximate overview of who international investor state dispute settlement – in the form of the ICSID treaty – has

⁹⁴ International Center for Settlement of Investment Disputes “The ICSID Caseload” (2014): p.7, web 15 May 2015

<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202014-2%20%28English%29.pdf>

⁹⁵ DG Trade Official (European Commission), Interview, via Phone, Budapest – Brussels, 17 April 2015

benefited most. Indeed, the statistics relating to the cases of the ICSID are also used to extrapolate some of the possible ramifications in ISDS by the Center for Strategic and International Studies (CSIS).⁹⁶

First of all, there is the issue of the legal basis of arbitration. As a CSIS working paper notes: “Over 90 percent of the nearly 2400 BITs in force have operated without a single investor claim of a treaty breach”⁹⁷ it also highlights that: “(...) European countries are a party to over 1200 BITs”⁹⁸. Upon looking at the legal basis invoked for ICSID arbitration, it becomes apparent that the majority of cases (63%) were based on bilateral investment treaties, or BITs (see Chart 1). So even though the majority of BITs have never been invoked, the majority of cases brought before the ICSID are based on BITs. The reason for this, is that investor state dispute settlement is highly concentrated in a few specific sectors. As chart 2 illustrates: oil gas & mining, electric power & other energy and transportation account for 49% of all cases brought before the ICSID. Services & trade on the other hand – with the services sector being the dominant economic sector in all EU countries⁹⁹ and the US – accounting for only 4% of cases. Arbitration relating to agriculture fishing & forestry – traditionally one of the most sensitive EU policy areas – account for a mere 4% of cases as well. Indeed, the CSIS working paper highlights that: “Many disputes arise in economic sectors characterized by high levels of state intervention. About 40 percent of filed ISDS claims are in oil, gas, mining, and power generation sectors which often feature prominent state involvement.”¹⁰⁰ In light of this, it is perhaps not surprising that: “Argentina (53 claims) and Venezuela (36 claims) are the leading

⁹⁶ Center for Strategic and International Studies “Investor-State Dispute Settlement – a Reality Check” *Working Paper* (2014), web 17 May 2015 <http://csis.org/publication/investor-state-dispute-settlement-reality-check-working-paper>

⁹⁷ Ibid.: p.1

⁹⁸ Ibid.: p.1

⁹⁹ European Union “The economy” web 15 May http://europa.eu/about-eu/facts-figures/economy/index_en.htm

¹⁰⁰ Center for Strategic and International Studies (2014): p.1

respondent states.”¹⁰¹ In other words, the major segments of EU economies are less involved in arbitration.

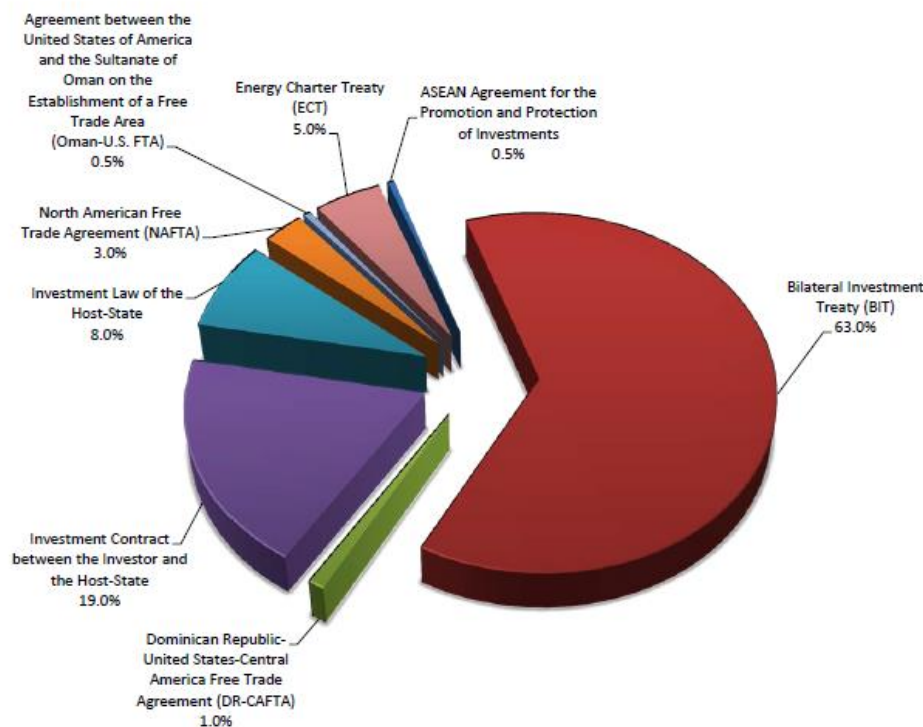


Figure 1 - Basis of Consent for Arbitration¹⁰²

Another interesting fact is that from all the cases the ICSID has arbitrated, 54% of claimants have were EU nationals – or corporations registered in the EU. Non-EU signatories of the ICSID charter (out of the 154 signatories the EU only accounts for 28 countries at present, and accounted for even less in the past) only brought 46% of the claims all together.

¹⁰¹ Ibid.: p.1

¹⁰² International Centre for Settlement of Investment Disputes “The ICSID Caseload – Statistics” Issue 2014-2 web 17 May 2015
<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202014-2%20%28English%29.pdf> (2014): p.10

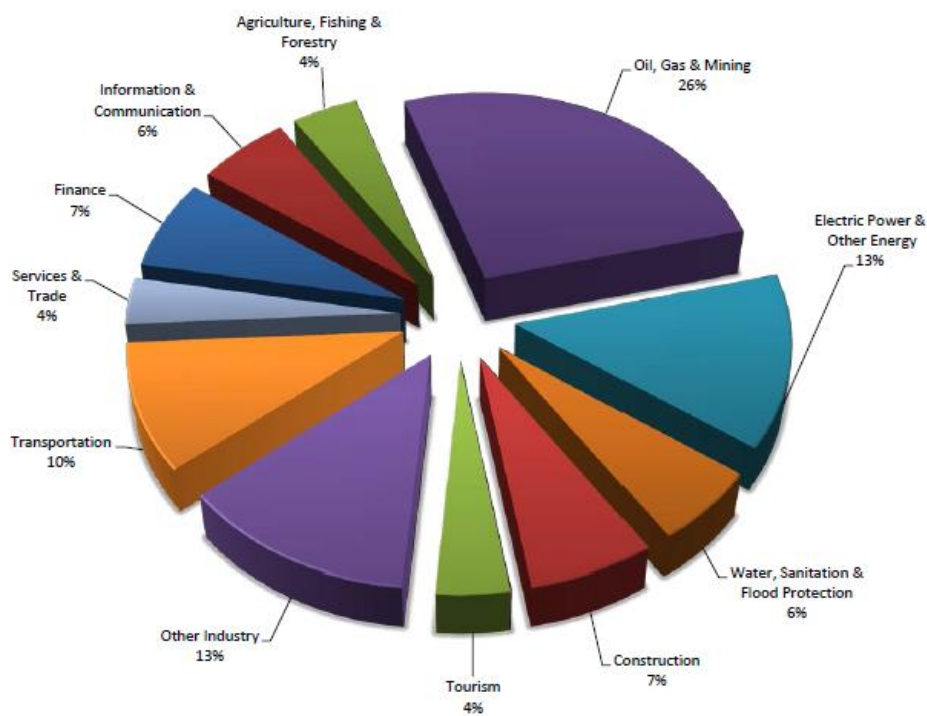


Figure 2 - Arbitration Cases by Sectors of the Economy¹⁰³

ICSID Cases by Claimant Nationality – March 1, 2014



Figure 3 - Arbitration Claimant Nationality¹⁰⁴

¹⁰³ Ibid.: p.11

¹⁰⁴ Kuijper, Pieter J., Ingolf Pernice, Steffen Hindelang, Meg Kinnear, Michael Schwarz, Martin Reuling. "Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements" *European Parliament Workshop*, Vol. 1 (2014): p.30

Even more interesting is the number of cases that EU member states have been claimants to. The S&D argument – as highlighted above – says, that it is not necessary to have investor state dispute settlement clauses in the cases where parties “...fully respect the rule of law”¹⁰⁵. Upon seeing the number of claims individual EU members have had to respond to, it becomes apparent that the highest number of claims are made against countries with bad track records in the field of democracy and rule of law.

	EU Member State	Number of ICSID Cases
1.	Austria	0
2.	Belgium	1
3.	Bulgaria	4
4.	Croatia	3
5.	Cyprus	1
6.	Czech Republic	1
7.	Denmark	0
8.	Estonia	3
9.	Finland	0
10.	France	1
11.	Germany	2
12.	Greece	1
13.	Hungary	11
14.	Ireland	0
15.	Italy	1
16.	Latvia	1
17.	Lithuania	1
18.	Luxembourg	0
19.	Malta	0
20.	Netherlands	0
21.	Poland	3
22.	Portugal	0
23.	Romania	9
24.	Slovak Republic	3
25.	Slovenia	3
26.	Spain	6
27.	Sweden	0
28.	United Kingdom	0

Figure 4 - Number of Cases for EU¹⁰⁶

¹⁰⁵ Group of the Progressive Alliance of Socialists and Democrats in the European Parliament “S&Ds want the investor-state dispute mechanism out of the EU-US trade and investment agreement (TTIP)” *Press Release* (2014) web 17 May 2015 <http://www.socialistsanddemocrats.eu/newsroom/sds-want-investor-state-dispute-mechanism-out-eu-us-trade-and-investment-agreement-ttip> :p.1

¹⁰⁶ International Centre for Settlement of Investment Disputes “The ICSID Caseload – Statistics (Special Focus – European Union)” Issue 2014-2 (2014): p.7, web 17 May <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Stats%20EU%20Special%20Issue%20-%20Eng.pdf>

In the 2006, 2008, 2010, 2011 and 2012 Economist Democracy Indexes¹⁰⁷ Bulgaria, Croatia, Cyprus, Estonia, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Romania, the Slovak Republic and Slovenia continuously scored in the category of ‘flawed democracies’. This correlation indicates that investors have more conflicts with governments that do not live up to fully democratic standards. Hungary – with its 11 cases – stands out especially. Although there is no specific data available on the temporal distribution of these 11 cases, it is true, that the current Hungarian Government – in power since 2010 – has received a substantial amount of international criticism over the past years for enacting retroactive legislation, levying arbitrary sectorial taxes, and tampering with the domestic court system. The case of Hungary is one that highlights the dubious nature of the S&D claim, that members of the EU “...fully respect the rule of law”.¹⁰⁸

3.3 Automatic Changes in ISDS clause of CETA

The somewhat more caveated arguments presented against CETA’s ISDS clause by civil society organizations criticized some seemingly legitimate elements of the initial finalized text, as mentioned above. However, during the process of legal scrubbing, most of these issues were addressed as pointed out by an S&D policy document:

“The draft text of the CETA agreement, which is not, yet, ratified and is currently undergoing modifications in legal scrubbing, contains some improvement. This applies in particular as regards:

- increased transparency as it relates to availability of documents and the public nature of hearings and rulings of arbitration,

¹⁰⁷ See Appendix

¹⁰⁸ Group of the Progressive Alliance of Socialists and Democrats in the European Parliament “S&Ds want the investor-state dispute mechanism out of the EU-US trade and investment agreement (TTIP)” *Press Release* (2014) web 17 May 2015 <http://www.socialistsanddemocrats.eu/newsroom/sds-want-investor-state-dispute-mechanism-out-eu-us-trade-and-investment-agreement-ttip>

- the introduction of a code of conduct for arbitrators which are controlled via the CETA Trade Committee,
- the more precise and clearer legal definitions on investment and indirect expropriation,
- the necessity for substantial business operations in the territory of a host state which prevent the use of shell companies to benefit from ISDS provisions in otherwise not applicable treaties,
- the mentioning of the right to regulate in the public interest in the preamble of the agreement,
- the ruling out of loss of anticipated future profits for initiating a case
- the possibility for parties to the agreement to issue binding interpretative definitions of provisions in the investment chapter to rule out unintended consequences in the aftermath,
- the introduction of state-to-state filters to prevent cases in the financial and tax sector”¹⁰⁹

Many of these changes seem commonsensical, and prudent. The code of conduct for instance, is expected to make it impossible for corporations to pressure arbitrators, while the possibility of parties to issue binding interpretive provisions leaves room for flexibility. The ever looming presence of the public opinion due to the increased transparency of the arbitration process should also be seen as a control measure of ISDS.

¹⁰⁹ Group of the Progressive Alliance of Socialists and Democrats in the European Parliament “S&D Position Paper on Investor-state dispute settlement mechanisms in ongoing trade negotiations” *Position Paper* (2015) web 13 May 2015
http://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.bernd-lange.de%2Fimperia%2Fmd%2Fcontent%2Fbezirkhannover%2Fberndlange%2F2015%2Fsd_position_paper_on_isds_march_4_2015.pdf&ei=SCVWVfryIoH7sgHd_oEw&usq=AFQjCNFqf4MS1EndYASavbwV2KJb-V9xew&sig2=g5yxqMontEj3ZnFTEhGxJw&bvm=bv.93564037,d.bGg

Other than these changes, the Commission is adamant, that there will be no further change to the text.¹¹⁰ Although we have established in Chapter 1, that the Parliament does fit the theoretical requirement of being considered a principal, these changes should not be understood as the result of the Parliament's actions. The procedure of 'legal scrubbing' is a normal part of international negotiations involving the EU. It takes "from 3 to 9 months"¹¹¹ and is done by a team of lawyers.¹¹² This observation calls into question the legitimacy of understanding the Parliament as being capable of substantively changing CETA's ISDS before it comes before the Parliament for ratification.

3.4 Possible reasons for the Quality of Arguments

Considering the general drive of the European Parliament and its parliamentarians to gain more traction in all areas of European policymaking, and considering the popularity of the issue of ISDS with European voters, it is a distinct possibility that although a strong case can be made for the inclusion of an investor state dispute settlement mechanism, those that continue to oppose this measure are motivated more by political calculus than anything else. ISDS mechanisms exist in abundance, and they have not lead to anything remotely reminiscent of what the S&D Group and other opponents of such mechanisms envision. States continue to regulate in the name of public interest in a variety of areas – including those sectors where claims are most regularly brought against states (see Chart 2).

Take for instance the fact that the current Hungarian Government went on to introduce controversial and rather drastic energy price capping measures in the 2010-2014 period –

¹¹⁰ DG Trade Deputy Head of Unit (European Commission) Phone Interview Budapest/Brussels, 17 April 2015

¹¹¹ European Commission – DG Trade "Trade negotiations step by step" (2013) web 16 May 2015

http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf :p.5

¹¹² Ibid.

popularly known as the utility price cuts¹¹³ – even though it had to face arbitration only a few years earlier for capping energy prices.¹¹⁴ More examples could be brought, however the point is, that having investor state dispute settlement measures do not – contrary to what the Socialists claim – in and of themselves inhibit a state from perusing what it believes to be the public interest, especially seeing the clarifications made to the finalized treaty following the procedure of legal scrubbing. Nonetheless, some MEPs continue to oppose ISDS based on questionable arguments. Perhaps because doing so gives MEPs more opportunities to gain publicity – as opposition to something is intrinsically more interesting for the public than agreement with something. They might also be reinforced in their arguments by the existence of strong grassroots initiatives opposing ISDS, which give them the opportunity to supplement their arguments with a ‘democratic element’ coming from the perceived legitimating effect coming from protestors. This is also a reaffirmation of the fact, that the EP is enfranchising voters, as discussed in Chapter 2.

Returning to the context of the McCubbins’ framework, as mentioned at the beginning of this chapter, the above described dynamics of preference formation of certain parliamentary groups is the most interesting question relating to the implications of having the EP as a co-principal in European legislation. The fundamental assumption of Moravcsik’s framework of Liberal Intergovernmentalism – that states are not ‘black boxes’ insofar as preference formation goes – may also be applied to the way that MEPs function. Moravcsik¹¹⁵ believes that state’s behavior is inherently rational on the one hand, and that this rationality is derived from adhering to the outcomes of internal preference formulation processes on the other hand.

¹¹³ Euronews “Hungary energy prices cut again” <http://www.euronews.com/2014/01/25/hungary-energy-prices-cut-again/> web 14 May 2015

¹¹⁴ Investment Arbitrator Reporter “Hungary prevails in first of three Energy Charter Treaty (ECT) Arbitrations over power pricing disputes: arbitrators affirm that ‘politics’ is not a dirty word” web 14 May 2015 http://www.iareporter.com/articles/20100928_7

¹¹⁵ Moravcsik, Andrew. “Preferences and power in the European Community: a liberal intergovernmentalist approach.” *JCMS: Journal of Common Market Studies* 31.4 (1993): 473-524.

While the first point may be traced back to some of the initial observations of classic IR realist theory (Morgenthau)¹¹⁶, the second one is based on the insights of the constructivist interpretation of state behavior – namely that the state is not a black box, but it is rather a box filled with divergent preferences which are distilled into a common policies based on compromises, democratic discourse and the inclination of the elected political class. As Moravcsik writes:

“(...) governments are assumed to act purposively in the international arena, but on the basis of goals that are defined domestically. Following liberal theories of international relations, which focus on state-society relations, the foreign policy goals of national governments are viewed as varying in response to shifting pressure from domestic social groups, whose preferences are aggregated through political institutions. National interests are, therefore, neither invariant nor unimportant, but emerge through domestic political conflict as societal groups compete for political influence, national and transnational coalitions form, and new policy alternatives are recognized by governments.”¹¹⁷

If we substitute national governments, or states in Moravcsik’s account of preference formation to Members of the European Parliament, then find that the account fits the process of voter enfranchisement remarkably well. Perhaps holding on to the notion that ISDS is bad, and should be opposed, is something that has been entrenched in the socialist’s and other resistant political groups’ perception of the issue. A reason for why the EPP might not share the hostile mindset towards ISDS may be due to several reasons. Although this paper does not provide sufficient space to elaborate on these, one should remember the fact, that the current president of the European Commission comes from the EPP, thus his success may

¹¹⁶ Morgenthau, Hans J. *Politics Among Nations: The Struggle for Power and Peace*. Alfred A Knopf, New York 1950

¹¹⁷ Moravcsik, Andrew. "Preferences and power in the European Community: a liberal intergovernmentalist approach." *JCMS: Journal of Common Market Studies* 31.4 (1993): p.481

also be interpreted as the success of parliamentarians of his political group. Nonetheless, we may tentatively affirm hypotheses [H2] and [H2/a].

4. Evaluation of the Theoretical Framework

As we saw in chapter 2, as a result of the new post-Lisbon *modus operandi* between the EP and the Commission, the Parliament has successfully mitigated informational asymmetries, and opponents of ISDS have successfully used public resistance to the issue to reinforce their standpoint. As we have seen in chapter 3, during the process of legal scrubbing there have been some substantial yet routine like changes to the initial CETA ISDS text. According to the DG Trade official interviewed, these changes would have happened with or without the vocal presence of the EP¹¹⁸. In any case, as was noted earlier, those groups that opposed ISDS did not oppose specific caveats of the mechanism, but oppose the very existence of ISDS.

The literature studying the why's of the process of agent compliance to principals norms is broadly divisible into two strands, as pointed out by Checkel: "Scholars have proposed two competing answers to this compliance puzzle, one rationalist, the other constructivist. Rationalists emphasize coercion, cost/benefit calculations, and material incentives, whereas constructivists emphasize social learning, socialization, and social norms"¹¹⁹. Indeed, one offshoot of rationalist models are Principal Agent models. As discussed in the first chapter, PA models operate under two fundamental assumptions: 1) preference asymmetries between principals and agents are everyday occurrences, and 2) the extent of informational asymmetries between the parties ultimately determine the outcomes of policy. These two assumptions lead to the following, rationalist understanding of policy change: policy change on the agent's side – for instance the abandonment of the initial agent position in favor of the principal's position – is best described by compliance due to a decrease in informational

¹¹⁸ DG Trade Official (European Commission), Interview, via Phone, Budapest – Brussels, 17 April 2015

¹¹⁹ Checkel, Jeffrey T. "Why comply? Social learning and European identity change." *International organization* 55.03 (2001): p. 1

asymmetries between the agent and the principal. While this framework does not mean that internalization or identification may not happen on the individual level, it explains agent's abandonment of their varied preferences in favor of their principal's preferences when the threat of punishment becomes real. This happens once the agent's slippage becomes apparent to the principal through access to more information. This is also the fundamental assumption at the heart of McCubbins' model. Once the parliamentary principal gains control to information of what the agent is doing, it will be able to expose the agent in front of the wider public, generating an uproar, and popular demand leading to the abandonment of the initial preferences of the agent in favor of the popular demand.

Yet the European Commission has not complied with the parliamentary principal's demands, as ISDS remains in the text of CETA, and there is no sign that the EC would abandon ISDS in the case of TTIP either. There are two supplementary explanations proposed here for this, neither of which is in contradiction with the findings that [H1] and [H2] hold true.

4.1 The Question of Divided Principals

It is important to point out the nature of the EU itself. It is – in the words of German EU scholar Thomas Risse-Kappen – the EU is a 'complex beast'.¹²⁰ As was observed during the introduction, the question of the Parliament's principaldom was always a question of auxiliary influence next to the member state's influence. Nonetheless, firstly focusing on the Parliament, we have to underline the findings of da Conceição-Heldt¹²¹, namely that the Commission has more discretion in formulating its policy preferences when it is faced with a divided principal. Indeed, the Commission has not taken ISDS out of CETA, or has not even

¹²⁰ Risse-Kappen, Thomas. "Exploring the nature of the beast: international relations theory and comparative policy analysis meet the European Union." *JCMS: Journal of Common Market Studies* 34.1 (1996): pp. 53-80.

¹²¹ da Conceição-Heldt, Eugénia. "Variation in EU member states' preferences and the Commission's discretion in the Doha Round." *Journal of European Public Policy* 18.3 (2011): 403-419.

seriously entertained the idea¹²² even though the issue has received a lot of vocal support from civil society and certain groups of the EP. This, however is not surprising, since the Commission is faced – from the Parliament – with a jumble of different opinions and there is no clear majority on either side. Mechanically adding up all the votes that the political groups carry – and not accounting for those potential members that will vote against their party lines – the opponents of ISDS, the Socialists, the Greens, GUE/NGL and EFDD have 45,4 % of the vote.¹²³ While the Greens and GUE/NGL oppose free trade in general, the Socialists and EFDD oppose CETA because of the inclusion of ISDS. Nonetheless, in the end the result is the same. These groups claim that they will vote against the agreement. On the other hand, we have the European People's Party and the ECR, which carry 38.7% of the votes. ALDE (carrying 8.9% of the votes) is a bit of a wild card, as are the non-inscrit members (6.9% of the vote), who are not in any political group. The Liberals have not yet formulated a group position of the matter of CETA or TTIP, and the senior ALDE trade MEP has voiced opposing opinions over the course of the past year. In other words, there is no clear majority on either side: the principal is divided, incapable as acting as one. The same dynamics as observed by da Conceição-Heldt during the Doha round¹²⁴ apply to this case as well.

¹²² DG Trade Official (European Commission), Interview, via Phone, Budapest – Brussels, 17 April 2015

¹²³ Calculated based on: European Parliament “Results of the 2014 Elections” web 19 May 2015

<http://www.europarl.europa.eu/elections2014-results/en/election-results-2014.html>

¹²⁴ In this particular case, the EC countered a proposal made by the U.S. by offering even more concessions: “In October 2005, the US presented a new negotiating stance calling for a complete elimination of all export subsidies over a 15-year period and for the reduction of blue box domestic support by 50 per cent. The Commission, now with Peter Mandelson (from the UK) in charge of trade and Marian Fischer Boel (from Denmark) at agriculture, reacted to this new proposal by circulating a new negotiating proposal of their own. This offered to reduce domestic support by 70 per cent, to accept higher cuts for higher tariff rates and to remove all export subsidies (Agence Europe, 11 October 2005). However, this concession led to a virulent reaction from EU member states with a defensive position on agricultural trade liberalization.” da Conceição-Heldt, Eugénia (2011): p.411

4.2 Lack of Parliamentary Control Mechanisms

The other observation is that although the informational asymmetries were mitigated between the Parliament and the Commission, there is only one pre-contracted control/sanction mechanism at the disposal of the Parliament: the final up or down veto. In turn, the threat of using this mechanism (as we have seen although there is no majority on either side, the forces saying that they will veto CETA outweigh those that support it) was not sufficient to have the Commission change its policy. Yes the EP does conform to the requirements as set out by McCubbins' framework for considering it a principal. Yes, new and regular mechanisms for keeping the EP informed have emerged (something we have termed informal *acquis*). However it seems that lacking an actual contracted subordination mechanism between the Parliament and the Commission with regard to parliamentary influence over the policy objectives of the Commission, the Commission will not comply with the will of those opposing ISDS. This sort of behavior from the Commission is only reinforced by the observation made above, namely that the Parliament is divided as well.

Whereas member states have the possibility of instructing the Commission to do x or y, as we saw above in the Doha case – in accordance with Article 207 of the TFEU, the Parliament does not. As noted earlier, this article stipulates that: “The Commission shall conduct these negotiations [international negotiations as laid down in Art. 207] in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly [sic!] to the special committee and to the European Parliament on the progress of negotiations”.¹²⁵ Where the Council is entitled to ‘issue directives’ to the Commission, the

¹²⁵ European Union “Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2008/C 115/01)” web 10 May 2015 <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2008:115:FULL&from=EN>

Parliament is not. It is only entitled to receive regular reports. In light of the fact that there has been no change the Commission's standpoint regarding ISDS, we may say that: considering the divided nature of opinions among the political groups of the EP, and lacking a pre-contracted control mechanism that would apply to the actual process of policy formation – only having a post facto control mechanism in the form of the veto – the EP's opponents of ISDS were incapable of forcing the agent to change its policy on the issue.

5. Summary and Conclusions

This thesis set out to explore the new dynamics of EU policy formation in the Common Commercial Policy following the entry into force of the Treaty of Lisbon. The 2009 treaty has substantially changed the role of the European Parliament, giving it a right to veto international trade deals negotiated by the Commission. During the course of 2014 there was a significant surge in public interest towards the EU's free trade negotiations following the closure of the CETA talks between the EU and Canada – which contains an ISDS clause. European capitals saw many mass protests against the inclusion of such clauses in either CETA or the more ambitious although still not finalized TTIP agreement. Under such circumstances, it seemed like a legitimate undertaking to examine if the European Parliament, as a directly elected body could have a role in influencing the European Commission in the policy debate surrounding the issue.

In order to examine the question, the relationship between the Parliament and the Commission had to be placed into context. Principal Agent theories examine the relationships between policymakers and policy executioners: or politicians and bureaucrats in other words. The majority of PA theories focus on relationships between government and civil service. The literature of how parliamentary bodies interact with bureaucracies are less developed.

Nonetheless, the framework proposed by McCubbins and his colleagues recognizes the specialties associated with a directly elected body wishing to influence bureaucratic organizations, namely the importance of utilizing public sentiment to influence outcomes. Applying McCubbins' framework to this specific context, in order to consider the European Parliament as being the principal of the Commission, the Parliament has to successfully mitigate the informational asymmetries that traditionally exist between principals and agents in order to enfranchise voters. This framework was applied to the issue of ISDS.

After establishing that the Parliament had indeed satisfied the theoretical requirements of being considered a principal, the thesis took a closer look at the actual arguments that have been presented by those opposing and those supporting ISDS. The claims of those MEPs that are against the introduction of such a mechanism seem to be oversimplified, shallow and unsupported by the facts. Nonetheless, they are reactive to public sentiment. Even so, somewhat counterintuitively to what is predicted to McCubbins' framework, namely that once the agent is 'exposed' to the public with the help of a parliamentary principal, it will cave to public pressure and change its policy, the Commission shows no signs of taking ISDS out of CETA. There have been some seemingly commonsensical changes that, although regarded as being positive, have not been sufficient to convince the opponents of the clause. One possible explanation for this, is that the Parliament is not unified as one in opposition to CETA. Although those that oppose adopting the deal (together with TTIP) outnumber those that support it, there is still no clear majority on either side. The fact that the member states are also principals – in fact they are the primary principals of the Commission – also means that those parliamentary forces opposing ISDS will have a harder time reaching their objectives. The outcome of the two deals are uncertain. Solely based on the arguments presented by MEPs in opposition to ISDD, the case for abandoning these deals is not very convincing.

Regarding McCubbins' framework, it seems safe to say, that although it is one of the few frameworks within PA literature that deals with the role of a parliamentary body, it was insufficient in and of itself to give an encompassing interpretation of the role of the EP in the post-Lisbon setup of the Common Commercial Policy. Although the Parliament's actions did meet the two criteria of McCubbins' framework, the EP has not managed to facilitate policy change in the Commission's standpoint. Nonetheless, the application of the framework does highlight several potential contributions to understanding the role of the parliament in this area. It also points out some of the areas where further research might be warranted.

- Firstly it highlights the limitations of existing PA models and PA literature in interpreting the post-Lisbon European Union. Although there are existing PA models to describe the relations between the Council and the Commission, existing frameworks intended to interpret the functions of parliamentary bodies, like McCubbins', do not sufficiently grasp the complexities of the EU.
- If the preference formation of the Socialists is any indication, than European Parliamentarians are very perceptive to perceived public moods / sentiments. Although this claim is made tentatively, and will require further research and detailed analysis, to explain why and how political groups ignore or take into consideration public pressure, in the specific case of ISDS, the Socialists have incorporated a series of vocal protests and the results of the Commission's public consultation into their arguments. Although the legitimizing effect of protests, and a public consultation involving 150 thousand responses (out of almost 500 million citizens) are questionable, the European Parliament might be prone to seizing elements of public legitimacy to decrease doubts about its own democratic deficit.

- The European Parliament has succeeded in mitigating one of the major entry barriers to taking part in the discussion on international trade. According to all accounts, the Commission no longer peruses the policy of information gatekeeping towards the Parliament. MEPs are satisfied in this regard.

Appendix

Economist Intelligence Unit democracy index 2006

	Rank	Overall score	Category scores				
			I Electoral process and pluralism	II Functioning of government	III Political participation	IV Political culture	V Civil liberties
Full democracies							
Sweden	1	9.88	10.00	10.00	10.00	9.38	10.00
Iceland	2	9.71	10.00	9.64	8.89	10.00	10.00
Netherlands	3	9.66	9.58	9.29	9.44	10.00	10.00
Norway	4	9.55	10.00	9.64	10.00	8.13	10.00
Denmark	5	9.52	10.00	9.64	8.89	9.38	9.71
Finland	6	9.25	10.00	10.00	7.78	8.75	9.71
Luxembourg	7	9.10	10.00	9.29	7.78	8.75	9.71
Australia	8	9.09	10.00	8.93	7.78	8.75	10.00
Canada	9	9.07	9.17	9.64	7.78	8.75	10.00
Switzerland	10	9.02	9.58	9.29	7.78	8.75	9.71
Ireland	11=	9.01	9.58	8.93	7.78	8.75	10.00
New Zealand	11=	9.01	10.00	8.57	8.33	8.13	10.00
Germany	13	8.82	9.58	8.57	7.78	8.75	9.41
Austria	14	8.69	9.58	8.21	7.78	8.75	9.12
Malta	15	8.39	9.17	8.21	6.11	8.75	9.71
Spain	16	8.34	9.58	7.86	6.11	8.75	9.41
US	17	8.22	8.75	7.86	7.22	8.75	8.53
Czech Republic	18	8.17	9.58	6.79	7.22	8.13	9.12
Portugal	19	8.16	9.58	8.21	6.11	7.50	9.41
Belgium	20=	8.15	9.58	8.21	6.67	6.88	9.41
Japan	20=	8.15	9.17	7.86	5.56	8.75	9.41
Greece	22	8.13	9.58	7.50	6.67	7.50	9.41
UK	23	8.08	9.58	8.57	5.00	8.13	9.12
France	24	8.07	9.58	7.50	6.67	7.50	9.12
Mauritius	25=	8.04	9.17	8.21	5.00	8.13	9.71
Costa Rica	25=	8.04	9.58	8.21	6.11	6.88	9.41
Slovenia	27=	7.96	9.58	7.86	6.67	6.88	8.82
Uruguay	27=	7.96	10.00	8.21	5.00	6.88	9.71
Flawed democracies							
South Africa	29	7.91	8.75	7.86	7.22	6.88	8.82
Chile	30	7.89	9.58	8.93	5.00	6.25	9.71
South Korea	31	7.88	9.58	7.14	7.22	7.50	7.94
Taiwan	32	7.82	9.58	7.50	6.67	5.63	9.71
Estonia	33	7.74	9.58	7.50	5.00	7.50	9.12
Italy	34	7.73	9.17	6.43	6.11	8.13	8.82
India	35	7.68	9.58	8.21	5.56	5.63	9.41
Botswana	36=	7.60	9.17	7.86	5.00	6.88	9.12
Cyprus	36=	7.60	9.17	6.79	6.67	6.25	9.12
Hungary	38	7.53	9.58	6.79	5.00	6.88	9.41
Cape Verde	39=	7.43	9.17	7.86	5.00	6.88	8.24
Lithuania	39=	7.43	9.58	6.43	6.67	5.63	8.82
Slovakia	41	7.40	9.58	7.50	6.11	5.00	8.82
Brazil	42	7.38	9.58	7.86	4.44	5.63	9.41
Latvia	43	7.37	9.58	6.43	6.11	5.63	9.12
Panama	44	7.35	9.58	7.14	5.56	5.63	8.82
Jamaica	45	7.34	9.17	7.14	5.00	6.25	9.12
Poland	46	7.30	9.58	6.07	6.11	5.63	9.12
Israel	47	7.28	9.17	6.64	7.78	7.50	5.29
Trinidad and Tobago	48	7.18	9.17	6.79	6.11	5.63	8.24
Bulgaria	49	7.10	9.58	5.71	6.67	5.00	8.53
Romania	50	7.06	9.58	6.07	6.11	5.00	8.53
Croatia	51	7.04	9.17	6.07	6.11	5.63	8.24
Ukraine	52	6.94	9.58	5.71	5.56	5.63	8.24
Mexico	53	6.67	8.75	6.07	5.00	5.00	8.53
Argentina	54	6.63	8.75	5.00	5.56	5.63	8.24
Serbia	55	6.62	9.17	5.36	5.00	5.63	7.94

Appendix Table 1 - Economist Democracy Index 2006 Excerpt¹²⁶

¹²⁶ The Economist Intelligence Unit "Index of Democracy 2006" web 15 May 2014
http://www.economist.com/media/pdf/DEMOCRACY_INDEX_2007_v3.pdf

	Rank	Overall score	Category scores				
			I Electoral process and pluralism	II Functioning of government	III Political participation	IV Political culture	V Civil liberties
Full democracies							
Sweden	1	9.88	10.00	10.00	10.00	9.38	10.00
Norway	2	9.68	10.00	9.64	10.00	8.75	10.00
Iceland	3	9.65	10.00	9.64	8.89	10.00	9.71
Netherlands	4	9.53	9.58	8.93	9.44	10.00	9.71
Denmark	5	9.52	10.00	9.64	8.89	9.38	9.71
Finland	6	9.25	10.00	10.00	7.78	8.75	9.71
New Zealand	7	9.19	10.00	8.93	8.89	8.13	10.00
Switzerland	8	9.15	9.58	9.29	7.78	9.38	9.71
Luxembourg	9	9.10	10.00	9.29	7.78	8.75	9.71
Australia	10	9.09	10.00	8.93	7.78	8.75	10.00
Canada	11	9.07	9.17	9.64	7.78	8.75	10.00
Ireland	12	9.01	9.58	8.93	7.78	8.75	10.00
Germany	13	8.82	9.58	8.57	7.78	8.75	9.41
Spain	15	8.45	9.58	7.86	6.67	8.75	9.41
Malta	16	8.39	9.17	8.21	6.11	8.75	9.71
Japan	17	8.25	8.75	8.21	6.11	8.75	9.41
United States	18	8.22	8.75	7.86	7.22	8.75	8.53
Czech Republic	19	8.19	9.58	7.14	6.67	8.13	9.41
Belgium	20	8.16	9.58	8.21	6.11	7.50	9.41
United Kingdom	21	8.15	9.58	8.57	5.00	8.75	8.82
Greece	22	8.13	9.58	7.50	6.67	7.50	9.41
Uruguay	23	8.08	10.00	8.21	5.00	7.50	9.71
France	24	8.07	9.58	7.50	6.67	7.50	9.12
Portugal	25	8.05	9.58	8.21	5.56	7.50	9.41
Mauritius	26	8.04	9.17	8.21	5.00	8.13	9.71
Costa Rica	27	8.04	9.58	8.21	6.11	6.88	9.41
South Korea	28	8.01	9.58	7.50	7.22	7.50	8.24
Flawed democracies							
South Africa	31	7.91	8.75	7.86	7.22	6.88	8.82
Chile	32	7.89	9.58	8.93	5.00	6.25	9.71
Taiwan	33	7.82	9.58	7.50	6.67	5.63	9.71
Cape Verde	34	7.81	9.17	7.86	6.67	6.25	9.12
India	35	7.80	9.58	8.21	5.56	6.25	9.41
Cyprus	36	7.70	9.17	6.07	6.67	7.50	9.12
Estonia	37	7.68	9.58	7.50	5.00	7.50	8.82
Israel	38	7.48	8.75	7.50	8.33	7.50	5.29
Botswana	39	7.47	9.17	7.50	5.00	6.25	9.41
Hungary	40	7.44	9.58	6.07	5.56	6.88	9.12
Brazil	41	7.38	9.58	7.86	4.44	5.63	9.41
Lithuania	42	7.36	9.58	5.71	6.11	6.25	9.12
Panama	43	7.35	9.58	7.14	5.56	5.63	8.82
Slovakia	44	7.33	9.58	7.14	6.11	5.00	8.82
Poland	45	7.30	9.58	6.07	6.11	5.63	9.12
Latvia	46	7.23	9.58	5.71	6.11	5.63	9.12
Timor-Leste	47	7.22	8.67	6.79	5.56	6.88	8.24
Trinidad and Tobago	48	7.21	9.58	6.79	6.11	5.63	7.94
Jamaica	49	7.21	9.17	6.79	5.00	6.25	8.82
Romania	50	7.06	9.58	6.07	6.11	5.00	8.53
Croatia	51	7.04	9.17	6.07	6.11	5.63	8.24
Bulgaria	52	7.02	9.17	5.36	6.11	5.63	8.82
Ukraine	53	6.94	9.58	5.36	5.56	6.25	7.94
Thailand	54	6.81	7.75	6.79	5.56	6.88	7.06
Mexico	55	6.78	7.92	7.14	5.00	5.00	8.82
Argentina	56	6.63	8.75	5.00	5.56	5.63	8.24
Sri Lanka	57	6.61	7.42	4.64	5.56	7.50	7.94

Appendix Table 2 - Economist Democracy Index 2008 Excerpt ¹²⁷

¹²⁷ The Economist Intelligence Unit "Index of Democracy 2008" web 15 May 2014
<https://graphics.eiu.com/PDF/Democracy%20Index%202008.pdf>

Democracy Index 2010

Democracy Index 2019							
Category scores							
	Rank	Overall score	I Electoral process and pluralism	II Functioning of government	III Political participation	IV Political culture	V Civil liberties
Full democracies							
Norway	1	9.80	10.00	9.64	10.00	9.38	10.00
Iceland	2	9.65	10.00	9.64	8.89	10.00	9.71
Denmark	3	9.52	10.00	9.64	8.89	9.38	9.71
Sweden	4	9.50	9.58	9.64	8.89	9.38	10.00
New Zealand	5	9.26	10.00	9.29	8.89	8.13	10.00
Australia	6	9.22	10.00	8.93	7.78	9.38	10.00
Finland	7	9.19	10.00	9.64	7.22	9.38	9.71
Switzerland	8	9.09	9.58	9.29	7.78	9.38	9.41
Canada	9	9.08	9.58	9.29	7.78	8.75	10.00
Netherlands	10	8.99	9.58	8.93	8.89	8.13	9.41
Luxembourg	11	8.88	10.00	9.29	6.67	8.75	9.71
Ireland	12	8.79	9.58	7.86	7.78	8.75	10.00
Austria	13	8.49	9.58	7.86	7.78	8.13	9.12
Germany	14	8.38	9.58	7.86	7.22	8.13	9.12
Malta	15	8.28	9.17	8.21	5.56	8.75	9.71
Czech Republic	16	8.19	9.58	7.14	6.67	8.13	9.41
US	17	8.18	9.17	7.86	7.22	8.13	8.53
Spain	18	8.16	9.58	8.21	6.11	7.50	9.41
UK	19	8.16	9.58	7.86	6.11	8.13	9.12
South Korea	20	8.11	9.17	7.86	7.22	7.50	8.82
Uruguay	21	8.10	10.00	8.57	4.44	7.50	10.00
Japan	22	8.08	9.17	8.21	6.11	7.50	9.41
Belgium	23	8.05	9.58	8.21	5.56	7.50	9.41
Mauritius	24	8.04	9.17	8.21	5.00	8.13	9.71
Costa Rica	24	8.04	9.58	8.21	6.11	6.88	9.41
Portugal	26	8.02	9.58	7.50	6.11	7.50	9.41
Flawed democracies							
Cape Verde	27	7.94	9.17	7.86	6.67	6.88	9.12
Greece	28	7.92	9.58	6.43	6.67	7.50	9.41
Italy	29	7.83	9.58	6.79	6.11	8.13	8.53
South Africa	30	7.79	8.75	8.21	7.22	6.25	8.53
France	31	7.77	9.58	7.14	6.11	7.50	8.53
Slovenia	32	7.69	9.58	7.14	6.67	6.25	8.82
Category scores							
	Rank	Overall score	I Electoral process and pluralism	II Functioning of government	III Political participation	IV Political culture	V Civil liberties
Estonia	33	7.68	9.58	7.50	5.00	7.50	8.82
Chile	34	7.67	9.58	8.57	3.89	6.88	9.41
Botswana	35	7.63	9.17	7.14	5.56	6.88	9.41
Taiwan	36	7.52	9.58	7.14	5.56	5.63	9.71
Israel	37	7.48	8.75	7.50	8.33	7.50	5.29
Slovakia	38	7.35	9.58	7.50	5.56	5.00	9.12
Cyprus	39	7.29	9.17	6.43	6.11	5.63	9.12
India	40	7.28	9.58	8.57	4.44	4.38	9.41
Lithuania	41	7.24	9.58	5.71	5.56	6.25	9.12
Timor-Leste	42	7.22	8.67	6.79	5.56	6.88	8.24
Hungary	43	7.21	9.58	6.07	5.00	6.88	8.53
Jamaica	43	7.21	9.17	6.79	5.00	6.25	8.82
Trinidad and Tobago	45	7.16	9.58	7.14	6.11	5.00	7.94
Panama	46	7.15	9.58	6.79	5.56	5.00	8.82
Brazil	47	7.12	9.58	7.50	5.00	4.38	9.12
Poland	48	7.05	9.58	6.07	6.11	4.38	9.12
Latvia	48	7.05	9.58	5.36	5.56	5.63	9.12
Mexico	50	6.93	8.75	7.14	6.11	5.00	7.65
Argentina	51	6.84	8.75	5.71	5.56	6.25	7.94
Bulgaria	51	6.84	9.17	5.71	6.11	4.38	8.82
Croatia	53	6.81	9.17	6.07	5.56	5.00	8.24
Suriname	54	6.65	9.17	6.43	4.44	5.00	8.24
Sri Lanka	55	6.64	7.00	6.07	5.00	6.88	8.24
Romania	56	6.60	9.58	6.43	5.00	3.75	8.24

Appendix Table 3 - Economist Democracy Index 2010 Excerpt¹²⁸

¹²⁸ The Economist Intelligence Unit "Index of Democracy 2010" web 15 May 2014
http://graphics.eiu.com/PDF/Democracy_Index_2010_web.pdf

	Rank	Overall score	I Electoral process and pluralism	II Functioning of government	III Political participation	IV Political culture	V Civil liberties
Full democracies							
Norway	1	9.80	10.00	9.64	10.00	9.38	10.00
Iceland	2	9.65	10.00	9.64	8.89	10.00	9.71
Denmark	3	9.52	10.00	9.64	8.89	9.38	9.71
Sweden	4	9.50	9.58	9.64	8.89	9.38	10.00
New Zealand	5	9.26	10.00	9.29	8.89	8.13	10.00
Australia	6	9.22	10.00	8.93	7.78	9.38	10.00
Switzerland	7	9.09	9.58	9.29	7.78	9.38	9.41
Canada	8	9.08	9.58	9.29	7.78	8.75	10.00
Finland	9	9.06	10.00	9.64	7.22	8.75	9.71
Netherlands	10	8.99	9.58	8.93	8.89	8.13	9.41
Luxembourg	11	8.88	10.00	9.29	6.67	8.75	9.71
Ireland	12	8.56	9.58	7.86	7.22	8.13	10.00
Austria	13	8.49	9.58	7.86	7.78	8.13	9.12
Germany	14	8.34	9.58	8.21	6.67	8.13	9.12
Malta	15	8.28	9.17	8.21	5.56	8.75	9.71
Czech Republic	16	8.19	9.58	7.14	6.67	8.13	9.41
Uruguay	17	8.17	10.00	8.93	4.44	7.50	10.00
United Kingdom	18	8.16	9.58	7.86	6.11	8.13	9.12
United States	19	8.11	9.17	7.50	7.22	8.13	8.53
Costa Rica	20	8.10	9.58	8.21	6.11	6.88	9.71
Japan	21	8.08	9.17	8.21	6.11	7.50	9.41
South Korea	22	8.06	9.17	7.86	7.22	7.50	8.53
Belgium	23	8.05	9.58	8.21	5.56	7.50	9.41
Mauritius	24	8.04	9.17	8.21	5.00	8.13	9.71
Spain	25	8.02	9.58	7.50	6.11	7.50	9.41
Flawed democracies							
Cape Verde	26	7.92	9.17	7.86	7.22	6.25	9.12
Portugal	27	7.81	9.58	6.43	6.11	7.50	9.41
South Africa	28	7.79	8.75	8.21	7.22	6.25	8.53
France	29	7.77	9.58	7.14	6.11	7.50	8.53
Slovenia	30	7.76	9.58	7.50	6.67	6.25	8.82
Italy	31	7.74	9.58	6.43	6.67	7.50	8.53
Greece	32	7.65	9.58	5.71	6.67	6.88	9.41
Botswana	33	7.63	9.17	7.14	5.56	6.88	9.41
Estonia	34	7.61	9.58	7.14	5.00	7.50	8.82
Chile	35	7.54	9.58	8.57	3.89	6.25	9.41
Israel	36	7.53	8.75	7.50	8.33	7.50	5.59
Taiwan	37	7.46	9.58	7.14	5.56	5.63	9.41
Slovakia	38	7.35	9.58	7.50	5.56	5.00	9.12
India	39	7.30	9.58	7.50	5.00	5.00	9.41
Cyprus	40	7.29	9.17	6.43	6.11	5.63	9.12
Lithuania	41	7.24	9.58	5.71	5.56	6.25	9.12
Timor-Leste	42	7.22	8.67	6.79	5.56	6.88	8.24
Trinidad and Tobago	43	7.16	9.58	7.14	6.11	5.00	7.94

Jamaica	44	7.13	9.17	6.43	5.00	6.25	8.82
Poland	45	7.12	9.58	6.43	6.11	4.38	9.12
Brazil	45	7.12	9.58	7.50	5.00	4.38	9.12
Panama	47	7.08	9.58	6.43	5.56	5.00	8.82
Latvia	48	7.05	9.58	5.36	5.56	5.63	9.12
Hungary	49	7.04	9.58	6.07	4.44	6.88	8.24
Mexico	50	6.93	8.75	7.14	6.11	5.00	7.65
Argentina	51	6.84	8.75	5.71	5.56	6.25	7.94
Bulgaria	52	6.78	9.17	5.71	6.11	4.38	8.53
Croatia	53	6.73	9.17	5.71	5.56	5.00	8.24
Suriname	54	6.65	9.17	6.43	4.44	5.00	8.24
Colombia	55	6.63	9.17	7.50	3.89	3.75	8.82
Peru	56	6.59	9.17	5.00	5.56	5.00	8.24
Sri Lanka	57	6.58	7.00	6.07	5.00	6.88	7.94
Thailand	58	6.55	7.83	6.07	5.56	6.25	7.06
Romania	59	6.54	9.58	6.07	4.44	4.38	8.24
Indonesia	60	6.53	6.92	7.50	5.56	5.63	7.06
El Salvador	61	6.47	9.17	6.07	3.89	5.00	8.24
Paraguay	62	6.40	8.33	6.07	5.00	4.38	8.24
Mali	63	6.36	8.25	6.43	4.44	5.63	7.06
Serbia	64	6.33	9.17	4.64	6.11	4.38	7.35

Appendix Table 4 - Economist Democracy Index 2011 Excerpt¹²⁹

	Rank	Overall score	I Electoral process and pluralism	II Functioning of government	III Political participation	IV Political culture	V Civil liberties
Full democracies							
Norway	1	9.93	10.00	9.64	10.00	10.00	10.00
Sweden	2	9.73	9.58	9.64	9.44	10.00	10.00
Iceland	3	9.65	10.00	9.64	8.89	10.00	9.71
Denmark	4	9.52	10.00	9.64	8.89	9.38	9.71
New Zealand	5	9.26	10.00	9.29	8.89	8.13	10.00
Australia	6	9.22	10.00	8.93	7.78	9.38	10.00
Switzerland	7	9.09	9.58	9.29	7.78	9.38	9.41
Canada	8	9.08	9.58	9.29	7.78	8.75	10.00
Finland	9	9.06	10.00	9.64	7.22	8.75	9.71
Netherlands	10	8.99	9.58	8.93	8.89	8.13	9.41
Luxembourg	11	8.88	10.00	9.29	6.67	8.75	9.71
Austria	12	8.62	9.58	8.21	7.78	8.13	9.41
Ireland	13	8.56	9.58	7.86	7.22	8.13	10.00
Germany	14	8.34	9.58	8.21	6.67	8.13	9.12
Malta	15	8.28	9.17	8.21	5.56	8.75	9.71
United Kingdom	16	8.21	9.58	7.50	6.11	8.75	9.12
Czech Republic	17	8.19	9.58	7.14	6.67	8.13	9.41
Uruguay	18	8.17	10.00	8.93	4.44	7.50	10.00
Mauritius	18	8.17	9.17	8.21	5.00	8.75	9.71
South Korea	20	8.13	9.17	8.21	7.22	7.50	8.53
United States of America	21	8.11	9.17	7.50	7.22	8.13	8.53
Costa Rica	22	8.10	9.58	8.21	6.11	6.88	9.71
Japan	23	8.08	9.17	8.21	6.11	7.50	9.41
Belgium	24	8.05	9.58	8.21	5.56	7.50	9.41

¹²⁹ The Economist Intelligence Unit “Index of Democracy 2011” web 15 May 2014http://www.sida.se/Global/About%20Sida/S%C3%A5%20arbetar%20vi/EIU_Democracy_Index_Dec2011.pdf

Spain	25	8.02	9.58	7.50	6.11	7.50	9.41
Flawed democracies							
Cape Verde	26	7.92	9.17	7.86	7.22	6.25	9.12
Portugal	26	7.92	9.58	6.43	6.67	7.50	9.41
France	28	7.88	9.58	7.14	6.67	7.50	8.53
Slovenia	28	7.88	9.58	7.50	7.22	6.25	8.82
Botswana	30	7.85	9.17	7.14	6.67	6.88	9.41
South Africa	31	7.79	8.75	8.21	7.22	6.25	8.53
Italy	32	7.74	9.58	6.43	6.67	7.50	8.53
Greece	33	7.65	9.58	5.71	6.67	6.88	9.41
Estonia	34	7.61	9.58	7.14	5.00	7.50	8.82
Taiwan	35	7.57	9.58	7.14	6.11	5.63	9.41
Chile	36	7.54	9.58	8.57	3.89	6.25	9.41
Israel	37	7.53	8.75	7.50	8.33	7.50	5.59
India	38	7.52	9.58	7.50	6.11	5.00	9.41
Jamaica	39	7.39	9.17	6.79	5.00	6.88	9.12
Slovakia	40	7.35	9.58	7.50	5.56	5.00	9.12
Cyprus	41	7.29	9.17	6.43	6.11	5.63	9.12
Lithuania	42	7.24	9.58	5.71	5.56	6.25	9.12
Timor-Leste	43	7.16	8.67	6.79	5.56	6.88	7.94
Poland	44	7.12	9.58	6.43	6.11	4.38	9.12
Brazil	44	7.12	9.58	7.50	5.00	4.38	9.12
Panama	46	7.08	9.58	6.43	5.56	5.00	8.82
Latvia	47	7.05	9.58	5.36	5.56	5.63	9.12
Trinidad and Tobago	48	6.99	9.58	7.14	5.00	5.00	8.24
Hungary	49	6.96	9.17	6.07	4.44	6.88	8.24
Croatia	50	6.93	9.17	6.07	5.56	5.63	8.24
Argentina	52	6.84	8.75	5.71	5.56	6.25	7.94
Indonesia	53	6.76	6.92	7.50	6.11	5.63	7.65
Bulgaria	54	6.72	9.17	5.71	6.11	4.38	8.24
Lesotho	55	6.66	8.25	5.71	6.67	5.63	7.06
Suriname	56	6.65	9.17	6.43	4.44	5.00	8.24
Colombia	57	6.63	9.17	7.50	3.89	3.75	8.82
Thailand	58	6.55	7.83	6.07	5.56	6.25	7.06
Romania	59	6.54	9.58	6.07	4.44	4.38	8.24

Appendix Table 5 - Economist Democracy Index 2012 Excerpt¹³⁰

¹³⁰ The Economist Intelligence Unit "Index of Democracy 2012" web 15 May 2014
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