

Reacting to Uncertainty: Institutional Responses to the Politicization of EU Trade Policy

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We are all apprentices in a craft where no one ever becomes a master - Ernest Hemingway

Declaration

I, the undersigned Péter Márton, candidate for the degree of Doctor of Philosophy at Central European University Doctoral School of Political Science, Public Policy and International Relations, declare herewith that the present thesis is exclusively my own work, based on my research and only such external information as properly credited in notes and bibliography. I declare that no unidentified and illegitimate use was made of work of others, and no part the thesis infringes on any person's or institution's copyright. I also declare that no part the thesis has been submitted in this form to any other institution of higher education for an academic degree.

Budapest 04.15 2020

A handwritten signature in blue ink, appearing to be 'P. Márton', is written above a horizontal line.

Signature

Abstract

The EU's Common Commercial Policy (CCP) has long served as one of the primary justifications for European Integration. A vehicle for delivering welfare-enhancing public goods to Europeans, the CCP has evolved along a logic of gradual trade liberalization and a shift towards regulatory cooperation since the creation of the WTO. This agenda had gone largely uncontested in Europe. It wasn't until the EU moved to agree a deep and comprehensive free trade and investment agreement with the United States that this changed. The Transatlantic Trade and Investment Partnership (TTIP) embodied a newfound politicization of trade which swept over the CCP as a *force majeure*, questioning the objectives and underlying standards of legitimacy of the CCP.

I set out to answer the question of whether this phenomenon of politicization triggered EU institutions within the CCP to pursue changes in policy goals, institutional arrangements, and modes of operation. While it seems obvious that EU institutions have to respond to politicization in a meaningful way, I demonstrate that the core policy objectives of the CCP have proved to be quite resilient. The EU trade elite's commitment to upholding the post-WTO liberal consensus has in fact translated into a preference for circle-fencing the CCP's core objectives and depoliticizing trade. This has meant that institutional changes in anticipation of and in response to politicization have followed a logic of incremental change, whereby the EU trade elite has tried to reconcile its institutionalized trade preferences with public resistance to these. Bizarrely, the CCP is arguably more throughput legitimate as a result while there has been little change in substantive policy preferences.

I set out to make this argument with the help of a theoretical framework derived from different strands of new institutionalisms used in combination with each other for better analytical purchase. My expectations are developed with the help of a process-tracing research design. I trace the evolution of the CCP from the Constitutional Convention on the Future of Europe taking place between 2001 and 2003 to the European Court of Justice's landmark 2/15 Ruling in 2017 on trade competences. I rely on primary source documents and a set of (N44) elite interviews conducted with a wide range of EU decision-makers from the institutions. The exercise in process tracing reveals that while anticipation of increasing public interest did play a part in

shaping the CCP's post-Lisbon ruleset (as the European Parliament was empowered as a veto-player to make trade more legitimate) once the floodgates broke open, the Lisbon ruleset proved inadequate to de-politicize trade. The struggle to save the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada – which had become first test case for comprehensive New Generation Trade Agreements – drove a series of institutional changes which not only rebalanced the power relationship between the institutions, but also led to a more streamlined institutional structure for the CCP. One which is better equipped to side-step politicization should it flare back up in the future.

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Introduction

Establishing Europe as a global trading power has long been one of the central aims of European Integration. The Common Commercial Policy (CCP) is as old as the Customs Union itself and its substantive and institutional evolution is no less storied. The history of this policy field has often been fraught with conflict, obfuscation, institutional breakdown and other sorts of intrigue. Over the past six decades, Member States have often jostled with the Commission and amongst themselves. The two primary issues of contention have been around the questions of just how much sovereignty to pool at the European level and finding a middle ground between protectionism and open markets. The creation of the World Trade Organization (WTO) in 1995 largely settled the latter debate as Member States – some more begrudgingly than others – endorsed the idea of rules-based trade premised on gradual liberalization of an ever-growing number of economic sectors. A policy direction that would also gradually shift trade policy from the realm of low politics to high politics as the public grew increasingly aware and wary of the effects of this agenda on their everyday lives.

From the institutional aspect, the European Parliament (EP) was traditionally excluded from trade policy. Yet as the interest in trade increased the debate around the institutional rules shifted away from issues of power delegation from Member States to the Commission toward the question of whether European Parliamentarians could and should play a role in shaping trade policy. The 2009 overhaul of the EU treaties gave the EP significant powers to monitor and influence the direction of EU trade. Yet as public resentment grew against what was increasingly seen as an overambitious agenda of liberalization which came to affect regulatory standards, Member States started questioning the EP's ability to 'legitimize' trade to the satisfaction of the public. A process that ultimately led to the near institutional paralysis of the entire CCP. Through the near blockage of the EU's 'gold standard' free trade agreement with Canada in 2016 – by the Belgian region of Wallonia – the backlash against the WTO trade agenda came full circle.

Yet through the intervention of the Court of Justice of the European Union (ECJ), trade policy was not only saved from meltdown, it was reborn! Despite a near decade long period of

institutional flux in which trade decision-makers grappled with themselves to answer the question of how best to reconcile public distrust against trade with the very *raison d'être* driving the CCP today the Union's trade policy is better equipped to pursue an agenda of aggressive trade liberalization than ever before. All while arguably being more inclusive and transparent, even if public distrust continues to linger. Nothing makes this more apparent than the successful conclusion of the EU-Japan Economic Partnership Agreement in 2019. The conclusion of this mega agreement, which covers no less than one-third of the world's GDP came only a few years after the public backlash against trade swept across Europe in the form of massive and sustained protests numbering in the tens of thousands which called for nothing short of a rejection of the EU's entire approach to negotiating 'new generation' Free Trade Agreements (FTAs) that go far beyond liberalizing the trade in goods to touching on standards harmonization and regulatory cooperation.

The developments of the past decade raise several interesting questions about the inner workings of EU trade policy. Not least of which is the question of how the perseverance of a broadly unchanged policy agenda can be reconciled with the simultaneous desire to respond to public demands to change the essence of how the EU shapes its most powerful international policy. I contend that in the case of the CCP where economic interests continue to be the primary drivers underpinning policy outputs, EU institutions have responded to increasing public scrutiny by aiming to manage rather than substantively engage with the public contestation – or politicization of their policy preferences. That is not to say that public backlash against trade has gone or can go unanswered in the future. Deepening European Integration has clearly triggered a more systemic backlash against hyperglobalization and the liberal economic worldview that underpins the EU and has raised the question of whether the economics of our day and age are even compatible with democratic politics (Rodrik 1995). In the European context criticism against liberal economic policies became intertwined with heated debates around the democratic credentials of the Union in the wake of the 2009 debt and financial crises at the latest. In fact, questions concerning capitalism, globalization, and democracy continue to be highly salient at the European and national levels as well (Ares, Ceka, and Kriesi 2016). In a climate like this not only is it unsurprising that European decision-makers would want to address questions around

how the EU can be made more legitimate but responding to calls for legitimacy clearly seems to be a baseline requirement for any EU policy.

However, the European level political debates of past years have showcased that there is no simple catch-all solution to the challenge of making the EU more legitimate and accountable in the eyes of its citizens despite continued top-down efforts to do so – such as the Convention on the Future of Europe, or the Conference on the Future of Europe. This is quite possibly the case because of the nature of the EU, where some areas of policymaking enjoy more while others less depth and width to their institutionalization and legalization at EU level. It follows that different aspects of integration are premised on different logics, both institutional and political. Deeply integrated policy systems tend to be based more on the economic logic of delivering Pareto-improving gains to Europeans as public goods. Hence these policies are less politicized in the day-to-day sense. In turn, lightly integrated policy areas are usually underpinned by differing value propositions held by the different Member States and agents of integration which are difficult to translate into a language of objective arithmetic. These are the areas that have been least affected by the creeping integration of functionalist ‘spillovers’ (Haas 1958; Haas 1963). In the latter case, the challenge of ‘seeking legitimacy’ in the face of increasing public interest has brought integration to a stop. Lacking a generally shared understanding of what public good is to be gained by pooling more sovereignty has led to nothing short of a ‘constraining dissensus’ (Hooghe and Marks 2009; Lindberg and Scheingold 1970) over many aspects of integration such as foreign policy, rule of law, education, etc. One which has amplified the ‘legitimate diversity’ (Scharpf 2003) that exists between different European societies.

In core policy areas such as trade policy, there is a contrary trend. The institutional changes in the CCP are instructive in this regard. Here, as I will argue, the functionalist logic seems to (largely) persist regardless of the increase in public pressure which levels criticisms against the CCP’s policy objectives. The result is a fascinating dichotomy. While it is the ideology underpinning free rules-based trade that has become more contested and politicized, the benefits ascribed to this liberal understanding of trade remain largely unhindered and resilient in the EU’s policy agenda. Rather, processes for decision-making which are (also) criticized – yet

only as a part of broader concerns – by the public for being opaque and unaccountable are tinkered with to make fundamentally unchanged preferences more acceptable. This is possible because unlike in the case of policies that are plagued by a constraining dissensus, EU level élites continue to share a common understanding of the desired aims of policymaking in core EU policies. Despite the often-contentious policymaking process of finding a mutually acceptable tradeoff for all Member States (something that all EU policies face) free, rules-based trade continues to be perceived as a public good that needs to be reproduced.

The key claim that I will make in this dissertation then is that politicization that explicitly or implicitly questions the legitimacy of the EU's institutionalized approach to trade is met by institutional responses that continue to prioritize a top-down imposed vision of what makes trade policy legitimate. This vision, in turn, translates into the 'instrumentalization' of the notion of legitimacy (Netelenbos 2016) meaning that trade decision-makers will strive to reconcile their views on what is appropriate with their interpretation of what is being demanded of them (Lenz and Viola 2017). In practice, institutional responses to this 'legitimacy challenge' posed to the EU's trade policy will take the form of treaty changes as well as informal institutional changes and even token changes made to policy outputs. All while not opening-up substantive and normative debates on the fundamental premise that underpins the way in which the benefits of trade are conceived of.

Instead of having to strike a bargain with each other based on divergent policy preferences fueled by domestic constituencies, the story of how the EU's trade policy responded to politicization is one of EU élites sticking to bargains rooted in the institutional development of the CCP while trying to convince the public that this is in their interest. While I will argue that this dynamic is partially explained by a liberal intergovernmentalist reading of the CCP's development, it is also important to expand this framework to account for politicization. Politicization acts as an external variable, or a structural constraint looming over otherwise neatly summed balance sheets and tidy bargains forcing élites to give discursive responses to public concerns despite not (necessarily or fully) agreeing with the underlying premise of public concerns. This dynamic of imposing a top-down interpretation on how to resolve a bottom-up

problem is similar to the one that unfolded in the wake of the Maastricht Treaty, where the sense that the EU had to be *made* more democratic was translated by EU élites into a focus on making processes more transparent, rather than opening up the question of how to foster more democratic inputs into decision-making (Sternberg 2013:chap. 5).

To be clear, this response on behalf of the EU's trade establishment does not imply that in the absence of public contestation deeply integrated policy domains like trade are tranquil areas of cooperation. As is the case in all areas of integration EU policy arenas always whiteness their fair share of inter-institutional disputes over degrees and modes of power delegation and policy making (Fligstein and Stone Sweet 2002; Hérítier 2012; Hérítier 2013a; Lindner and Rittberger 2003; Stone Sweet 2010). This has also been the case with trade policy (Bourgeois 1995; Gstöhl 2013; Woolcock 2005; Young 2007; Young and Peterson 2014). Yet prior to the increased public visibility of these areas debates between the EU institutions could be resolved without a need to respond to externalities such as politicization. Under what Hooghe & Marks (2009) term the 'permissive consensus', appropriate legitimacy (in-, through- and output alike) for deals struck amongst élites was implied simply through the delivery of Pareto-improving outcomes at the end of any process. Today, these conflicts unfold more transparently, which also means that there are more opportunities for political grandstanding, which might often create the impression that inter-institutional conflicts are more dire and unresolvable than they actually are.

In other words, in absence of external pressure threatening the *raison d'être* of trade policy – or other core policies driven by a similar economic logic – the institutions and policy content of trade could develop endogenously and incrementally along the logic of Pareto-improving gains. In fact, the bulk of policy-specific literature, seeking to map the development of different core policies such as the Common Agricultural Policy (CAP) or the Single Market are chronicles of incrementalism of this sort (Bulmer and Burch 2001; Bulmer 1993; Dimitrakopoulos 2001; Fennell 2002; Graham 1998). Developing out of the public eye, under the auspices of delivering economic benefits to all the CCP has evolved based on path dependencies despite institutional conflicts or even periods of apathy. While the long-held wisdom that the EU is not capable of disintegration has been disproven with Brexit, we are yet to witness the disintegration of deeply integrated

policies such as the Single Market, the CCP, the CAP or even the more controversial and politicized Common Monetary Policy.

Having said that, it is important to underscore that recently, scholarship has identified a gap in the literature when it comes to answering the question of how the variety of crises faced by the EU interplays with this habitual process of incremental policy development. This growing body of literature contends that the multitude of Europe's crises could plausibly reach a tipping point and lead to the partial or total disintegration of the EU (Börzel 2018; Jones 2018) a possibility that, according to this literature, has been ignored because of a systemic bias in EU scholarship which assumes that that integration that has already been carried out is undoable (De Bièvre and Bursens 2017; Hix 2007; Rittberger and Blauburger 2018). Yet while the growing body of work in this regard has sought to create a solid theoretical grounding for developing grand theories of disintegration, there has been scant focus on how the crises faced by the EU can actually lead to a renewed commitment to safeguard the working, mutually beneficial aspects of integration. To date, the limited work in this field has focused on challenging the argument that politicization causes paralysis. For instance, the resurgent intergovernmentalist literature of late (Bickerton, Hodson, and Puetter 2015a) is primarily focused on answering what it sees as an 'integration paradox' by which member states are thought to have pursued more integration without accompanying power delegation through an increase in deliberations and the creation of *denovo bodies*. Others (Genschel and Jachtenfuchs 2013) have focused on what they see to be the reemergence of creeping supranationalization of yet more core Member State powers in spite of the constraining dissensus.

This dissertation, in turn, contributes to better understanding the other side of the coin. Instead of disintegration, the argument is premised on the assumption that the EU's trade policy, as an economic foundation of integration remains uninhibited by the constraining dissensus. Instead, decision-makers demonstrate unwavering institutional and policy resilience to the post-WTO liberal trade agenda, with institutional changes geared towards ensuring the continued survival of this agenda. The conflict that this causes with the *vox populi* that questions this agenda manifests itself in a clash between different visions of what makes trade legitimate.

At a higher level of abstraction, the primary contribution I make through this research is shining a light on how and why the EU as a system of multilevel integration has the capacity to respond differently to constraints posed by politicization in a deeply integrated policy subsystem than those of lesser institutionalization, plagued by the constraining dissensus. In its simplest form, my general argument is that contestation of policies like the CCP can trigger top-down driven institutional change premised on the desire to conserve as much of the economic logic underpinning these areas as possible. As much as possible, of course, implies some level of flexibility when it comes to responding to public pressure. After all, total institutional rigidity is unlikely when talking about a system of decision making which has always been premised on incremental change and compromise. In light of these considerations, I set out to answer the following research question:

- [RQ₁]: Does politicization of EU trade policy trigger EU institutions to pursue changes in policy goals, institutional arrangements, and modes of operation?

The answer that I propose is essentially threefold. First and foremost, I expect the EU decision-making élite – understood as the conjuncture of decision-makers that are empowered by the treaties to make decisions in the area of trade policy – to share a preference for depoliticization. This expectation is grounded in the literature that underscores the tendency of the EU institutions to prefer depoliticization and technocratic decision making as opposed to high salience polarization of issues in general (Hix, Kreppel, and Noury 2003; Mair 2007; Schmidt 2013). Secondly, as discussed above I expect the trade élite to primarily be motivated by a desire for conserving the functionalist justification of legitimacy in the trade policy in the face of politicization. This will translate into instrumentalized institutional changes geared towards ‘making’ trade policy more legitimate by changing process related aspects related to transparency without calling into question the legitimacy of policy outputs – or only affecting token changes. The success of these changes will be judged by decision-makers based on whether they lead to depoliticization. Failing to depoliticize trade will lead to ‘experimenting’ with different top-down solutions.

Finally, owing to the wealth of literature that tells us how institutional actors will behave during processes of change – both treaty-making (formal) (Hix 2002; Stacey and Rittberger 2003) and more incremental informal change (Farrell and Héritier 2007; Rittberger 2003) – I expect the European institutions to continue to bargain over the details of their involvement in the CCP when responding to politicization. This is important because it highlights the duality of EU institutions’ agency towards each other and external challenges. A shared policy preference does not mean abandoning institutional interests.

Accordingly, the dissertation is divided into the following chapters;

Chapter I: Firstly, the concepts of political legitimacy, politicization and institutional change in Europe are discussed, defined and conceptualized. These are subsequently linked together to propose a theoretical framework and a set of hypotheses to answer the research question posed above. My theoretical framework relies on a series of observations about institutional change made with the help of new institutionalisms’ analytical lenses.

Chapter II: The epistemological and ontological origins of process-tracing as a methodology for single-case qualitative research are discussed here as are the data-gathering techniques used throughout the dissertation. Questions relating to types of primary and secondary data used as well as interview sampling and utilization are discussed at some length.

Chapter III: In order to transform the general expectations about what kind of institutional responses can be expected of core policies when they become contested into more specific expectations related to EU trade policy, I undertake a historical overview of the evolution of the CCP. Some time is spent reviewing the initial decades of the CCP in order to appreciate the functionalist foundations of the policy. Subsequently, the systemic relevance of the creation of the WTO is underscored and the aims of the ensuing liberal trade agenda are unpacked. The chapter also discusses why the increasingly complex trade agenda elicited growing public contestation. The Chapter concludes by proposing a causal mechanism that builds on the hypotheses of the first chapter. Through this mechanism, I claim that the increasing contestation of trade policy has elicited different top-down institutional responses that have aimed to safeguard the policy aims of the CCP.

Chapter IV: The first institutional response in this vein, came during the Convention on the Future of Europe which took place between 2001 and 2003. Although trade was not yet politicized at this time, the EP aimed to empower itself in the CCP, an area where it had limited competences at that point. In order to achieve this, Members of the European Parliament (MEP) participating in the Convention employed obfuscation tactics but also made an appeal to other participants' sense of appropriateness. The only way to make the CCP legitimate and democratic, they argued, was to increase the level of parliamentary scrutiny. This argument was instrumental in laying the groundwork for the eventual Lisbon Treaty which effectively made the EP a co-principal of the Commission along with Member States, who accepted – at least implicitly – the EP's argument.

Chapter V: Following the entry into force of the Lisbon Treaty the EP's promise was quickly put to the test as the CCP exploded to become the most politicized policy in the wake of the launch of bilateral trade negotiations between the EU and Canada and the EU and the US. The proposed investor-to-state dispute settlement (ISDS) provisions of the agreements quickly became the centerpiece of anti-trade activism which resulted in large protests across the EU. In response, the Commission enacted several ad-hoc reforms to increase the transparency of the negotiating process and worked to address the substantial criticisms leveled against ISDS. The EP proved to be a reliable partner in working towards fixing rather than wrecking these agreements. Tweaking ISDS, however, was not enough to quell public discontent which threatened to wreck the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada which had grown to become a symbolic test-case for the EU's ability to deliver on the post-WTO trade agenda.

Chapter VI: Member States came to the realization that additional steps were required to save CETA. As a result, the Council tried to boost the legitimacy of the agreement by making national parliaments rubber stamp it while simultaneously bringing to a head a longstanding conflict over investment power delegation with the Commission. This resulted in CETA being submitted for ratification as a 'mixed competence' agreement and the ECJ stepping in as a third-party adjudicator between Member States and the Commission on investment competences. In

turn, the landmark Court ruling - Opinions 2/15¹ - resulted in the partial 'renationalization' of investment policy implicitly answering the broader question of how to resolve the politicization of future trade agreements. The result was a more streamlined CCP unburdened by ISDS, which I argue was a reaffirmation of the economic logic that has underpinned the development of trade policy since the creation of the WTO.

Chapter VII: In the final chapter I take stock of the informal and formal changes that have taken place in the aftermath of the Court Ruling. I pay particular attention to the new mechanisms that enable wider civil society input into trade bringing cogent issues such as climate change to the forefront of the policy debate. Yet I also argue that the widened scope of debate does not translate into substantively changed policy preferences on behalf of trade decision-makers, a point which I illustrate by showing how easily the Commission put aside its rhetorical commitments on climate change when faced with a trade war with the United States.

The dissertation ends with a concluding discussion.

¹ ECJ, *Opinion 2/15*, EU:C:2016:992.

Chapter I: Conflicting views on legitimacy and what they mean for institutional change

‘People start to understand that they can change governments, but they cannot change policies’ - (Ivan Krastev: Can Democracy Exist without Trust? 2012)

Political legitimacy is a thorny concept. Even though it has been at the center of many polemic debates in political philosophy since antiquity it arguably has no consensual definition or conceptualization. Yet it is often used casually in empirical political science to qualify governments, agency, policies, institutions, elections and so on. In relation to the EU, legitimacy has been a centerpiece of the academic debate since the start of Integration and particularly since the 1980s and 1990s witnessed the explosive expansion of the EU’s activities (Sternberg 2013).

Nevertheless, conceptualizing legitimacy seems especially difficult in relation to the EU as doing so would require establishing an objective measure for judging whether EU institutions are indeed delivering outputs that Europeans want and expect from them. The reality of integration over the past decades has arguably shown this to be a near-impossible task. Policy debates taking place under circumstances of intense political debate and public scrutiny have without a fault served to underline the diverse nature of European societies and have mostly meant that Member States have been unable to reach meaningful and shared understandings of what it is that they want from integration in the first place. The continued haggling over how to rectify the structural deficiencies of the Economic and Monetary Union without truly communalizing risk-sharing or the fierce and oftentimes tasteless debate over how to deal with refugees and asylum seekers or even migrants more broadly are recent examples of how clashes between different societal preferences lead to an inability to establish and accept a shared view on what qualifies as legitimate EU level policy.

Delivering legitimate EU level outputs is somewhat easier given different scope conditions. Having a broadly shared understanding of what it is that the EU should do relating to a specific problem and given the lack of increased public attention, policy technicians can produce

outputs that are mutually acceptable to Member States and EU institutions (Majone 2010). The focus of this research, in turn, is looking at what happens when elite preferences that have developed through bargains and institutionalized visions of legitimacy are exposed to politicization. In other words, what happens when the fault lines of preference formation are not to be found between different Member States or between the EU institutions but rather between ‘the people’ and the institutionalized elite.

To be able to formulate expectations as to how EU institutions will react to politicization first it is important to appreciate just how and why shared and institutionalized elite preferences – based largely on output legitimate considerations – could come to develop in the first place. Looking back at the outset of integration it seems quite apparent that European societies had narrowly defined expectations of the European project which was largely about delivering peace and an agricultural revival to a divided and starving continent (Leibfried and Pierson 1992; Leibfried 1993). Sovereigns set the course for Europe amongst themselves, needing only to consider narrowly defined national interests and bargains rather than the divergent characteristics of their societies (Héritier 2013b; Majone 2010). So long as outcomes were reflective of economic gains or commonly accepted norms (like forwarding peace) which were understood as public goods, legitimacy was implied.

When Fritz Scharpf distinguished between an abstract *input* and *output* legitimacy, he did so to capture this almost mechanical output-oriented nature of European decision making that characterized Integration during its first decades. Member State governments’ interests were ‘determined directly by [their] immediate self-interests’ (Scharpf 1988:255). Self-interests that were determined based on a realist or even organic view of statehood as opposed to a constructivist or even liberal understanding of it. Given the isolation of supranational decision making from the public, direct democratic inputs did not need to figure into equations about how dismantling tariffs would enhance welfare. The Single European Act and subsequently the Maastricht, Amsterdam and Nice treaties were the culmination of this decade long process of splendid isolation as they sought to make the output legitimate paradigm of integration more efficient. While it is also true that the European project had systematically been frontloaded with

ever more normative considerations creating tensions between advocates of supranationalism and intergovernmentalism (Bulmer 1998).

Although these tensions were largely confined to the political élite, the tour de force of treaty change starting in the 90s increasingly met resistance from broader swaths of society that became ever more attentive and involved in EU politics. In large part owing to national parties introducing EU politics into domestic arenas (Ares, Ceka, and Kriesi 2016; Kriesi and Grande, 2016). It soon became apparent that writ-large Europeans continued to self-identify within the confines of the nation-state without necessarily accepting EU level decisions on what qualified as public goods. Seeing how a European polity had simply not materialized despite these advances to integration – the lack of which is often identified as the primary obstacle standing in the way of a federal EU – the élite – public divide had become a distinguishing feature of European politics by the turn of the millennia (Mair 2005; Mair 2007; Schmitter 2003).

Policy élites that grew out of the renewed commitment to push for deeper integration increasingly developed a *spirit de corps* oftentimes coming to have ‘more in common with each other than with the more rooted, ethnically distinct members of their own particular civil society’ (Grainger and Cutler 2000:245). Having little ‘faith in the creative political ability of laypeople’ (Bang 2009:101) Commission bureaucrats, Member States in the Council and centrist European Parliamentary groups worked together to ‘set the political course and tone for society relatively independently of the conventional public domains (...) and civil society’ (Ibid).

While this did not necessarily mean the total abandonment of national identities, there is evidence to suggest that EU institutions do have a socializing effect on those working within them (Egeberg 1999) who tend to develop shared understandings of appropriateness in relation to substance and process (Beyers 2005). Even those that suggest that EU level socialization is less pronounced at the European level, do not question that more general claim that national level socialization of policy-makers tends to have a pro-European bias (Hooghe 2005). Regardless of where socialization occurs, however, research also suggests that individual policy fields developed strong, self-defined epistemic communities in Brussels that purport to know the right recipe to issues as complex as designing and saving the European economy (Crum 2013),

protecting Europeans from growing internal and external security threats (Cross 2011) or to making the most of the EU's bargain power as a trading block (Trondal 2012). These visions often gain expression in grandiose policy agendas that lack the necessary commitment from national governments. A good example was the 2000 Lisbon Agenda which sought to: 'make Europe, by 2010, the most competitive and the most dynamic knowledge-based economy in the world' (European Union 2000).

Top-down visions like this of how common European problems should be solved have often led to popular backlash from a constantly expanding Union which includes very different societies. In the trade policy, the dynamic is slightly different. The CCP has been an area that has traditionally been left out of the fray of high politics. This allowed for the development of a shared élite identity that was at the very least implied between EU institutions based on decades' worth of bargains and shared ideas about trade. The politicization of trade helped crystalize this shared identity as EU institutions have been put in the position of having to defend past decades' neoliberal agenda in order to save the CCP from becoming inoperable. What this meant is that EU institutions had to try and justify and more importantly safeguard to the public their understanding of what made the CCP legitimate in the first place.

For this very reason, I argue that when faced with public contestation decision-makers in the trade policy subsystem will prefer to not formulate substantive policy change addressing the criticisms at the core of public concerns. While the institutional desire to become more responsive to European electorates is *ab ovo* present amongst EU élites on all levels – as this is the *zeitgeist* of today's EU politics – in relation to the CCP their primary preference will be to circle-fence or isolate the trade policy from substantive change as much as possible. The rationale for this is safeguarding what is seen as an important part of the economic core of integration, something that brings welfare enhancing benefits to Europe.

Against this backdrop, my starting point for elaboration is that the trade policy's institutional structures have developed to become more input legitimate over past decades in an explicit and genuine effort to move away from opaque and secretive decision making while safeguarding policy objectives. In practice this has meant the empowerment of the EP,

establishing more formalized pathways for civil society to voice their opinions, and increasing the public visibility of the negotiations process. However, whereas this effort should logically mean that policy can change over time, even dramatically to reflect different societal inputs, the example of trade policy suggests something different. Despite the increased focus on societal engagement, policy outcomes continue to show little elasticity. While there might well be more lip service being paid to effective climate action in trade agreements or guarantees for conserving the right to regulate in the public interest, the EU continues to negotiate non-binding environmental and labor rights commitments combined with aggressively pursuing publicly controversial regulatory practices – such as negotiating to have strict intellectual property rights protections for pharmaceuticals.

In this chapter, I proceed to unpack the theoretical basis of my argument in three steps. First by settling on a value-neutral conceptualization of political legitimacy I make the point that different political stakeholders – such as policy-makers and those actively contesting policies can come to internalize different understandings of legitimacy – in this sense legitimacy is in the eye of the beholder. Secondly, I make the point that the foremost driver of politicization in the EU context is precisely the existence of such parallel conceptualizations of legitimacy which only become more crystallized and articulated through public debate. Especially on the side of EU institutions where these conceptualizations are based on long-standing bargains and deeply internalized norms. In other words: whereas in policy areas plagued by the constraining dissensus the problem is that there is no straightforward way of formulating a common conceptualization of legitimacy the problem in the CCP is that the conceptualization of legitimacy is too sticky. Thirdly, drawing on the new institutionalist literature on institutional change I formulate several expectations as to what this dichotomy will mean for the institutional structure of EU trade policy.

1. Conceptualizing legitimacy

There are several different aspects of political legitimacy. Max Weber's original 1922 conceptualization of the term as a *belief* prompting citizens to obey political or social hierarchies has been quite influential (Weber 1958). Political philosophers have discussed and debated a

wide array of questions in relation to it. Whether or not power alone can produce legitimacy (Tyler 2004). Whether or not only democratic settings can produce legitimate authority (Dahl 1998; Dogan 1992). Or whether traditional and charismatic sources of legitimacy might be of equal importance even in democracies (Mayntz 2011). How legitimacy is transferred through socialization (Easton 1965), and of course how international organizations might be made more legitimate (Christiano 2012).

Increasingly, however, there is a desire amongst political scientists of all types to use the term in a more analytical, empirical fashion (Netelenbos 2016; Weßels 2016). An analytical approach to the concept of legitimacy which allows for distinguishing between different and more importantly competing understandings of when policymaking is considered legitimate is crucial for my purposes. To be sure, such a desire is not entirely new. Peter G. Stillman of Vassar College had proposed such a conceptualization accordingly in the 1970s.

In 1974, Peter Stillman (1974) sought to develop an analytical framework for the concept of legitimacy that could be of use in diverse settings, beyond proverbial western democracies. In his words, he wished to allow political scientists to operationalize the concept to make it ‘empirically useful’ (:32). Stillman’s starting point was that definitions of legitimacy based in value positive assessments of the term - such as Carl Friedrich’s or Lipset’s ‘democratic definitions’ (Friedrich 1963; Lipset 1959) – unnecessarily narrowed down our understanding of when a political system or an institution is *seen* to be legitimate by different segments of society.

These definitions take the view that if an institution is not democratic, it is not legitimate. In turn, Stillman made the point that such a narrow either/or conceptualization was not helpful if one wished to study *if* and *why* a given institution might be considered legitimate in relation to the ‘value pattern’ of a specific polity, or group of people. In other words, Stillman sought to add more context while simultaneously disconnecting the concept from the western standard of democracy. Instead, making the point that the value patterns of polities can vary across space and time. As is the case with the European Union, which is composed of a multitude of oftentimes competing, isolated, or even pan-European value patterns that can cut across nation-states and societal classes or be entrenched in regional identities. To bridge the problem of value-positive

conceptualizations yet in an effort to avoid a purely proceduralist understanding of legitimacy as that proposed by Hans Kelsen (1949:112–115), Stillman sets forth the following definition;

‘a government is legitimate if and only if the results of governmental output are compatible with the value pattern of [society and] the relevant systems’ (Stillman 1974:39)

The definition is like value-positive definitions only inasmuch as it ties legitimacy to values. Yet in applying a domain-specific understanding of values, there is inbuilt flexibility here.

While it was likely not the intention of Stillman, his approach can accommodate the EU quite well. Saying that the EU has evolved to become a multilevel polity (DeBardeleben and Hurrelmann 2007) with some aspects of sovereignty and legitimacy located at the supranational while others at the national level is a widely accepted proposition. Yet during the initial decades of ‘integration by stealth’ (Majone 2010) strong EU level policies developed by way of agreement between Member States and brought with them an in-group specific understanding of legitimacy. Member States’ choice to create the CCP was in-line with Member States’ value patterns – or national (self)-interests as understood in a realist or intergovernmentalist paradigm otherwise the CCP would never have been created. This, in turn, carried the implication that these national interests were reflective of societal value patterns, meaning that decisions made in the CCP were legitimate ‘by default’. However, the scope conditions of integration have clearly changed.

Stillman’s conceptualization rightly assumes that societies’ value patterns can change over space and time. Whereas a lack of public attention at t_{-1} can leave such institutional self-perceptions and understandings of legitimacy unchallenged, a more active public can lead to the emergence of competing understandings of legitimacy at t_0 . It is not hard to see how this causes tensions that cannot easily be resolved. Especially in the context of a decision-making system that has well-institutionalized rules and practices that continue to treat Member States as the ‘normative reference points’ (Bolleyer and Reh 2012) as opposed to individuals. Given that these rules and practices have evolved over decades and iterative changes, they will be hard to change. Yet this is exactly the aim of politicization as it looks to question and discredit the idea that

legitimacy can be based on top-down imposed visions. Instead aiming to expand the normative reference points that feed into decision-making.

The issue at hand in the trade policy is that civil society organizations' or non-élite compliant political parties' efforts to open-up more paths of direct input legitimacy into decision making are met by sticky and entrenched views on what makes trade legitimate. This places the conflict of value patterns between the institutions – or the trade élite – and the public. As opposed to between the EU institutions (Commission, EP) and Member States as is the case with newer EU policies that are less institutionalized and have not benefitted from decades of integration under the permissive consensus. In this conflictual situation, politicization contests value patterns that have long served as élites' basis of self-evaluation constituting a threat not only to the existing policymaking paradigm but also the policy outputs. After all, there is no guarantee that a public debate about trade policy will ultimately lead to what Member States would consider to be welfare-enhancing outcomes.

I conjecture that when confronted with this type of dilemma, maintaining a business as usual approach to policy becomes a chief concern for EU level decision-makers. The convictions of the in-group – a belief in *the single market, the benefits afforded by rules-based trade, the Eurozone, etc.* become objects to defend. While the opposition to these beliefs might often be quite articulated – think of the protests against the Eurozone, austerity, comprehensive free trade agreements – these out-groups are rarely able to juxtapose a clear-cut alternative vision upon which to judge the legitimacy of the policy they contest thus reinforcing the perception of the in-group that they are right. This no doubt reduces the possibility of constructive compromise politics. After all, 'putting an end to the corporate sell-out of Europe' (Corporateeurope.org 2013) – as was advocated for by some civil society organizations in relation to TTIP and CETA is not a demand that can form the basis of a constructive dialogue on how to reform trade policy objectives. Yet, contestation still needs to be addressed, as the imperative to become more input legitimate and democratically accountable continues to underpin EU institutions in the wake of the failed Constitutional Treaty and the 2009 sovereign debt and Euro crises.

To sum-up then, while the reproduction of public goods – as is understood by the in-group – might well be quantifiably beneficial for European economies, under the circumstances of politicization the very intent of free trading can still be at odds with the out-group's value orderings. Stillman's conceptualization is important to be able to make this distinction between in and out group and it is equally important for the theoretical assumption that the élite, in fact, shares the same value patterns for judging the legitimacy of the CCP. I contend that EU institutions including Member States in the Council, the Commission, and the European Parliament are 'relevant systems' in the multilevel EU polity which form part of the same in-group. Out of this line-up, the Commission's commitment to economic liberalization in general and free trade is well documented and has already been touched upon. Chapter III will underscore how the Commission has consistently been the primary change agent advocating for less protectionism and more free trade.

In turn, it is important to highlight that Member States' track record shows that there has always been a shared general preference for the post-WTO policy baseline even if this preference was forged through conflicts and even if there were pockets of societal pushback from different interest groups (Young and Peterson 2014). This observation is at the heart of the dissertation's main conjecture. There was simply no public interest in trade for the better part of the 20th Century. This allowed Member States to collectively formulate their decisions based on a liberal intergovernmentalist understanding of national interests. Moravcsik contends that absent public input, powerful economic lobbies come to represent the closest available proxy to aggregating national interests in the policymaking process (Moravcsik 1993). In fact, we know as much from Pascal Lamy, a former EU Trade Commissioner and WTO Secretary General who has characterized (non-politicized) trade policy preference formation in the EU as an equation of Member States' offensive and defensive interests (Lamy 2015). As discussed in Chapter III, this is no longer the case today, as the increasing complexity of trade has acted as a catalyst for its politicization (Laursen and Roederer-Rynning 2017).

The basis of the EP's successive empowerment since the Maastricht treaty has been the argument that it, as the only directly elected EU institution can serve to aggregating public

interests into the policy cycle directly by spurring public interest and involvement. That is to say, the EP is supposed to provide direct input legitimacy for policy outputs. However, several consecutive legislative cycles have shown that the centrist political groups in the EP have proven to be reliable allies of the Council and the Commission in the post-Lisbon period as is evidenced by the growing number of legislative files that are fast-tracked through the EP even at the cost of transparency (Héritier and Reh 2012; Reh et al. 2013).

In trade, as will be discussed subsequently in Chapters V. and VI., the EP leveraged its role in amplifying public contestation to gain more institutional powers over negotiations during the CETA and TTIP negotiations. However, as the dust settled, the center-left – center-right coalition in the 2014-2019 legislature proved to be just as reliable an ally in forwarding the in-group specific trade agenda as in other policy areas. One might almost say that the EP leveraged its position as an ‘input legitimizer’ to gain more institutional standing and become a part of the trade élite.

Returning to Stillman’s definition, I take the view that European institutions and the broadly interpreted polities of Member States are the relevant systems for determining policy legitimacy. Identifying the opinions of EU institutions and institutional actors is straightforward. However, the ‘general public’ is a more incoherent category. Given the basic nature of anti-system public contestation and given the nature of the EU which encompasses discrete national polities I will focus primarily on trans-European civil society organizations when looking at what role the general public plays in contesting the existing paradigm of trade legitimacy. Given the central role played by business interests in shaping EU trade policy these too have to be considered relevant systems.

All that considered, I settle on the following – modified – definition for the CCP’s legitimacy based on Stillman’s original one:

The CCP is legitimate if and only if the results of EU outputs are compatible with the value patterns of EU institutions and EU civil society.

In this context, ‘EU outputs’ are the outputs produced by the CCP which for the sake of simplicity we can equate with bi-, multi- or plurilateral international trade agreements as the

internally focused legislative parts of the CCP (such as trade defense instruments) still continue to be perceived as highly technical and have generally not been the focus of public criticisms against trade.

Having established this definition it is also unavoidable to ask the question of how one would know that these outputs are not accepted as being legitimate by Europeans? How would we be able to identify clashing value patterns and when can we say that differences of opinion, which is a natural feature of any democratic system, speak to a broader point about legitimacy? In order to answer these questions, we are in need of a conceptualization of politicization.

1.1 Politicization: crystallizing different perceptions of legitimacy

The bulk of the EU politicization literature conceives of '*politicization*' as being part of party politics, or as being a general feature of European politics to which EU élites are unable to respond to due to the fundamental deficiencies the EU faces as a polity when compared to a nation-state. For the latter strand of literature, the Maastricht Treaty is often the first point of reference in trying to understand how the push to speed-up integration in the wake of the Single European Act generated more public pushback (Szczerbiak and Taggart 2008; Taggart 1998; Hooghe and Marks 2005). The emergent conflict between the EU level integration agenda and the broader public is either conceptualized as being issue centric and fueled by extreme anti-establishment parties that capitalize on populist sentiments around sovereignty and national identity (de Vries 2007; De Wilde and Zürn 2012; Hooghe and Marks 2009; Steenbergen and Scott 2004) or as a process which has always been a part of everyday EU politics based on party cleavages and divides since the 1970s (Ares, Ceka, and Kriesi 2016; Grande and Hutter 2016) with EU integration providing a 'strategic opportunity' to 'mobilise citizens' (Grande, and Kriesi 2016:279) for political gains. In other words, politicization is usually associated with party politics.

As discussed above, I contend that in the case of trade policy there is a strong policy specific in-group which cuts across institutions, time, and in the case of Member States political ideology to create something like an epistemic community of policy élites that hold very similar views about trade policy and how it should be carried out. The focus of inquiry for the dissertation is

on how this group responds to politicization that questions the legitimacy of their views and resulting policy output. Add to these assumptions the observation that trade policy has not held much public interest over past decades seldom entering the domain of Member State party politics, and it is easy to see why a party-political approach to politicization is not the most adequate for my purposes.

In turn, when talking about politicization in the context of colliding value patterns the central focus must be on establishing the fact of politicization and subsequently being able to address the substance of the criticism contained within. This means answering the why and the how questions. Chapter III discusses the substantive criticisms that drive the politicization of trade policy and provide more context for understanding what the value patterns of those contesting trade are. Here, however, the aim is to answer the how question and provide the mechanics for understanding the process of intensification and entrenchment in the policy debate. To be clear none of this means the denial of the importance of party politics. As the review of the evolution of trade policy and the subsequent case study around CETA will show there are nuances to the ways in which trade is viewed which depend on national context and political ideology. Nevertheless, the broader point that I wish to demonstrate is that these will only be nuances and not the drivers of policy making. To answer the question of when exactly we can talk of this politicization I turn to de Wilde's (2011) framework as it is specifically developed in relation to the EU.

1.1.1 Politicization of what?

Developed specifically in relation to the EU de Wilde's (De Wilde 2011) framework does not stake a claim in the politicization debate, rather it looks to provide a way of conceptualizing politicization in a way that makes it measurable. This is achieved with the help of a typology that de Wilde creates for establishing the different venues where politicization might occur as well as steps to determine whether it has occurred. This is a deductive process insofar as the venues and steps are based on observations of where research has found politicization to occur and what steps are usually identified when talking about the phenomenon. Based on this, De Wilde observes that *institutions, decision-making processes, and issues* can all become politicized.

In this framework, the politicization of institutions refers to how traditional national left-right cleavages become more influential across the ‘political institutions of the multi-level EU polity’ (De Wilde 2011:560). Scholarship using the term in this context brings together research on national party politics with questions of integration. In a sense, the above-mentioned strands of literature on the politicization of the EU fit into this venue.

In turn, when De Wilde talks about the politicization of the decision-making process, he is referring to the ‘increasing influence of elected or appointed politicians at the expense of professionals’ (De Wilde 2011:561). This refers to conscious attempts to make the EU’s institutions more political and less bureaucratic. The experimentation with the ‘Spitzenkandidaten’ system and the ensuing efforts of President Juncker to make his Commission ‘more political’ is a clear example of this (Peterson 2017). While the politicization of the European Commission might well be a novel development, this venue has its roots in the non-EU politicization literature that studies how bureaucracies and bureaucrats can become more political (Peters 2004).

Lastly, the politicization of issues refers to how certain proposed or delivered policy outputs (trade agreements, legislation, implementation of legislation, etc.) can become more contentious than others in the public eye, drawing an increasing amount of public attention and generating debate. This relates to the distinction between low politics and high politics. In a sense this is the most neutral of the three venues, seeing how one can propose different theoretical explanations for why a certain issue becomes political depending on policy context.

My focus here is on establishing the politicization of institutional practices, norms, as well as policy outputs and the decision-making procedures that underpin these. In other words, my venues are: 1) the two specific trade agreements (CETA and TTIP) that I argue acted as catalysts for the politicization of EU trade policy; and 2) the broader institution itself which encompasses ‘shared concepts used by humans in repetitive situations organized by rules, norms and strategies’ (Ostrom 2007:23). The trade agreements fall under the venue of politicization of issues, while the politicization of the trade policy as an institution fits in somewhere between de Wilde’s first two categories given that in response to the politicization of these agreements,

European Parliamentarians, Ministers, and Heads of Government started taking a more active and deliberate role in shaping responses to the public's criticisms. This was not necessarily the case in the past, seeing how the guiding principles of the CCP had been settled writ large in previous decades.

While de Wilde's venues are interesting for framing my conceptualization of politicization, the definition and related conceptualization of how to establish if politicization has indeed occurred is even more so. I adopt the following definition:

'(...) an increase in polarization of opinions, interests or values and the extent to which they are publicly advanced towards the process of policy formulation' (De Wilde 2011:566).

1.1.2 Politicization how?

De Wilde develops a set of necessary and sufficient conditions for establishing when politicization has occurred in any of the above venues. These conditions follow from the disaggregation of the above definition. They are as follows;

- *Polarization of opinions*: consists of the following elements: '(...) at least two different opinions on the subject' (De Wilde 2011:567) which are 'articulated by representatives (...) who perceive themselves or their constituency as having an interest in the topic' (ibid) and which 'consists of an increase in the diversity of opinion' (ibid). – This is a necessary but insufficient condition for politicization. Polarization of opinions is, of course, *necessary* as without it there are no grounds for saying that something is contested but in and of itself it can take place in isolation of the public view, between for instance legislators and lobby interests or in purely transactional bargaining settings.
- *Intensifying debate*: 'refers to the number of different actors involved in the debate. As more actors become involved and more resources are spent, debates intensify, and this contributes to politicization' (De Wilde 2011:567). – Again, this is a necessary but insufficient condition. An escalation of arguments between actors can still occur outside of the public domain.
- *Public resonance*: 'in order for a debate to gain 'public' resonance, there needs to be an audience present and/or able to follow the proceedings of the debate (...) public resonance

consists of participation of the public in the debate’ (De Wilde 2011:568). – Public resonance presupposes the *apriori* existence of a polarization of opinions, and an intensification of the debate as such, it can be regarded as a necessary and sufficient condition to establish the politicization of the three venues.

So, to be clear, these three conditions must be present jointly, to consider an issue or a process (a broadly understood institution) to be publicly contested.

Taking this step-by-step process which conceptualizes politicization as a build-up of tensions that eventually boils-over to the public domain, demanding more political action on behalf of decision-makers it is not hard to see how the process itself would help entrench élites’ beliefs in what is thought to be the appropriate course of action. The need to ‘stick to one’s guns’ under pressure seems to be particularly relevant in the trade policy, where negotiating partners come to the negotiating table with the expectation that the EU shares the same post-WTO neoliberal policy agenda as they do and expects to be able to ‘speak the same language’.

2. Institutional change

How will élites respond to the realization that the institutions they have built seem not to be accepted as legitimate? The stipulation so far is that politicization thrusts institutions built on output legitimacy into the spotlight from the domain of low politics. The politicization of trade policy will amount to a questioning of EU level bargains and norms built by the trade élite in order to produce what is conceived of as a public good – rules-based trade. The existence of this common EU level identity around trade will mean that unlike other policy areas where no such identity exists, the trade élite will not face a constraining dissensus when looking to respond to politicization. However, this is not to say that engineering responses that simultaneously safeguard the trade policy’s ability to deliver policy while also endeavoring to provide adequate responses to politicization will be simple, given:

- the nature of politicization whereby public demands being made of policy-makers are often not articulated clearly or are often fundamentally at odds with the basic principles that justify EU level policymaking and given

- the unavoidable process whereby the Commission, the Council, and the European Parliament are constantly and actively looking to rebalance, according to their own bureaucratic and political preferences, the executive-legislative relationship.

It then seems reasonable to assume that institutional change in response to politicization will be a messy process. The main argument elaborated through the remainder of this chapter is that the trade élite will try to reshape the institutional structures underpinning the CCP in order to produce a more publicly acceptable policy with as little actual policy change as possible. The success of any change, in turn, will be judged based on whether it leads to de-politicization. If not, more changes will follow. This incremental and iterative process will also give way to a more fundamental reconfiguration of the distribution of power amongst the trade élite, rebalancing the legislative-executive relationship in favor of the EP.

I proceed to build this argument by turning to the new institutionalist literature to arrive at a set of theoretically grounded expectations on how the CCP will respond to politicization. Taking historical institutionalism as my point of departure I make the point that politicization is not merely an external shock that can be resolved through bargaining or the internalization of new norms. Rather politicization is better understood as an external variable which indicates to élites that institutional change is needed. So long as politicization persists, élites may try several different approaches to respond to politicization. This might entail new bargains or the introduction of new norms. In this sense, élite responses instrumentalize the notion of legitimacy. The reliance on bargains and/or normative arguments to demonstrate to the public that the CCP is more in line with their value patterns forms part of a discursive effort on behalf of élites who will 'select ideas that seem appropriate with regard to enabling them to build coalitions (...) [and] ensure the legitimacy of their actions' (Crespy and Schmidt 2014:1090). Regardless of whether these ideas are totally accurate reflections of what these institutional actors actually think.

The approach taken here sidesteps much of the dead-end debate that the New Institutional paradigm faced from the late 1990s onwards, whereby scholars looked to create competing, standalone endogenous theories based on one strand of institutionalism or another. Instead, my approach is built on a recognition that the new institutionalisms are best used as

analytical lenses that can complement each other when studying complex situations involving several agents with their own organizational and political agendas, competing norms, and deeply rooted historical practices. In this vein, I pick-up on the strand of literature that had argued for the need to ‘sit at the same table’ (Aspinwall and Schneider 2000), look for ‘avenues of collaboration’ (DiMaggio 1998) and recognize the ‘theoretical core’ (Immergut 1998) of the new institutionalisms.

Chapter III adds the necessary context to transform the conjectures developed in this chapter into a specific causal mechanism for the CCP. The main points made throughout the entire chapter are summarized in bullet points at the end of this section.

2.1 The changing focus of New Institutionalisms

In order to understand how and why historical institutionalism is the key to formulating my theoretical expectations, it seems important to start with a brief overview of how the focus of inquiry of the new institutionalist literature has changed over time in order to better situate my argument in relation to the existing literature.

The primary driver underpinning the ‘new institutionalist turn’ starting in the 1980s was the increasing realization that there needed to be more systemic attention dedicated to studying the role of institutions beyond only individualism. While much of the initial groundwork was led by March and Olsen (March and Olsen 1983; March and Olsen 1989; March and Olsen 1998) the study of institutions soon exploded leading to the widely accepted claim that: ‘we are all institutionalists now’ (Pierson and Skocpol 2002:706). Placing their emphasis on the role of institutions in creating ‘order and predictability’ (March and Olsen 2008:4) March and Olsen defined institutions as something akin to a stable domain of rules and norms, or a:

‘relatively enduring collection of rules and practices embedded in structures of meaning and resources that are relatively invariant in the face of turnover of individuals and relatively resilient to the idiosyncratic preferences and expectations of individuals and changing external circumstances’ (March and Olsen 2008:1).

Or to turn to Ostrom’s more streamlined definition:

'shared concepts used by humans in repetitive situations organized by rules, norms and strategies'
(Ostrom 2007:23).

In the EU context, I take the view that any given policy domain – such as the CCP – can be understood as an institution given that it is made-up and defined by a subset of relevant institutional actors (relevant Council formations, Commission DGs, EP Committees, civil society, etc.) decision-making rules and processes as well as embedded norms which are policy specific. Within the boundaries of these rules and norms, institutional actors develop strategies to pursue common, or at times conflicting agendas to shape the character of a given policy.

Shortly after the term 'New Institutionalism' was initially coined (March and Olsen 1983) Hall and Taylor's seminal work (1996) took stock of the main brands of new institutionalisms, distinguishing between rational choice, sociological and historical variants. Despite the initial focus on stability, however, the continuously evolving nature of European Integration shifted the focus of this literature towards studying institutional change in the *sui-generis* EU setting (Wallace, Pollack, and Young 2010). The rise and fall of the Constitutional Treaty in the early 2000s showed scholars that the EU's constitutional structure almost certainly precluded reaching a constitutional endpoint of stability (Closa 2004; Eriksen, Fossum, and Menéndez 2005). Instead, through turning to study consecutive treaty modifications scholars realized that studying the *dynamics of change* was essential to identifying and understanding the relatively invariant preferences of EU level actors and how this squared-off with each other to produce change. The additional focus on *informal change* – a change that takes place in between treaty modifications added yet another layer to the paradigm (Bulmer 1993; Eberlein † and Grande ‡ 2005; Heisenberg 2005; Heisenberg 2005; Mahoney and Thelen 2010; Reh et al. 2013; Stacey and Rittberger 2003).

The aim of much of this literature was to develop explanations based on one strand of new institutionalism into generalizable theories. Rather than staying on the ground of description, as

was arguably the original intent of the initial paradigm² there was a push to seek theoretical endogeneity to explain change (Hay 2006). This has had important consequences.

Problematically, scholarship increasingly started favoring the rational choice and sociological institutionalist explanations of why institutions change. The desire to develop self-contained theories often resulted in ignoring the importance of historical context underpinning integration and focusing instead on the mechanics of juxtaposing agency and structure with each other in competing ways (Hay 2006; Wallace, Pollack, and Young 2010). This meant prioritizing either the importance of consequentialism over norms (Garrett 1995; Pollack 2002; Schimmelfennig 2001; Tsebelis 1995; Tsebelis and Proksch 2007) or norms over power politics (Norman 2015; Risse-kappen 1996; Rittberger 2012; Schmidt 2010) even though the history of European integration clearly suggests that an either/or understanding of how bargains and norms have shaped the EU cannot provide a comprehensive understanding of complex European politics.

Perhaps the single biggest issue faced by many of these deceptively complex elaborations of new institutionalist theory was dealing with how to conceptualize unexpected crises and resulting changes in institutional behavior that did not follow from the logic of consequentiality or appropriateness. In lieu of a better alternative, such shifts were explained with the help of external shocks (Pierson 1996; Pierson 2004) which were conceptualized as formative moments, or critical junctures. These turning points were seen to set new trajectories for institutions through reordering the distribution of power or solidifying new norms (Peters, Pierre, and King 2005; Steinmo, Thelen, and Longstreth 1992). In this vein, rational agents can come to consider new pieces of information that they omitted during previous bargaining because of for instance informational asymmetries only to return to change based on embedded power distributions (Héritier 2013b; Windhoff-Héritier 2007). Or, alternately institutional rules can be characterized as shock absorbent (Koremenos 2005). Or, institutional structures in which agency is grounded can come to change to better mirror some important norm that had been ignored in the past (Rittberger 2012). Or, normative structures can ‘rupture’ through, taking the place of rational

² March and Olsen (March and Olsen 1983) considered the NI to be ‘neither a theory nor a coherent critique of one’ but rather ‘an argument that the organization of political life makes a difference’ (:747).

choice bargains (Norman 2015). However, once a new bargain is struck, a new norm is introduced and accepted, institutions return to a pattern of rule reproduction based on one logic or the other (Farrell and Héritier 2004; Farrell and Héritier 2007; Rittberger 2012; Windhoff-Héritier 2007). All this to conserve theoretical endogeneity and claim a large degree of generalizability.

Approaches like this can unnecessarily limit our understanding of what happened in complex situations taking place in the world's most complex decision-making system, while often providing little additional analytical purchase beyond the specific situation given that external shocks or specific institutional crises tend to be different based on the political context of the day.

A case in point of how this limiting mindset prejudices analysis is the sociological institutionalist argument that European élites have become almost addicted to empowering the European Parliament in order to make the EU more legitimate (Rittberger 2012). Over time, in consecutive treaty modifications. As the argument goes, they do so because of the external shock that is the politicization of European politics in general, following the Single European Act. Their conclusion, in turn, is the realization that the norm of representative democracy must be respected in designing European institutions. This norm becomes equated with the empowerment of the EP as a sort of unquestioned reflex or a cognitive shortcut. This is an endogenous explanation, insofar as the process is self-replicating and path-dependent, and not reliant on external explanatory factors. Yet it ignores and precludes the possibility of further conceptualizing the EP's empowerment as the result of a complex set of issues based on bargaining, obfuscation or even accident. (Márton 2018a; Meunier 2017). Ceding that the role played by the EP in trying to respond to the popularly perceived democratic deficit of the EU is neither straightforward nor simply understood by one explanatory factor might be a more productive approach.

Another good example can be found when looking at how scholarship has tried to explain the dynamics driving the sovereign debt and Euro crises. There are several explanations that suggest that despite the complex nature of the crisis, élite responses fit neatly into already existing categories of agency such as: muddling through (Hall 2014); the introduction of well-

known intergovernmentalist mechanisms (Gocaj and Meunier 2013); or the triumph of neofunctionalism (Tosun, Wetzel, and Zapryanova 2014).

Such explanations exclude the seemingly intuitive possibility that dealing with external shocks or responding to an unexpected set of external circumstances – like politicization – can entail a learning process. Élités might not be able to adequately address crises at first try. This was arguably the case with the sovereign debt and euro crises which resulted in a slew of top-down responses that were far from clear-cut and would be difficult to categorize either as being exclusively based on the logic of consequentiality or appropriateness. Consider how amongst the responses given to the crisis, as a firefighting measure, élites created the European Financial Stability Facility (EFSF) and later the European Financial Stability Mechanism (EFSM) in contradiction of the treaties (arguably driven by consequentiality). Furthermore, the subsequently created European Stability Mechanism (ESM) was created as a separate international organization (consequentiality). Only to be incorporated – very painfully – into the EU acquis some years later in order to bring the Union back to the grounds of legality (appropriateness). In addition, a decade on, many of the reforms deemed necessary to hedge against another similar crisis (banking union, insurance deposit guarantee, fiscal union) remain incomplete as Member States struggle to reconcile economic consequentiality with nationally held norms about risk sharing, which suggests a complex cluster of contradictory interests.

Crespy and Schmidt's (2014) discursive institutionalist reading of the Euro crisis provides a much more realistic and credible framework for understanding what transpired. They argue that the interpenetrating nature of domestic and national preference formation in the EU forced élites to adopt a dynamic approach to how they interacted and communicated with each other and the broader European polity at a time of institutional uncertainty. While they had a shared desire to save the Euro Zone, they had different preferences as to how this should be achieved. The process of reaching a common understanding was contingent on France and Germany reconciling their disparate preferences rooted and embedded in their respective societies. The process of reaching a common understanding relied on bargains and argumentation which unfolded at the EU élite level but also in public discourse in France and Germany – which was an important part

of ensuring that the outcome would not become politicized in either national arena. In other words, the process of settling on what institutional responses to give to the crisis at hand involved something akin to a two-level game where the two arenas – domestic and EU – were mutually constitutive of each other. By no means was this process easy, quick or straight forward as it lasted several years, and was filled with messy and iterative solutions (the creation of the EFSF, EFSM, and ESM). While the EU is in a much better position to tackle the next financial crisis than it was before the last one, the continuing antagonistic debate over EMU reform indicates that the process of change originating from that external shock still hasn't entirely run its course.

For my purposes, the takeaway from Crespy and Schmidt's theoretical approach is twofold. First and foremost, the iterative nature that institutional responses to the crisis took supports the argument that external shocks often develop into more than critical junctures, coming to drive institutional responses to an acute problem over a longer period. Not for nothing, the EU today is often characterized as facing a multitude of *ongoing* crises to which there are no clear-cut answers (Börzel 2018; Rittberger and Blauburger 2018; Vollaard 2014). Secondly, the complex pathways of preference formation between Germany and France which were premised on arguing and bargaining to move away from historically rooted preferences strengthen the view that different new institutionalist lenses can and should be used in conjuncture when looking to understand institutional change.

2.2. Expectations of change

In this final section of the chapter, I suggest that the analytical purchase of the distinct logics underpinning the different institutionalisms can be best combined to explain the complexities of change by adopting 'a broad, historical, and contextualized account' of the object of study (Bickerton, Hodson, and Puetter 2015b:34).

This approach is based on perhaps the most frequently applied historical institutionalists starting point that: 'causal variables of interest [in studying change] will be strongly influenced by overarching cultural, institutional, and/or epochal contexts' (ibid:708). Applied to a specific policy area, such as the CCP, understanding the meaning of such contexts allows for making reasoned

expectations as to how an institution might behave and how norms and bargains will interact when the CCP is confronted with politicization. I take the view that institutional responses to the politicization of the CCP will be; consequentialist, yet mindful of the normative context, and iterative when it comes to dealing with change. These are not courageous assumptions. Far from it. They are grounded in the history of the development of the CCP, which is detailed in Chapter III.

I derive my first expectations, that the trade élite will act in a consequentialist manner from the observation that politicization results in a near-unique set of scope conditions in the CCP. As discussed above, politicization as I conceptualize it is a phenomenon that poses an existential challenge to the perceptions of legitimacy that underpin the trade policy. These perceptions of legitimacy, in turn, are based on a combination of sticky norms and bargains which are ultimately rationalized by the economic logic of producing trade as a public good. This, of course, is not all that surprising considering that Member States have all, to varying degrees made oftentimes sensitive sacrifices in the past which have ‘priced-in’ their commitment to the EU’s trade agenda – such as exposing previously protected industries to outside competition.

In turn, seeing how the Commission as an organization will measure its success based on its ability to successfully deliver policy outputs and seeing how DG Trade Officials by all accounts are socialized by neoliberal economic thinking in the line of their work, we can have every expectation that the Commission will also be interested in producing outcomes that are accepted by Member States and are in line with economic orthodoxy. The European Parliament’s motivations will be more complex and are addressed in more detail later. Yet for our purposes here we can note, that up until the Lisbon Treaty the EP had no substantive contractual role in the CCP. While this changed after 2010, the practical terms for the EP’s participation in the CCP were left unclear. In this context, politicization will be seen partly as a window of opportunity by the EP for solidifying its organizational empowerment. To become a fuller part of the trade élite. These points are further elaborated in Chapter III. Yet the initial evidence seems strong enough to pose the hypothesis that the élite’s primary action logic will be consequentialist insofar as

Member States, the Commission, and the EP will want to keep to a paradigm which values trade for its capacity to produce public goods.

Yet given the fundamentally normative nature of politicization, responses to public concerns from the élite will have to be normatively grounded. They will have to speak the language of protesters, who are more concerned with transparency, standards, inequalities as opposed to Pareto-improving economic gains. Here lies the basis of the near-unique character of the CCP when it comes to EU policies. Other aspects of integration that are confronted by politicization often relate to more normatively based policies in the first place where élites do not share a common understanding of economic rationality – policies related to social transfers for instance. In turn, politicization feeds into government narratives of why, for example, more integration is undesirable in one area or another. However, given the strong structural, historic embeddedness of the consequentialist logic in the case of the CCP, consequentialism is the starting point of any élite response to politicization with normative arguments playing a supporting role to try and better market the product that is trade agreements. Hence élite responses will be sensitized to the normative context meaning that the value objections raised by politicization will have to be heard and addressed in a meaningful way, without compromising the economic logic. Reconciling these two imperatives will not be straightforward. In fact, it will be anything but, seeing the disparate views of the public and the élite on legitimacy. Hence the actions of the trade élite will likely be dynamic and based on an iterative try and see approach – this is the point discussed in the previous section.

In characterizing EU trade decision making prior to politicization, I took the view that liberal intergovernmentalism most adequately captured the way that tradeoffs were made between national import and export interests, something that was explicitly confirmed by Trade Commissioner Lamy (Lamy 2015:5). Yet this form of transactional decision making where procedure all but equaled substance does not adequately characterize a trade policy which is no longer purely transactional, but more emotional and complex (Laursen and Roederer-Rynning 2017). So, how can an institution change without actually changing? Returning to the definition of an institution - ‘shared concepts used by humans in repetitive situations organized by rules,

norms and strategies' (Ostrom 2007:23) - it is important to note that the procedural elements of decision making (the rules that organize decision-making) are separate from policy substance (norms and strategies) that define policy output.

Responding to politicization under conditions like this will inevitably lead to an assessment of what can be sacrificed from the policy agenda without hindering the public good aspect of trade. Seeing how the preference for this policy agenda is rooted in the sticky bargains and norms discussed above, addressing procedural criticisms – creating more transparency for instance – instead of opening-up wide-ranging policy debates will likely be an easier proposition. The trade élite will likely be more flexible when it comes to changing the procedural elements of the CCP in response to politicization, while they will be more cautious to initiate changes that might compromise the substance that makes trade what it is. This means that we can expect some aspects of trade policy to change more in response to politicization than others (see *Figure 1*).

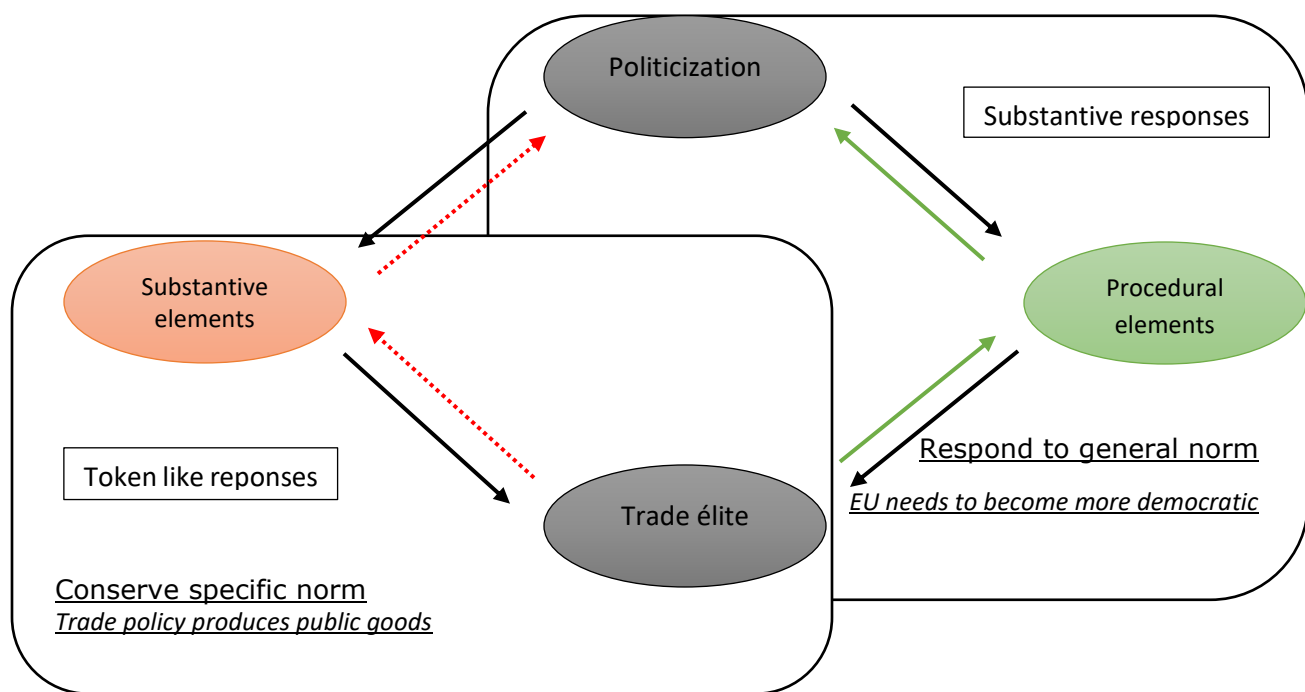


Figure 1: expected responses of trade élite to politicization

Another thing to consider in looking to give a comprehensive response to the research question is how elite responses to politicization will interplay with the inter-organizational tug-o-war to rebalance the legislative-executive relationship. This point speaks not only to the habitual wrangling on how to interpret rules that goes on between the Commission and the Member States but also to the position of the EP as an institutional underdog. While I contend that Member States, the Commission, and the EP form part of the same in-group regarding their preferences, it is also true that Member States are the primary principals of trade policy, with the Commission as their agent and the European Parliament as a veto player. In other words, not all are created equal as in these institutions all have different roles to play.

Hence it will be Member States that drive these responses condoning change in some areas and resisting it in others. This is not to say that the European Commission and the Parliament will not be proactive in seeking to respond to the public. Rather it suggests that the act of responding to politicization in and of itself also has the capacity to stir and reorder the power relationships amongst EU institutions. Under conditions of no public contestation, the patterns of inter-institutional relationships within trade are predictable and more or less well defined (see *Figure 2*). The Commission, the European Parliament, and Member States in the Council grapple over the extent of power delegation and the specific roles and responsibilities of each institution. Bargaining and argumentation both figure into how decisions are made about policy and institutional rules.

However, when the primary aim becomes circle-fencing the reproduction of trade as a public good and addressing, or rather managing politicization it is only reasonable to expect these patterns to become less predictable as well. The preferences of the Commission and the Parliament on how to address public pressure on trade might or might not conflict with those of Member States. And Member States might (try) to further empower or disenfranchise these institutional actors in the process of addressing concerns over policy and process. In this sense, conceiving of these responses as being inductive and dynamic means that all institutions have the capacity to learn from failed attempts at responding to the challenges at hand.

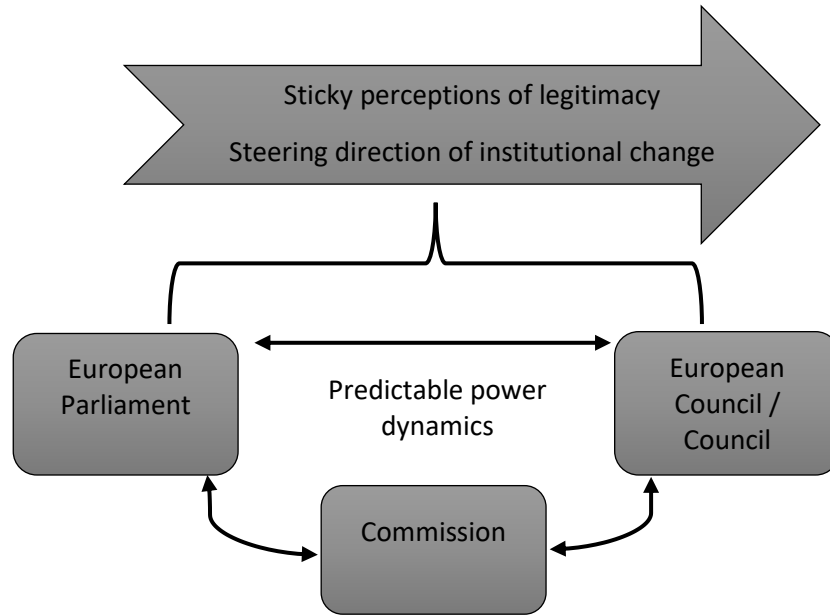


Figure 2: predictable institutional change absent public contestation

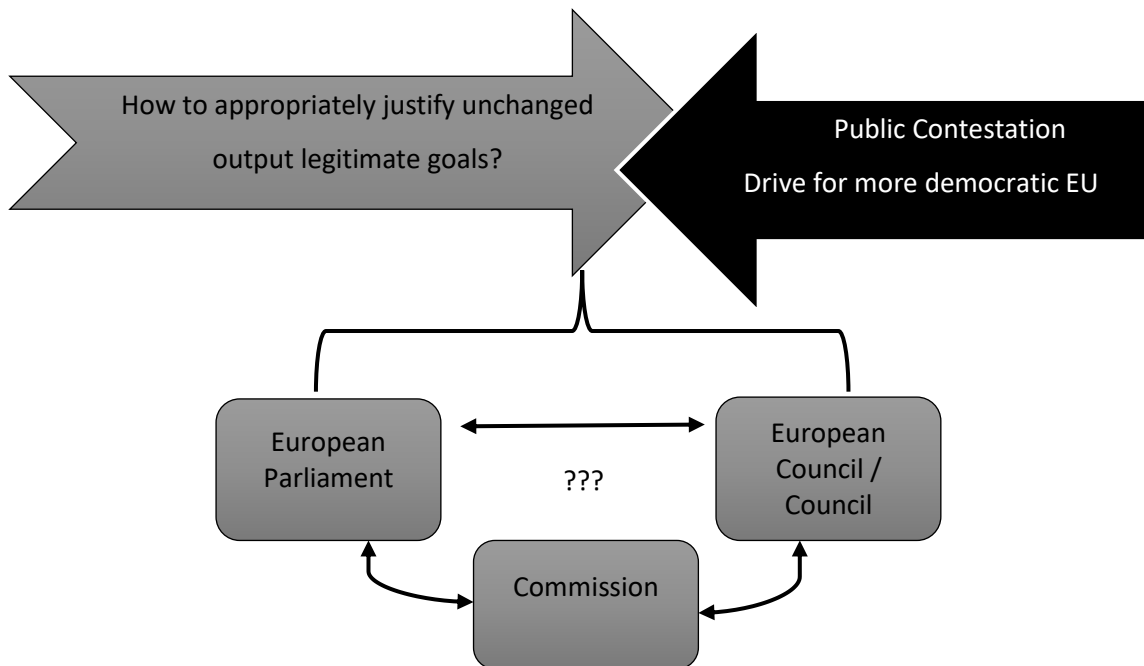


Figure 3: institutional development under public contestation and democratization drive

Before summing-up the main points made in the final section on institutional change, let us recall the main conjectures put forth in this chapter;

- Historically, under circumstances of public disinterest the EU has evolved to favor output legitimate sovereignty transfers in trade policy;
- Politicization of the process and policy aspects of the CCP amounts to the questioning of the bargains and norms that provide the trade policy's underlying strain of legitimacy;
- The trade élite is not faced by the problems of the constraining dissensus as they all have buy-in for the standards of legitimacy upon which the trade policy is built. The élite's understanding of legitimacy is juxtaposed with those that contest it;

Turning to the claims made in this final section of the chapter I put forward the following expectations on change;

- Politicization is a standalone variable: Because of the conflicting value patterns between the trade élite and those contesting trade, politicization will evolve into a standalone input that hangs over the process of preference formation and institutional change - as opposed to a critical juncture that can be easily addressed with a new bargain or the introduction of a new norm;
- Wrangling over inter-institutional power distribution: The primary burden of responding to politicization will rest with Member States, as the masters of the treaties although politicization will also open windows of opportunities for the Commission and especially the Parliament to try to rebalance the principal-agent and executive-legislative relationships between the Council, Member States, and the Parliament.
- Consequentialist behavior: We can assume consequential behavior on behalf of trade decision-makers when they look to address politicization through enacting changes to the CCP. This means a preference for maintaining past historically grounded preferences as much as possible in order to keep producing trade understood as a public good;
- Being sensitized to the normative context: By that same token, we can also assume some degree of normatively driven behavior on behalf of trade decision-makers as they will

want to act in line with the general *Zeitgeist* of our time which demands that the EU become more accountable and transparent;

- Iterative changes: Under constant pressure to address politicization, and trying to balance consequential and normative behavior the institutional responses of the trade élite will follow a 'try and see' approach to modifying the CCP to see how much change is necessary to satisfy the public and depoliticize trade policy;

Following a methodological discussion on process-tracing and causal mechanisms in Chapter II, and a historic overview of the development of the EU's trade policy preferences in Chapter III these conjectures can be joined together in order to produce a causal mechanism to formulate a clear expectation on what the institutional responses to politicization will look like.

Chapter II: Process-tracing and interview sampling

‘One of the great advantages of process-tracing is that it puts researchers at risk of stumbling upon many potential causal factors, evident in the details and sequences of events within a case, which they had not anticipated’ – (Bennett and Checkel 2015:29)

Given the expectation that EU trade policy will change iteratively, over time, and seeing as the object of my research is one institution – the CCP – as opposed to several different ones in this chapter I make an argument for why process-tracing lends itself well for my purposes as a methodology. Not only does process-tracing allow for sequencing conjectures which can be joined together into a larger claim about institutional change over time, but process-tracing is also especially well-suited for single N research. To make this argument I start by discussing the ontological and epistemological foundations of the methodology as well as the importance of conducting process-tracing in a transparent, accountable and falsifiable manner. Something that is achievable through developing ‘observable manifestations’ for conjectures.

Subsequently, I also address in some detail the data types and collection techniques used in the dissertation. Beyond relying on primary EU source documentation as well as secondary sources such as news articles, the dissertation relies on élite interviews (N44) conducted over the span of over three years with (N43) being used in the dissertation. The notion of using data as causal process observations is also elaborated in the second half of the chapter.

1. Process-tracing methodology

Process-tracing has arguably received a bad reputation. On the one hand, the term has attained somewhat of a buzzword status and has often been used loosely without much rigor or standardization (Bennett and Checkel 2015:4). On the other hand, the notion of mechanistic causation, which process-tracing relies on has drawn criticism from positivist social science for being a gimmick or a slippery slope leading to the problem of infinite regress (Gerring 2010; King, Keohane, and Verba 1995). Nonetheless, today it is increasingly accepted that ‘process-tracing is a fundamental tool of qualitative analysis’ (Collier 2011:1) and as such it is increasingly becoming

more formalized. Scholarship has developed practical advice and collected best practices (Bennett and Checkel 2015), and has laid out different typologies for using process-tracing as a tool for theory building, testing or simply explaining an interesting outcome based on a mechanistic understanding of causation (Beach and Pedersen 2013).

In the subsequent, I explore the origins of the method, the notion of mechanistic causation and what it implies for the ontology and epistemology of process-tracing, as well as the different types of process-tracing that one can conduct in different situations. In identifying these typologies, I draw heavily on Beach and Pedersen's (2013) work given that it provides the clearest guidelines for conducting theory building not simply theory-testing process-tracing. Following the discussion of the methodology, I also discuss the data used for this dissertation.

In the field of cognitive psychology, process-tracing originally referred to: '...techniques for examining the intermediate steps in cognitive mental processes to understand better the heuristics through which humans make decisions' (Bennett and Checkel 2015:5). Building on the 'nuts and bolts' approach to social sciences propagated by Elster (1989), which emphasizes the importance of opening up social interactions to the study of the complexities of human motivation and interaction, loosely defined mechanisms made inroads into the social sciences in the late 20th century. Through the work of (Bennett and George 1997; George and Smoke 1989) process-tracing became intertwined with the notion of mechanistic causation.

At its most basic, process-tracing is an attempt to comprehensively understand how a singular outcome is produced through the interplay of several causal factors. As Bennett & Checkel define it, process-tracing is the:

'analysis of evidence on processes, sequences, and conjunctures of events within a case for the purposes of either developing or testing hypotheses about causal mechanisms that might causally explain the case' (2015:7).

As such process-tracing has often been identified as something akin to a historical investigative method, or the 'Sherlock Holmes' method (Collier 2011). To be certain, in the realm of social sciences, such a historical investigative approach has proven to be popular amongst International Relations scholars, who oftentimes have a very limited number of cases (or a single

case) to investigate. Hence their aim is to provide more comprehensive and thorough understandings of specific historic events, decisions, or choices that are seen to be of particular importance in explaining an outcome³.

Yet, as process-tracing evolved to become a standalone method there was increasingly an understanding in the relevant literature that not all single case historical investigative research equals process-tracing. As the epistemological and ontological grounding of process-tracing grew more specific, the first major distinction to be made here was that between process-tracing and congruence analysis. While ‘the congruence method’ (George and Bennett 2005) relies on: ‘the consistency between the theoretically expected and the observed outcome’ (Bennett and Checkel 2015:101) or the ‘Plurality of full-fledged and coherent theories from which concrete expectations can be deduced’ (Ibid), process-tracing relies on induction through observation.⁴

Importantly, seeing how there are no ready-made theoretical expectations that could be applied to answer the proposed research questions, the dissertation cannot rely on the congruence method. Rather, in seeking to understand how élites respond to the politicization of the CCP the ambition of this dissertation is to propose a distinct theoretical framework.

2. Mechanisms & Bayesian inference

The growing popularity of process-tracing around the turn of the century signaled dissatisfaction with the dominant view in positivist social sciences that sought to apply one logic to all types of social scientific inquiry. Starting from the baseline observation that: ‘The difference between quantitative and qualitative methods is not substantial and only stylistic’ King, Keohane and Verba (1995:4) made their case for a uniform understanding of causality that proved to be quite influential. Based on an experimental research design logic these authors understood causation as probabilistic and regular. In this paradigm, results are arrived at through deductive inference (Ibid:76-114). More X leads to more Y, regularly, across discrete venues. Case study research, in

³ One early example of such a historical investigative analysis and parallel theory building might be found in Graham T. Allison’s seminal work on the Cuban Missile Crisis (Allison 1969).

⁴ Tannenwald’s (1999) work on the Cuban Missile Crisis has been a point of departure in making this distinction, as it is widely accepted to be an exercise in congruence analysis rather than process-tracing.

their view, is not epistemologically different from any other methodology. Large-N panel regressions, comparative case studies and process-tracing should all be conducted along the same logic. However, this epistemological world view has received much criticism in subsequent years from qualitative social scientists.

Bradey, Collier and Seawright (2010) argue that KKV's intention of transposing an experimental research logic to qualitative research ignores the unique epistemology of observational studies insofar as good case study research for single - or a very small population of cases – needs to rely on more than a covariational logic to make strong theoretical arguments. In turn, mechanistic case studies were seen to be distinct from covariational and comparative case study designs exactly because of their application to only a limited number of cases (Blatter and Blume 2008). While mechanisms have been criticized for being effectively little more than a series of conjoined hypotheses that can lead to infinite regress and banality (Gerring 2010) advocates of process-tracing have made the case that large-N studies and even comparative case studies can too often rest on covariational findings portrayed as causation. Starting from the realization that covariation or correlation does not equal causation practitioners of process-tracing seek to connect independent variables to dependent variables through making detailed, easily falsifiable observations of how, through what steps the road leads from one to the next. In other words, mechanisms are generally understood as a series of small, well observable and definable steps that fill the space between cause and effect without having causal effects of their own. In order to avoid the problem of infinite regress, the notion of 'productive continuity' has been suggested by some to mean that each step of a mechanism:

'logically leads to the next part, with no large logical holes in the causal story linking a cause (or set of causes) and an outcome together' (Machamer, Darden, and Carver 2000:3)

In this sense, the steps of mechanisms are not 'intervening variables' (Bennett and George 1997:1). Rather, they constitute pieces of 'diagnostic evidence' (Bennett and Checkel 2015:5) that can be used to update our confidence in a hypothesized link of why X causes Y. That is to say, mechanisms as understood by process-tracing are not 'action-formational' in relation to causality, but are more 'situational' opening up different levels of analysis (Blatter and Blume 2008:321). The individual parts of a mechanism are separately necessary but only jointly

sufficient to establish causality between suspected cause and effect. The underlying notion of updating our confidence through gaining more insight in the validity of a mechanism has its origin in the Bayesian logic of inference.

Instead of seeking falsification in the Popperian tradition, Bayesian inference is premised on the notion of learning through observing. Estimation of a likely cause and effect leads to (dis)verification and the updating or down-grading of our confidence intervals in estimated conjectures. Inductive approaches to social science, in general, are premised on the idea that observable patterns of cause and effect (observable *As* causing *Bs*) indicate the existence of patterns in the social world. This allows for the proposal of theories and hypotheses as to why all *As* would cause *Bs* even if we are not certain that they do under all circumstances. Subsequently, in order to prove or disprove our hypotheses, they have to be tested.

Similarly, to Popper's epistemological point of view, process-tracing is not premised on the notion that such inductive conjectures/mechanisms can be definitively proven. However, while the epistemology of Popperian falsification claims that our conjectures can become *less wrong* through the accumulation of evidence that fails to disconfirm them, the Bayesian logic of verification claims that our conjectures can become *more correct* under the accumulation of evidence to support them. In the Popperian epistemology, hypotheses can never be confirmed. However, a single instance of disconfirmation is enough to definitively falsify and dismiss conjectures as wrong. In the Bayesian logic, in turn, our confidence in certain hypotheses can increase to such a degree that other alternative hypotheses that perhaps seemed equally plausible in absence of evidence can be disregarded as invalid. In other words, the Bayesian logic embraces the notion of equifinality as its starting point. There can be several valid explanations as to what caused a given outcome. It is the social scientist's task to determine which plausible explanation can withstand the burden of providing sufficiently credible evidence. A process that involves a lot of iterative back and forth as inductive research usually does.

2.1 Theory building process-tracing

While the ontological and epistemological uniqueness of process-tracing has been generally recognized by the growing number of practitioners, lacking a single methodological canon these practitioners have continued to apply the method according to very different standards⁵. To move towards more uniform standards, and further define the uniqueness of this approach Beach and Pederson have proposed a comprehensive framework for process-tracing. While there are points of friction between Beach and Pedersen's understanding of process-tracing and that of for instance Bennett and Checkel (2015), these are not so severe as to qualify their approaches as being fundamentally different. Most certainly it is not my intent to open these debates here. Rather, I rely on Beach and Pedersen for their practical categorization of the different process-tracing designs that research can follow depending on its scope and aims. In turn, I also rely on Bennett and Checkel (2015) as they provide more practical advice on how to formulate mechanisms.

Beach and Pedersen identify three main variants of process-tracing designs;

1. Explaining-outcome
2. Theory-testing
3. Theory building

Explaining outcome process-tracing is essentially the closest to what might be considered a historical case study. When we have a singular outcome that we find puzzling, without it necessarily relating to any other more generalizable phenomenon, we still might want to explain the underlying mechanism that leads from X to Y, or might want to find the X(s) that trigger a mechanism leading to Y.

Theory testing process-tracing is more akin to comparative case study methods. We can apply process-tracing to test 'whether or not a mechanism [derived from well-established theory]

⁵ For a good illustration of this point, compare Rosén (2016) with Márton (2018). The focus of both pieces is tracing the origins of a rule change at the European Convention. Both pieces purport to use Process-tracing methodology. And both pieces report and evaluate the data used to support their findings according to very different standards.

is present in a case' (Beach & Pedersen, 2013:89). Given that in most cases established theories will not come with pre-developed mechanisms, developing a mechanism connecting X to Y can be seen to be a valuable contribution to the further development of theory in and of itself. However, given that Process-tracing holds that equifinality is possible in relation to mechanisms and given furthermore the singular in-case applicability of the method:

'Neither inferences about necessity nor sufficiency of a mechanism in relation to the population of a phenomenon can be made. To prove necessity or sufficiency of conditions in relation to a population requires cross-case comparative methods, such as investigating all cases where Y is present to see whether the mechanism is also always present when Y occurs...' (Beach & Pedersen, 2013:89).

Given that the aim of this dissertation is not to test an already existing theory but rather to fill the theoretical gap identified in the introduction, my intention is rather to build a plausible theory for how the European Union as a system of differentiated integration will respond to politicization of one of its' core policy domains.

This leads me to theory building process-tracing, as the most suitable application of this methodology for my purposes. The purpose of this type of process-tracing is to derive a plausible mid-range theoretical explanation from a singular case that can be generalized to a wider population of cases (Beach & Pedersen, 2013:16). This can be desirable in situations where pre-existing theories have been clearly discredited, or when there is no theory to explain an empirical phenomenon. As illustrated by Figure 4 Beach and Pedersen suggest three concrete steps in such cases.

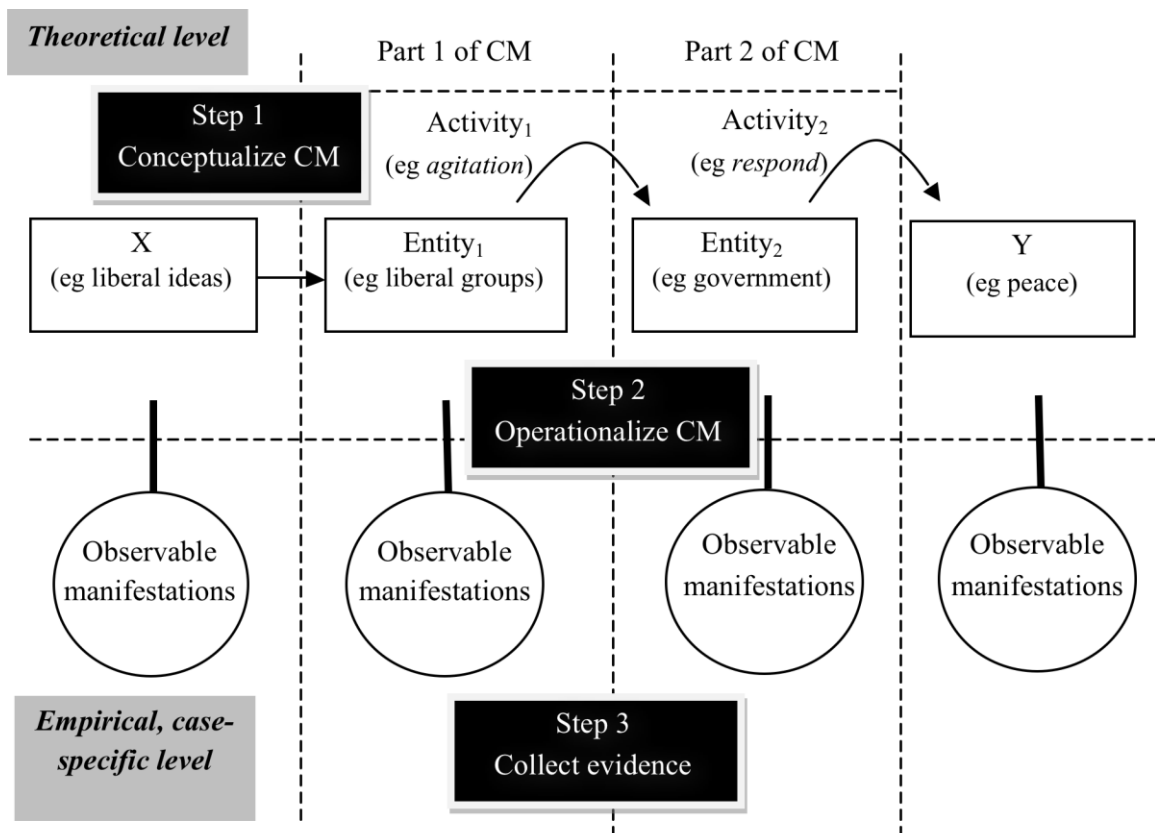


Figure 4 Theory Building Process-tracing [CM = Causal Mechanism] – Source: (Beach & Pedersen 2013 p.15)

While explaining outcome process-tracing is perhaps the most inductive of the three types discussed here, theory building is the most deductive type of process-tracing. This is because most exercises in theory building will involve taking cues from already existing theory or several theories to make an initial, plausible argument. In turn, this theoretically conceptualized mechanism can be traced between a cause and an outcome, boosting our certainty of its validity. At the end of the exercise, this leaves us with a set of theoretical expectations that can be applied to other cases under similar scope conditions.

The steps outlined in Figure 4 are the steps that were followed in this dissertation. Chapter I conceptualized the theoretical framework to answer the research question while Chapter III carries out the operationalization of the mechanism through providing the historical context for the development of trade policy.

2.2 Testing mechanisms

While the epistemological grounding of process-tracing in the Bayesian logic has been generally accepted as a valid alternative to the falsification logic in the positivist paradigm, the ontological question of how to practically conduct tests to increase confidence intervals in mechanisms also had to be addressed by proponents of the method. While Bayesian logic has made inroads into quantitative statistical analysis through reliance on continuously updating probabilities, process-tracing has, understandably, taken a different avenue to adopt the Bayesian logic for its uses.

Today practitioners of process-tracing rely on four principle tests to update or downgrade their confidence in the hypothesized steps of their mechanisms. The empirical tests were initially coined by Van Evera (1997) and have since further been adopted to process-tracing by a number of authors (Beach and Pedersen 2013; Bennett and Checkel 2015; Collier 2011). There is no significant difference between how these tests: the straw-in-the-wind, the hoop, the smoking-gun and the doubly decisive tests are understood by scholarship. In the subsequent, I briefly discuss these.

Straw-in-the-wind test

The ‘Straw-in-the-Wind’ test is the weakest of tests that any step of a mechanism – essentially a hypothesis of its own – can be subjected to. This test is neither necessary nor sufficient for establishing causality. In plain terms, these tests confirm the minimal scope conditions that are necessary for a proposed hypothesis to be considered plausible. For instance, suppose that our hypothesized mechanism builds on the assumption that the public contestation of one thing or another took place, triggering a chain of events. If we fail to establish that something was indeed publicly contested according to some reasonable benchmark than the proposed mechanism fails to even take off as plausible. While such tests are often not made specific in process-tracing studies, as they contribute relatively little to making an argument, either way, they can be of great help in structuring researchers’ thinking during the inductive research process.

Hoop test

Hoop tests are much more demanding. A hoop test's aim is to see if there is empirical evidence that confirms the presence of the theoretical conditions that are necessary for a hypothesized mechanism. Say for example that we hypothesize that in country X, the status-quo approach to considering the importance of gender when designing social policies becomes publicly contested resulting in more gendered policy outputs. If, in conjuncture with establishing the existence of public contestation we can establish with credibility that there was a change in country X's welfare policies, with these becoming more gendered than our hypothesis has passed a hoop test. This result does not imply causality. Yet based on a theoretical expectation we might have formulated based on the literature, passing this hoop is enough to dig deeper towards establishing causality.

So, whereas a Straw-in-the-Wind test establishes scope conditions for a hypothesized mechanism to occur, hoop tests go one step further in establishing theoretically necessary conditions for the hypothesis to remain in the realm of plausibility. If our conjecture does not jump through the hoop, it will fail. However, successfully jumping through a hoop will contribute relatively little to updating our confidence in the validity of our conjecture. Yet reliance on a series of hoop tests creates a larger web of data-points that can help systematically update our confidence in the validity of the individual steps of our mechanism.

Smoking-gun test

Smoking-guns tests are demanding to the point of rarely being practicable. For empirical evidence to pass such a test it must be highly unique and relatively certain. As the name indicates, to pass a smoking-gun test, a piece of evidence must provide strong indications to support our conjecture – seeing a videotape of a suspected murderer holding a smoking-gun over the body of a victim. Passing such a test updates our confidence in our conjecture greatly, but not beyond a reasonable doubt – the videotape does not show the actual moment of the shooting. As such, smoking gun evidence is sufficient but not necessary to confirm a conjecture. After all, we can imagine other possible – if less probable – mechanisms that could explain how a victim died.

Staying with the above example, if we find evidence that policy-makers decided to change a welfare policy to make it more gendered because of a realization that such a change leads to more economically efficient outcomes, that would mean that our hypothesized conjecture has passed a smoking-gun test. While this is not the same as saying that the public contestation of the issue was the direct cause for the policy change – indeed the change might have originated from an intrinsic realization or it might have been motivated by some other factor. Nonetheless, having such a piece of evidence in a small or single N research design, substantiated by a number of hoop tests would lend very strong support to the conjecture. However, as in real life criminal investigations, smoking gun type evidence is rare.

Doubly decisive test

Doubly decisive tests are highly unique and very certain pieces of evidence satisfying the requirements of necessity and sufficiency in establishing causality as such they are even rarer than smoking gun tests. A videotape showing the actual moment of murder. Staying with the above example, if we find evidence that policy-makers acknowledge the need to change a welfare policy to respond to public contestation, then our conjecture is confirmed.

As acknowledged by Beach and Pedersen, Bennett, and Collier, it is highly unlikely that we would find singular pieces of doubly decisive evidence in searching to (dis)confirm a mechanism. Rather: ‘this leverage may be achieved by combining multiple tests, which together support one explanation and eliminate all others’. (Collier, 2011:827). This is accomplished by relying on a combination of hoop tests testing for as large a number of necessary theoretical conditions as possible to a point where we can safely eliminate most or all alternative causal explanations. And in addition, keeping our eyes open for the odd smoking-gun.

2.2.1 What does this mean in practice?

What do these tests imply in practical terms for a research design that employs process-tracing? How does a researcher go about applying these tests? What is the difference between a case study relying on a ‘thick’ description and a process-tracing study? These are important albeit

often ignored questions in the literature. Hence, the practical aspect of how one goes about conducting process-tracing is as inductive as the methodology itself.

A version of Chapter IV of this dissertation was published as a standalone article using process-tracing methodology. In the process of writing that piece, I was confronted with these practical challenges early on during my doctoral research. The exercise in collecting, evaluating and subsequently presenting the data I used to make my arguments has been very useful for developing a set of general guidelines to follow throughout subsequent exercises in process-tracing. Some of these might well seem self-explanatory to the point of being trivial, yet they formed a part of the research process underlying this dissertation. In short order, these guidelines are the following:

- Keeping an open eye in data collection: When conducting inductive research, evidence oftentimes does not present itself in a neat and orderly fashion. While looking to better understand one aspect of a mechanism, it is quite possible to find evidence that speaks to some other part of the argument. As such, keeping an open eye to recognize relevant information is practical as it saves time. This requires keeping an open mind. In practice, while sifting through source documentation or interview data, I marked data that I thought could be relevant for other parts of the argument.
- Structuring evidence along a timeline derived from the mechanism: Seeing how the output of process-tracing is a rich and detailed description of a series of intertwining events, it is especially important to be accurate in presenting one's timeline of events. Structuring evidence along a timeline that correlates with the steps of a mechanism reduces the chance of making a mistake and greatly simplifies ones' life when looking at the bigger picture.
- Do not discard evidence: when analyzing data, it is good practice to see which empirical tests the data satisfies/fails to satisfy rather than discarding it if it does not satisfy a demanding test. Even if a piece of data only passes a straw-in-the-wind test or a hoop test it can still be useful for the simple reason that these less unique pieces of data can still add to the critical mass of evidence.

3. Data collection, sampling, triangulation and reporting

This dissertation relies on a mixture of different types of qualitative data. These can be categorized into three broad categories: primary EU source documents, reporting by reputable news outlets and semi-structured elite interviews. This section addressed issues related to data sampling, triangulation, collection and reporting with an emphasis on explaining the interview design and the use of interview data.

Throughout the empirical sections of the dissertation, I rely heavily on EU source documents. This category includes; press releases from the institutions or from political groups in the context of the European Parliament, briefing materials prepared by the European Parliament's Research Service, Commission policy papers such as white papers or communications, Parliamentary resolutions, Council conclusions, press releases or statements made by the institutions – especially the European Commission. In addition, I also rely on the policy papers of non-governmental organizations (NGOs) and other civil society groups, think-tanks, industry associations, and national political parties. In Chapter IV, which deals with the Convention on the Future of Europe I rely on the minutes and other official papers of the Convention. As a separate category, I also rely on primary and secondary EU law and the jurisprudence of the ECJ. In terms of EU treaties, I draw on the consolidated versions of the Treaty on the Functioning of the European Union (TFEU) and the Treaty of the European Union (TEU).

In addition, I rely on reputable media outlets and their secondary reporting on EU affairs as well as dedicated EU affairs blogs (most prominently Europeanlawblog.eu). Primary media sources include but are not limited to; EU Observer, The Economist, Euractiv, Politico and the Financial Times. This primary source documentation and secondary media reporting spans a timeframe of approximately 15 years, as the first documents and news articles relate to the Convention on the Future of Europe and the last documents relate to the interpretation of the Court's decisions on Advisory Opinion 2/15, and the ratification process of CETA from 2019.

In addition to these sources, I also conducted an online elite questionnaire on perceptions of legitimacy which was sent to 191 email addresses in August of 2017. The target audience were

MEPs, DG Trade Officials, as well as TPC deputies posted at Member States' Permanent Representations in Brussels. The questionnaire was conducted with the help of Qualtrics and consisted of 13 questions and returned 29 responses between August the 30th and October the 2nd. I do not rely extensively on the results of this questionnaire to make causal claims rather I use the findings in conjuncture with élite interviews in Chapters V ([p.138](#)) and VI ([p.152](#)), where the responses are presented alongside the questions asked in the questionnaire.

3.1 Interview sampling & design

Process-tracing as a methodology carries a number of important implications for interview data generation and analysis. In this part of the chapter, I address questions relating to interview design and techniques. I consider the question of random versus non-random sampling and I lay-out how I use interviews throughout subsequent chapters to update or decrease my confidence in the causal mechanisms proposed in Chapter II. The interview data is reported at the end of this chapter in Table 1.

There are various techniques for sampling a population for relevant interview subjects. I choose to use a non-random purposive sampling design, given that it seemed to be the most appropriate choice for the given research problem and method. Random sampling implies selecting interviewees from a pre-defined population of potential subjects at random. As Lynch (2013) notes, random sampling is often considered to be 'the gold standard for making generalizations, or inferences, from the sample to the population' (Ibid:39). However, as she also points out, both researchers' possibilities for sampling in general and the methodology they use in particular might make random sampling unfeasible or undesirable, respectively. In other words, the most appropriate type of sampling is dependent on the research design and methods employed. As such, Lynch also notes that: 'not all interview research demands random sampling' (Ibid:40) as non-random sampling is seen to be the *defacto* most appropriate method in the following cases:

- Where research employs a mixed-methods design, and interviews are used to generate hypotheses that are subsequently tested against other data;

- For interpretivist research designs;
- **For process-tracing research designs and for testing mechanistic hypotheses;**
- For In-depth case studies;
- To augment survey results with triangulation;
- Cognitive mapping and pattern matching;

Seeing as I employ process-tracing methodology, the use of non-random sampling seems unproblematic. As Lynch further points out (Ibid), there are different techniques and factors to consider in non-random sampling designs. First and foremost, non-random samples can be *convenience, snowball, interstitial, purposive* samples or a combination of these. Convenience sampling involves talking with people the researcher might already know or people that are easily accessible. Such interviews might be useful as antecedents to more structured research, but there is a high risk implied in simply talking to people one meets without any underlying strategy. Namely that the sample will be non-informative, or very biased.

Snowball sampling, in turn, implies inductively following a chain of recommendations provided by interviewees as to who a relevant person of interest might be to talk to. This, however, still carries the danger of selection bias. Interstitial sampling, in turn, implies relying on spontaneous conversations and even unsolicited opinions given by people embedded in a given population (taxi drivers and local research assistants are brought as examples by Lynch). Such an approach, if taken as the basis of an in-depth research project would possibly be closer to the interpretivist research paradigm than to a positivist albeit qualitative one. As discussed above, process-tracing is a positivist qualitative tool that seeks to provide a large degree of certainty to the validity of fine-grained causal explanations in singular cases. This recognition of the aims of the method carries with it the recognition that process-tracing research must be based on a substantial, holistic and triangulated understanding of how events unfolded. Purposive sampling seems to be particularly convenient to pursue these goals:

'Purposive sampling (...) is a form of non-random sampling that involves selecting elements of a population according to specific characteristics deemed relevant to the analysis (...) a purposive sampling design does not call for a complete census of every element in the population, but it does require knowing enough about the characteristics of the population to know what characteristics

are likely to be relevant for the research project (...) purposive sampling can yield a sample that is loosely “representative” of the population, at least along the dimensions that are likely to be of interest for a study, without requiring a very large number of interviews.’ (Lynch, 2013:41)

As discussed in Chapter I, this research seeks to capture EU élites’ changing perceptions of how to respond to public contestation and what this means in terms of institutional changes. Beyond being purposive, this meant that for the interview design to provide reliable data on élites’ actions, the interview data also has to be triangulated.

The term triangulation comes from the discipline of Geography. More specifically from land surveying. It refers to the process of: ‘tracing and measure[ing] a series or network of triangles to determine distances and relative positions of points spread over an area’ (Stevenson 2010:1897). In other words, the basic idea behind triangulation is determining the position of something through relying on different points of view. The triangulation logic has proven to be popular in the social sciences. Following the typology of Denzin (1978) triangulation can be applied to increase both the reliability and robustness of theories, methods, data and the research process itself.

- Theoretical triangulation: implies: ‘using multiple rather than single perspectives in relation to the same set of objects’ (Ibid:297). This is what research designs employing the falsification logic do. Proposing and subsequently testing rival hypotheses drawn from different theories increases the credibility of research findings. Stepping away from the Popperian logic, the concept of triangulation can also be found at the heart of theory testing Process-tracing, which pits rival causal mechanisms against each other.
- Methodological triangulation: Those concerned with bridging qualitative and quantitative epistemological approaches in the form of mixed method research designs often invoke the term triangulation. They do so in order to point-out that if well-chosen, different methodologies have the capability to supplement each other’s blind spots.
- Researcher triangulation: Denzin labels this ‘investigator’ triangulation. This refers to: ‘using multiple rather than single observers of the same object’ (ibid). A good

example of this might be found in text analysis when the process of coding text is often subjected to standards of inter-coder reliability.

- Data triangulation: Lastly data triangulation refers to the process of distinguishing between and relying on different types of data sources to account for possible biases, differences in perspectives or viewpoints reflected in data. In other words, triangulating data means that one strives to get the big picture.

While this dissertation does draw on existing theories to put forward its theoretical conjectures, it does not pit theories against each other in hopes of disproving some and validating others. In terms of methodology, process-tracing seems uniquely suited for a single-N research design. Seeing how the research does not aspire to quantify data and draw direct conclusions from only the number of speech acts relating to a given topic, inter-coder reliability does not seem to be necessary. However! Triangulating interviews seems absolutely necessary in relation to research that aspires to trace EU level processes and institutional responses to a given X. Keeping in mind the aims of this research – capturing élite responses to public contestation - it is important to appreciate that in talking about European élites we are talking about élites from three different European institutions. Three institutions which:

- have different organizational cultures;
- are involved at different points of and to different degrees in the same processes, and;
- often compete for institutional empowerment.

The way this effects interviewing is rather straightforward. Talking to decision-makers affiliated with only one of the three institutions would provide a biased view of processes that unfolded between all three institutions. That is not to say that biased equals useless. In looking at perceptions, biases are unavoidable. Indeed, they help to bring to the forefront institutional thinking on a given question. However, in considering only one biased point of view, for instance from the Commission and ignoring the points of view of the Council and the EP would mean exposing ourselves to only parts of the same story. This realization effected the sample design which needed to represent views from all three EU institutions.

In order to arrive at a purposive yet feasible sample, I defined my broadest possible population of interview subjects as European political élites that were involved in the institutional decision-making process of the CCP. This initial and potential pool included:

- From the Member States' side: heads of state and government, trade ministers, deputy-ministers, secretaries of state and career officials from national foreign and trade ministries, relevant diplomatic staff serving at permanent representations of Member States' in Brussels, relevant officials from the Council Secretariat, and national agents in any relevant ECJ proceedings.
- From the European Commission's side: Commission Presidents Barroso and Jean-Claude Juncker (given the timeframe of the study), Trade Commissioners Karel de Gucht and Cecilia Malmström who served under these Presidents – respectively, Officials from the Directorate General for Trade and agents of the Commission's legal service representing the Commission in any relevant ECJ proceedings.
- From the European Parliament: Members of Parliament that were either permanent or substitute members on the European Parliament's International Trade Committee (INTA), staff of these parliamentarians working on trade related issues, permanent research staff of the Parliament, and agents of the Parliament's legal service representing the Parliament in any relevant ECJ proceedings.

The focus of the research is on making the causal link between public contestations and élite responses to them specific through understanding how élite perceptions change. This means that I did not consider including civil society groups or industry into this pool. Furthermore, recent literature has dealt extensively with the anatomy of the public contestation of the European Union, and trade policy – including the role of these groups (Bauer 2016b; Dietz and Dotzauer 2015; Dominguez 2017). This initial large pool of subjects had to be narrowed down to a more feasible pool. I took three important decisions here:

- Firstly, as a general rule, I took the decision to focus on the EU level, excluding national politicians and ministry staff because of two reasons. First and foremost, after reaching out to national trade ministry officers in 18 Member States (with an initial email

followed-up by a second one) I received one response. Secondly, it would not have been feasible to conduct fieldwork in all Member States – or even a select number of Member States – trying to gain access to ministry staff on the ground. This meant that to understand Member States’ positions I would target relevant diplomatic staff serving at permanent representations in Brussels. The choice seemed justified given that such staff are usually stationed in Brussels from relevant ministries and are experts of the field they work in, representing their Member States’ positions in the Council’s relevant working groups.

- Secondly, I took the decision to focus on DG Trade Officials within the European Commission given that DG Trade is the relevant Commission that deals with the CCP.
- Thirdly, relating to the European Parliament, as a general rule I decided to primarily focus my efforts on centrist MEPs, excluding radical right and left from the pool of possible interviewees in recognition of the tendency of the EP to set organizational level goals based on grand-coalition party dynamics. In turn, these goals will come to delineate the bargaining positions of the Parliament *vis-à-vis* other institutions during instances of change. Hence, to best understand the role that the EP played in responding to public contestation and thus to shaping change it was important to capture the mainstream rather than the fringe accounts of what happened.

In addition to this narrowed-down pool, I also had to consider the importance of talking to people that had been closely involved and intimately familiar with Opinion 2/15 and the Achmea rulings of the ECJ. This led me to identify a narrow pool of possible subjects, including national agents representing Member States during the proceedings, as well as agents of the Parliament and the Commission. The interview pool for the Convention on the Future of Europe was substantively narrower, given the time that had elapsed since 2003. As such, here I relied on a convenience sample.

I conducted a total of N44 élite interviews over the course of over three years from April of 2015 to May of 2018 and used N43 in this dissertation as one interview was useless in any practical sense as the subject was not forthcoming. Out of these interviews, five did not result from my

purposive sampling design. Four were related to the European Convention, occurring between 2001 and 2003 (Chapter IV) while one interview resulted out of a chance encounter at a conference with a former Minister of Foreign Affairs of an EU Member State.

As Leech, Baumgartner, Berrz, Hojnacki, and Kimball (2013) point out, semi-structured interviews connote a broad range of designs between unstructured anthropological research and highly structured mass surveys – which are considered as a type of interview. The advantage of the semi-structured format is that it allows for the possibility of induction as: ‘a general set of questions are determined by the interviewer beforehand, but the questions are virtually all open-ended and provide the interview subject with a substantial amount of leeway in how to answer them’ (Ibid:210). The interview questionnaires employed were of a semi-structured nature. The purpose was to leave enough space for the discussions to evolve inductively, in the hopes that interviewees might present new and intriguing information that I might not have anticipated. In this sense, the interviews were in-line with the inductive nature of theory building process-tracing. To recall the quote from the beginning of the chapter:

‘One of the great advantages of process-tracing is that it puts researchers at risk of stumbling upon many potential causal factors, evident in the details and sequences of events within a case, which they had not anticipated on the basis of their prior alternative hypotheses’ – (Bennett & Checkel, 2015:29)

Most of the interview subjects did not agree to be recorded. As such, I took notes during the interview. In most cases, the digitalization of these notes *started* within 30 minutes to a few hours after the end of the interview. In some cases, the elapsed time amounted to several hours. Yet digitalization always took place on the day of the interview. The resulting interview transcripts were coded according to topics, or themes with the unit of coding ranging between a few sentences, to entire paragraphs. Coding was only a tool to help navigate more easily between responses to the same questions or to discover and group similar themes emerging out of discussions that unfolded spontaneously, as opposed to a way of quantifying responses.

3.1.1 Use of data as Causal Process Observations

Both interview and source document data are used to make ‘causal process observations’ (CPO) throughout the dissertation in order to systematically increase or decrease confidence in the

validity of my proposed causal mechanism. CPOs are identified by Collier *et al* as: ‘insight or piece of data that provides information about context, process, or mechanism, and that contributes distinctively to causal inference [compared to data set observations]’ (Collier, Brady, and Seawright 2010:3). In other words, CPOs can connote a wide variety of data from source documentation, to news reports to interviews. The empirical tests discussed in in this chapter are different types of CPOs. The distinction in the definition between data set observations and CPOs is important, seeing how single case research implies a differentiated epistemological starting point from the one advocated for by King Keohane and Verba (1995). Using CPOs means:

‘(...) draw[ing] upon multiple sources of information, utilizing inferences based on common sense, to establish an argument. It tries to approach the problem in several different ways, cross-checking information at every turn, and asking if the posited causal effect is probable, or even possible, given what we know from many different sources. In short, it investigates causal processes in close detail (...)’ (Brady 2010:240).

The point here is that the type of quantitative data set observations argued for by the KKV paradigm to social sciences emphasizes the importance of robustness understood as a function of the number of observations made. The more the better. Indeed, this is the logic followed by quantified qualitative approaches to interview data that code interview responses in order to use semi-quantitative methods to turn ‘mountains of words’ into measurable phenomenon (Johnson, Dunlap, and Benoit 2010). CPOs, in turn, are developed specifically for single or very small N research designs, with a strong underlying assumption that not all interviews can be assigned equal importance. Indeed, as is apparent by looking at Table 1 at the end of the chapter some interviews lasted 15 minutes while other lasted 80. Some subjects become non-responsive or even hostile despite having agreed to take the interview. Some are ill-informed or inexperienced while others are seasoned and kind. Thus, coding the responses of subjects base on the logic of data set observations and treating these on par with each other seems to be problematic.

The distinctiveness of CPO data comes from the recognition ingrained in process-tracing as a method; the covariation logic and the implied ‘thin causation’ argued for by KKV is not sufficient or indeed suitable to capture within case causation. As such, CPOs are what make thick descriptive case studies so valuable. Or reversing that, thick description is based on the systematical and logical use of CPOs – that is to say process-tracing.

The weight that official documents, such as press releases, pieces of legislation or Council resolutions play in supporting ones' arguments seem to be relatively clear. As does the role of reputable media coverage in establishing timelines, dates, people of interest, important milestone events, context and so on. Interviews, however, are a little trickier. Interviews can be used for a number of different purposes depending on the research design. For instance, they can be useful as preliminary research instruments, helping find or clarify the focus of our inquiry, in which cases interviews are not necessarily used or even reported on in a main study. Or they can be used to generate data in a main study, to establish crucial pieces of insight about context, or specific events, dominant perceptions, dominant feelings within a group of decision-makers, bureaucrats, epistemic communities, etc.

In turn, interview data can be used in a semi-quantitative manner, or in a more qualitative one. As established above, the epistemology of causal process observations lends itself better to a qualitative approach. In practical terms, interview data is used in two ways throughout the dissertation. Firstly, interview subjects are assigned codes (for example MEP1 or Minister2) and are cited as one would cite literature at the end of an argument. Some examples of the types of inferences that are made in this manner are:

- What the dominant perception of an event was in the in-group in relation to a specific event at a given time;
- How these perceptions differed from institution to institution;
- How these changed over time.

Secondly, verbatim and non-verbatim quotes are used to bring to the forefront these differences between the institutions in a more tangible manner. To help drive the process of triangulation. While the embedded use of the interviews seems unproblematic, using quotes from interview data requires some further justification considering some criticisms that have been leveled against interview quotes.

Perhaps the most common criticism leveled against the use of interviews in such a manner is that quotes can be used for 'window dressing' Lynch (2013:32) making dry research more readable (Bleich and Pekkanen 2013). The underlying assumption of these criticisms is that in

these cases few interviews are used selectively, with single or few quotes presented as confirmatory evidence. Without any systemic standards or guidelines. Such uses of interviews are undoubtedly problematic, especially if the interviews are not based on a well thought-out sampling design. For instance, if they are not triangulated to capture all sides of a debate.

However, triangulated quotes extracted from a well sampled interview corpus and used systematically to establish turning points in the narrative not only makes the reading experience more digestible but also contributes to transparency. It is a way of laying bare the evidence that is used to update confidence in the causal mechanism at hand. Indeed, one of the aspirations of Process-tracing studies should be to systematically present the data that they use. While evaluating data based on uniqueness and certainty may be intuitive, transparency in this regard is often missing.

This still leaves the question of *selection bias*. How does the reader know that the quote presented as a piece of evidence is not taken out of context? Or is not contradicted later in the interview? There are two intuitive guidelines that I have followed to ensure more transparency:

- Quote as completely as possible – minimize the use of ‘[...]’ – which is usually used to filter non-relevant points from quotes. The recognition here, of course, is that filtering such parts is arbitrary and may be used to cover-up contradictory information to the point one is trying to make.
- Appreciate the importance of robustness – when using quotes to triangulate a given perception or event it is important to use as many quotes as possible to be able to claim a degree of robustness. If MEPs across the political isles, diplomats from several different Member States, or a number of different Commission officials attest to the same viewpoint in relation to something, that will lend robustness and credibility to the causal inference made from quotes.

The subsequent table reports the interview data.

| # | Interview Subject | Coded as | Date | Interview Type and Place | Notes Digitalized | Duration | Other Comments |
|---|---|----------|----------------|--------------------------|----------------------|-----------------------|--|
| 1 | S&D MEP INTA Committee | EP1 | 2015.04. 13 | In-person – Brussels | W/in 60 Minutes | Approx. 60 minutes | Activist mentality – strong political opinions. |
| 2 | S&D MEP INTA Committee | EP2 | 2015.04. 13 | In-person – Brussels | W/in 120 Minutes | Approx. 15 minutes | Of very little use. Stand-offish, not forthcoming. |
| 3 | ALDE MEPA INTA Committee | EPa1 | 2015.04. 13 | In-person – Brussels | W/in 30 Minutes | Approx. 35 minutes | Young bright staffer. |
| 4 | Senior Researcher - EP Research Service | EPRS | 2015.04. 13 | In-person – Brussels | Immediately | Approx. 60 minutes | Very seasoned. |
| 5 | EPP MEP INTA Committee | EP3 | 2015.04. 14 | In-person – Brussels | W/in 30 Minutes | Approx. 60 minutes | Very broad historical overview. Long monologues. Useful. |
| 6 | Convention Participant / National Parliamentary Conventioneer | NPC | 2016.03. 10 | In-person | W/in 60 Minutes | Approx. 60 minutes | Long-time retired, fond memories of Convention. |
| 7 | Convention Participant / National Government Conventioneer | NGC | 2016.04. 05 | Email | | | Few, short (dis)confirmatory questions. Useful, but not substantive beyond that. |
| 8 | Convention Participant / Presidium Member | PRES | 2016.03. 25 | Skype | Immediately | Approx. 70 minutes | Excellent memory. Very detailed answers to |

| | | | | | | | |
|----|---|-----------------|------------|----------------------|-----------------|--------------------|--|
| | | | | | | | questions. Passionate about topic. |
| 9 | Former. Member State Foreign Minister | Minister 1 | 2016.04.16 | In-person | W/in 30 Minutes | Approx. 70 minutes | Good memory. Very candid about own tenure as minister. |
| 10 | Convention Participant / Commission Legal Service | ComLs | 2016.06.13 | Email | | | Several emails exchanged for follow-up questions. |
| 11 | National Trade Ministry Officer | MS Trade Expert | 2016.10.27 | Phone | W/in 30 Minutes | Approx. 45 minutes | Forthcoming and eager to share. |
| 12 | TPC Member | TPC1 | 2016.11.23 | In-person – Brussels | W/in 30 Minutes | Approx. 35 minutes | Took-up posting recently. Still learning on the job. |
| 13 | European Commission Dept. Head of Unit | EC1 | 2016.11.24 | In-person – Brussels | W/in 30 Minutes | Approx. 60 minutes | Very businesslike and restrained. |
| 14 | TPC Member | TPC2 | 2016.11.24 | In-person – Brussels | Same day | Approx. 85 minutes | Very informative and comprehensive overview of state of play. |
| 15 | TPC Member | TPC3 | 2016.11.24 | In-person – Brussels | W/in 30 Minutes | Approx. 20 minutes | Very short meeting. Difficult to arrange, had to be rescheduled various times. Blunt answers to questions. |
| 16 | TPC Member | TPC4 | 2016.11.24 | In-person – Brussels | Same day | Approx. 40 minutes | Restrained and hesitant to express opinions. |

| | | | | | | | |
|----|--------------------------|----------|----------------|----------------------|---------------------|-----------------------|--|
| 17 | EP Administrator | INTA Sec | 2016.11. 25 | In-person – Brussels | Same day | Approx. 60 minutes | Very good understanding of motivations of all political groups. Strong on informal rules aspects. |
| 18 | TPC Member | TPC5 | 2016.11. 26 | In-person – Brussels | W/in 60 Minutes | Approx. 60 minutes | Cynical. Seasoned. |
| 19 | S&D MEP INTA Committee | EP4 | 2017.04. 15 | Email | | | No follow-up questions. |
| 20 | EPP MEP INTA Committee | EP3* | 2017.05. 03 | In-person – Brussels | Same day | Approx. 60 minutes | Well informed and easygoing. |
| 21 | European Commission DHoU | EC2 | 2017.05. 03 | In-person – Brussels | W/in 120 Minutes | Approx. 40 minutes | Very cautious about expressing strong opinion. Good factual and historical overview. |
| 22 | European Commission DHoU | EC3 | 2017.05. 04 | In-person – Brussels | W/in 60 Minutes | Approx. 60 minutes | Blunt and cynical. |
| 23 | TPC Member | TPC6 | 2017.05. 08 | In-person – Brussels | W/in 60 Minutes | Approx. 40 minutes | Strong personal opinions of other institutions. |
| 24 | ECR MEP INTA Committee | EP6 | 2017.05. 09 | In-person – Brussels | W/in 60 Minutes | Approx. 30 minutes | General. Perhaps ill- prepared? |

| | | | | | | | |
|----|--------------------------------------|------|----------------|----------------------|--------------------|-----------------------|--|
| 25 | EPP MEPA INTA Committee | EPa2 | 2017.05. 09 | In-person – Brussels | Immediately | Approx. 45 minutes | Young staffer very well prepared on a broad range of issues relating to topic. |
| 26 | Greens Political Group Advisor EP | PA | 2017.05. 09 | In-person – Brussels | Same day | Approx. 40 minutes | Activist mentality – strong political opinions. |
| 27 | S&D MEP INTA Committee | EP1* | 2017.05. 09 | In-person – Brussels | Same day | Approx. 50 minutes | Activist mentality – strong political opinions. |
| 28 | EPP MEP INTA Committee | EP7 | 2017.05. 10 | In-person – Brussels | Same day | Approx. 20 minutes | Jovial. In a hurry. |
| 29 | GUE/NGL MEP INTA Committee | EP8 | 2017.05. 10 | In-person – Brussels | W/in 30 Minutes | Approx. 50 minutes | Articulate, political activist opinions. |
| 30 | S&D MEPA INTA Committee | EPa3 | 2017.05. 11 | In-person – Brussels | Same day | Approx. 40 minutes | Well prepared, jovial, at ease. |
| 31 | S&D MEPA INTA Committee | EPa4 | 2017.05. 11 | In-person – Brussels | Same day | Approx. 40 minutes | Long-winded but well informed. Very passionate about trade. |
| 32 | TPC Officer | TPC7 | 2017.05. 11 | In-person – Brussels | W/in 30 Minutes | Approx. 50 minutes | In position for a long time. Strong political opinions. |
| 33 | European Commission HoU | EC1* | 2017.05. 12 | In-person – Brussels | Same day | Approx. 80 minutes | Very long interview. Very forthcoming, full of personal experiences |

| | | | | | | | |
|----|--|---------------------|----------------|----------------------|--------------------|-----------------------|---|
| 34 | European Commission HoU | EC4 | 2017.05. 12 | In-person – Brussels | Same day | Approx. 60 minutes | Good personal examples. |
| 35 | European Commission | EC5 | 2017.11. 13 | In-person – Brussels | W/in 60 Minutes | Approx. 60 minutes | Two subjects. Seasoned, kind. |
| 36 | Epistemic Community | Epst.Co1 | 2017.11. 14 | Skype | Immediately | Approx. 60 minutes | Very helpful, forthcoming and encouraging. |
| 37 | Epistemic Community | | 2017.11. 14 | In-person – Brussels | W/in 30 Minutes | Approx. 20 minutes | Of very little use. Stand-offish, not forthcoming. Arrogant. |
| 38 | Permanent Official Council Secretariat | Council Sec | 2017.11. 14 | In-person – Brussels | W/in 30 Minutes | Approx. 60 minutes | Excellent conversationalist. Interested in research project. |
| 39 | EP Officials | EP Officials | 2017.11. 15 | In-person – Brussels | W/in 60 Minutes | Approx. 80 minutes | Group of three individuals, very forthcoming. |
| 40 | National Agent at ECJ | National Agent1 | 2017.11. 17 | In-person – Brussels | W/in 90 Minutes | Approx. 60 minutes | Candid about not being able to answer all questions. |
| 41 | National Agent at ECJ | National Agent 2 | 2017.11. 17 | In-person – Brussels | W/in 60 Minutes | Approx. 80 minutes | Group of three individuals, two very seasoned professionals |
| 42 | EP Research Service | EPRS2 | 2017.11. 17 | In-person – Brussels | W/in 60 Minutes | Approx. 80 minutes | Very passionate about trade |
| 43 | S&D MEP INTA Committee | EP9 | 2017.11. 22 | Phone | W/In 10 Minutes | Approx. 35 minutes | ‘Know-it all’ attitude to questions, but nevertheless detailed answers. |

| | | | | | | | |
|----|---------------------------------------|---------------|-------------------|--|-------------|-----------------------|---|
| 44 | Fmr. Member State Foreign Minister | Minister 2 | 2017.05. 08/16 | 2-part interview: phone + In- person - Budapest | Immediately | Approx. 70 minutes | Legal background, very competent in international trade law |
|----|---------------------------------------|---------------|-------------------|--|-------------|-----------------------|---|

*= These subjects were interviewed two times on different dates and are coded using the same abbreviation. When cited in the text, they can be distinguished by the date.

Table 1 Interview Reporting

Chapter III: Reaching a liberal consensus in the CCP

‘In the old world, when I was a tariff negotiator, I knew my political equation: I had consumers with me who remained silent and I had producers against me who were vocal against increased competition (...) In the new world of trade the political economy is upside down.’ – (Lamy 2015:5)

This chapter develops the general expectations formulated at the end of Chapter I on reactions to politicization into specific expectations suited to answer the research question. This is done by undertaking a historical overview of how the policy aims and the corresponding institutional architecture of the CCP evolved from its creation with the Treaty of Rome in 1958 until the Treaty of Nice in 2001. Here I rely on a review of the relevant secondary literature as well as a subset of (N5) interviews conducted with members of the think-tank community, and former trade policy practitioners.

During this period, changes to the CCP took place exclusively through intergovernmental conferences (IGCs). The EP, to its members disappointment, was excluded from taking part in these IGCs. As a result, Treaty change was reflective of bargains struck between Member States. This fascinating period spanning over four decades was characterized by conflict. Conflict over both policy and institutional design preferences. The battle lines not always being the same on both counts. Whereas Member States often held different views on open markets and protectionism, they often found themselves joining together to counterbalance the empowerment of the European Commission as the European trade executive.

The main argument of the chapter is that despite these clashes Member States gradually reached a liberal trade policy consensus agreeing on the fundamental aims and power delegation structures of the CCP all without altering the conceptualization of CCP legitimacy. The new structure of the CCP which resulted in the significant empowerment of the Commission was based in the ambition to make the most of a newly emerging trade environment which was built to encourage the gradual liberalization and harmonization of world trade based on a multilateral ruleset. This meant tackling remaining tariffs on goods along with non-tariff barriers, liberalizing

services trade, harmonizing standards and propagating regulatory cooperation with the members of the newly formed WTO. By the dawn of the 21st century, the Union was on the verge of becoming a proactive trading power in pursuit of the public goods promised by this new world of trade. Yet trade decision-makers neglected to consider that this newfound liberal consensus amongst them could be more publicly contested than the old trade agenda which was confined mostly to tariffs. This created a latent tension between the trade policy's aims and the public which grew more conscious of this agenda, eventually resulting in the public contestation of the CCP.

This overview focuses on the question of how the EU's trade in-group understood the concept of legitimacy at various stages in this story of institutional development. In doing so, the account given here reflects on how the gradual internalization or the acceptance of the liberal trade agenda lacked any substantive public debate or societal reflection on the policies implied by it. Prior to the formation of the WTO, protectionist Member States were protecting their agriculture and industries, which made-up large portions of their workforce. Protectionist policies were seen to be legitimate so long as they shielded French butter production and Italian shoemakers. While the effects of protectionism ultimately effected European consumers (negatively), one would not expect societies standing to gain from trade liberalization to protest for cheaper Japanese shoes, consumer electronics, cars, etc. Under these circumstances, opening-up the debate on trade was not seen to be a necessity. Hence the bargains struck at the negotiating table in Brussels (between more and less protectionist Member States) were legitimate so long as they were based on the logic of the smallest common denominator. In balancing the protection of large segments of domestic workforces, while achieving piecemeal tariff reductions in less sensitive sectors, the CCP was reflective of the value patterns of European societies, at least implicitly.

The emergence of the new trading agenda in the 1990s coincided with the crowding out of protectionist Member States, and there seemed to be a general expectation amongst trade policy decision-makers that liberalizing segments of the economy beyond the trade in goods would not be contentious. After all, the services industries do not employ unionized blue-collar workers in factories, or farmers that flood streets with milk if they feel provoked. However, the new trade

agenda clearly became contested shortly after the creation of the WTO as epitomized by the Seattle Riots in 1999. Yet in the absence of a well-established and embedded civil society during the 1990s, Member State trade élites were afforded the luxury of not having to give immediate responses to how to modify the rules of EU trade policy to bring them more in line with the aims of the new trading agenda.

In contrast to the 1990s, today the EU trade élite has had to accept the fact that non-tariff related aspects of trade are regularly problematized by European society, and that the idea of free trade is often blamed for all the woes of globalization (Minister2 2017). While EU trade decision-makers slowly realized that the CCP lacked robust direct inputs and transparent throughputs in the policy process the point this chapter makes is that the need for broader societal debate was simply not realized at a time when EU trade policy was undergoing tumultuous change. Rather the focus was on how to square questions of power delegation with the liberal policy consensus which posed new procedural challenges for the CCP internally.

The remainder of the chapter is divided into four parts. First, I discuss the fundamentally output legitimate logic that necessitated the creation of the CCP with the Treaty of Rome. Second, I proceed to outline how the EU internalized the WTO agenda and how this related to several inter-institutional competence debates starting in the 1990s between Member States and the Commission. While these eventually lead to a substantial empowerment of the Commission, which was largely accepted by Member States, the process was not accompanied by a meaningful societal debate. Third, I unpack the dominant explanations of why the new trade agenda has become so publicly contested with the creation of the WTO globally and in Europe at the turn of the century. Finally, and considering the historical overview presented in the chapter, I propose a causal mechanism to answer the research question posed in the introduction i.e.: Does politicization of EU trade policy trigger EU institutions to pursue changes in policy goals, institutional arrangements, and modes of operation?

1. Customs Union – the birth of the CCP

It is generally recognized today, that the integration of Europe was propelled forward by a desire to provide guarantees for peaceful coexistence and economic prosperity. In her account of the contemporary political discourses on the question of integration, Sternberg (2013) points out that that these two ends became fused in the thinking of political élites during the 1950s. Envisioning a drastic increase in living standards through jointly strengthening European competitiveness and production capabilities politicians of the day sought lasting peace and prosperity through strengthening economic interdependencies. This output legitimate vision of Europe was framed as a public good with: ‘the advocates of European integration and its legitimacy [aiming to establish] a common European interest’ (Ibid:22).

Establishing European integration as a public good would take place through the creation of a customs union and the setting and application of common tariffs for third party goods. The Treaty of Rome established such a union in the form of the European Economic Community (EEC). Creating a Common Commercial Policy to jointly negotiate tariff levels on goods was an understandable necessity. However, the emerging institutional architecture of the CCP was reflective of Member States’ different attitudes toward trade. While the Benelux countries were more in favor of trade liberalization, France and Italy had more protectionist positions. As such:

‘The Treaty of Rome (...) reflected a compromise between these views. It gave the Commission a greater role in coordinating the member governments’ policies (...) and the job of negotiating with other countries. The Commission was, however, subject to close supervision by the member governments, through the establishment of a special oversight committee; what became the Trade Policy Committee’ (Young and Peterson 2014:50–51).

Through Article 110 of the Treaty of Rome, the Commission was empowered to negotiate tariffs on behalf of the EEC’s Member States, specifically to pursue trade liberalization. Or: ‘the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers’ (European Community 1958:40). So, while there might have been initial differences between the trade preferences of the founding countries, the commercial policy was born with a strong and explicit liberal core. One which would come back to haunt some Member States some three decades later when the Commission

would seek to expand its competencies based on the wording of Article 110. Yet the liberal bent of the emergent trade policy is not all that surprising if one considers that the General Agreement on Trade and Tariffs (GATT) was created to institutionalize the goal of progressive tariff reductions a decade earlier. This agenda had its roots in an interpretation of contemporary 20th century world history that identified protectionism as one of the principle causes of two World Wars and trade liberalization as a way of securing lasting peace (Jones 2015:29–31). In this sense, the nascent CCP's institutional DNA was reflective of the consensus amongst Western democracies, and the overall aims of the EEC; to establish free trade as a public good for society and the world.

As is often the case in the saga of European Integration, the establishment of an institutional framework to pursue a policy does not translate into smooth-running institutions right from the get-go. Young and Peterson (2014) characterize the CCP as 'being under construction' (:52-53) during the initial decades of integration. Owing to the disparate preferences of the different member governments the commercial policy was often subject to cross-sectorial bargains. Disagreements on the extent and degree of tariff concessions were regular. These internal disputes kept the CCP from developing competences beyond those envisioned in the Treaty of Rome. European trade policy remained largely reactive to the United States' agenda during much of the 1960s and 70s (Ibid:57-58). And while the EEC participated in the global effort of progressively lowering tariffs there were instances of manifest protectionism during the second and third decades of integration through resorting to anti-dumping policies in response to flailing domestic economies (Baldwin 1992).

It would be hard to deny the liberal intergovernmentalist (Moravcsik 1993; Moravcsik 1998) nature of the CCP during this time. Seeing that this argument identifies strong pro-European economic interest groups (protectionist and liberal alike) as the main drivers of integration and policy output. In this reading of integration, national preferences are formed based on domestic interest groups' lobby power, which is subsequently aggregated to the intergovernmental level through a two-level game. Integration moves forward based on the logic of the smallest common denominator. Balancing between divergent national interests, while moving in the general direction of liberalization was at the core of the CCP. The liberal intergovernmentalist mechanism

seems to be especially credible, given that there was no explicit public interest in trade during the formative decades of integration.

During the 1950s Europe, along with the United States established exceptions and mechanisms for protecting their agricultural production, which largely remain in place until today. During this period farmers formed a large constituency across Europe representing nearly 25% of the workforce (Keeler 1996). The Common Agricultural Policy (CAP) was put in place to shielded them from international competition. While the 1964 Kennedy Round of the GATT saw further tariff reductions in non-agricultural goods, starting from the mid-1960s the global trading system was faced with the emergence of labor-intensive industrial exports from Asia and was subsequently hit by two oil crises in the early 1970s. In turn, the 1970s witnessed the proliferation of new Non-Tariff Barriers (NTBs) and a reinvigorated system of export subsidies that had not been regulated under GATTs (Miner 2007). The pace of multilateral trade negotiations slowed to a crawl as the United States moved towards institutionalizing many of these NTBs and Europe was preoccupied with its first expansion (Hughes and Waelbroeck 1981; Miner 2007).

The Tokyo Round which started in the late 1970s swung the pendulum back in the direction of liberalization as it tackled many of the most important NTBs. While the 1980s continued to witness unilateral protectionist trade actions from the United States and Europe as well, the shifting focus of trade conflicts from goods to services and investment foreshadowed the emergence of a new trading agenda. By 1986 Europe was on the verge of completing the Single Market, and global trade policy was becoming more complex. This period saw the emergence of several regional free trade agreements and a simultaneously renewed appreciation for multilateralism. The Uruguay Round, starting in 1986 sought to tackle existing and preempt further disputes over these new areas of trade, leading to the creation of the WTO.

Throughout this three-decade long period, European trade policy was reactive in character and ill-equipped to take-on the expanding nature of the global agenda given that the Commission's competences were limited to the trade in goods (Young and Peterson 2014:chap. 3). Nevertheless, the agricultural and industrial protectionism, as well as the participation in the progressive reduction in tariffs and NTBs attest to how the CCP was reflective of the diverse

interests of Member States. Keeping these interests at heart throughout this period is precisely what gave the CCP its output legitimate character. Free trade was conceived of as a public good dependent on consensus among Member States reached through intergovernmental bargaining. Input and throughput legitimacy were implied. So long as there were no protests, and debates about free trade were confined to economists arguing amongst each other (see for instance: Bhagwati, 1994; Lipsey, 1989), policy making could be conceived of as being compatible with the value patterns of society.

2. From Uruguay to Nice

During the first decades of the CCP liberal intergovernmentalism reigned supreme and European trade policy followed shifting global trends ebbing between less and more protectionism. The shift in the global trading agenda in the 1990s, however, triggered a series of treaty changes that would lead to a paradigm shift in both the institutional design and policy preferences of the EU. As Europe was working to complete its Single Market in 1986 with the Single European Act the 'new protectionism' that had emerged during the 1960s and 1970s took a back seat to a renewed impetus to liberalize intra- and extra- European trade. Even in France, where a support for protectionism had long been a question of national consensus amongst political parties, protectionism was becoming less popular (see Figure 5). Global and European protectionism were on the decline (Hanson 1998).

This trend gave rise to a fundamental paradigm shift. The Uruguay Round of the GATT remains to this day the 'largest attempt in human history to liberalize global trade' (Cernat, Gerard, and Guinea 2018:5). This herculean effort which lasted the better part of eight years saw global tariffs reduced by 37% and for the first time established multilateral rules for expanding free trade beyond goods to the trade in services (GATS), while also setting common standards for the trade related aspects of intellectual property rights (TRIPS), and common rules for international investment policy (TRIMS) (Ibid). The negotiating process was based on the principle of unanimity and outcomes were premised on the idea of building winning coalitions that could provide economic gains to all (Drake and Nicolaïdis 1992). In this regard, this process of liberalization was premised on a similar output legitimate logic to the one that had steered the

CCP since its inception. This impetus to create a system of rules based free trade became institutionalized through the creation of the WTO in 1995 which became one of the building blocks of the wider post-Cold-War Washington Consensus ideology (Buzan and Little 1999; McMichael 2000; Peet 2009).

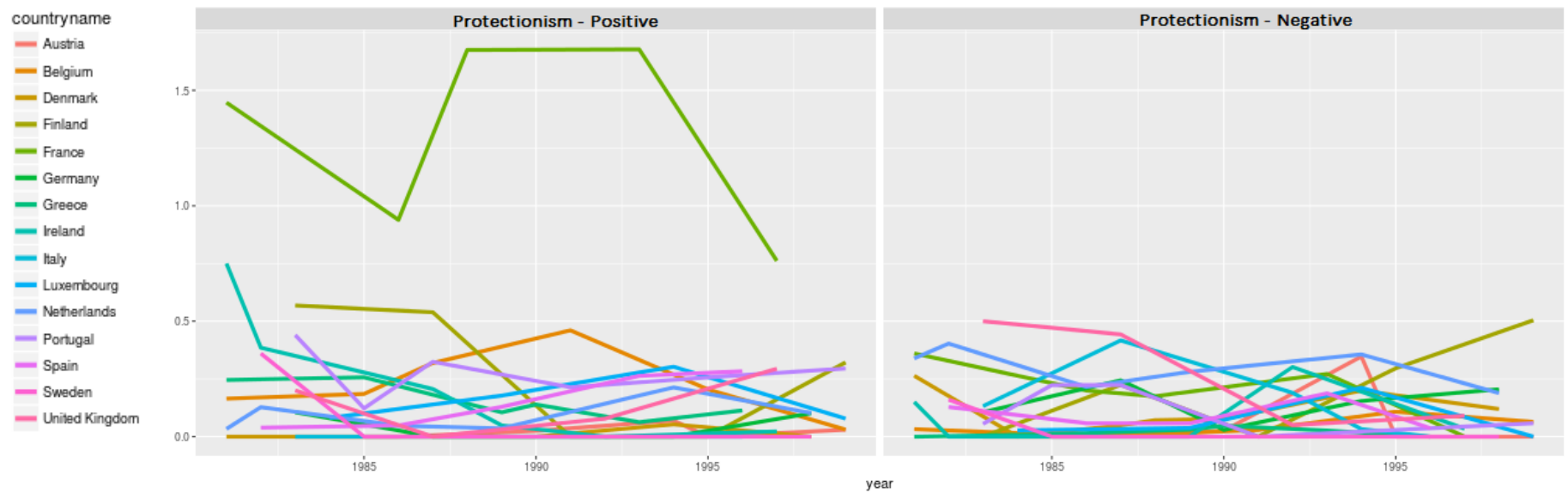


Figure 5 Attitudes towards protectionism in EU 15 1980-2001 – Comparative Manifesto Project (Volkens et al. 2018)

Despite EU Member States' commitment to this agenda, the Uruguay Round process brought with it several internal challenges for the EU's trade policy. Between 1986 and 2001 through various rounds of Treaty Change, Member States and the Commission were locked in a continuous struggle to determine the content as well as the rules of the CCP. While the Uruguay Round brought great opportunity for European economies by liberalizing services trade (Brown et al. 1996) the expansion of the scope of trade perturbed the balance that had characterized EU preference formation in earlier decades. Every victory came with a concession which forced several Member States out of their traditional comfort zones, especially in the area of agricultural trade liberalization as the Uruguay Round had a direct effect not only on agricultural tariffs but also the CAP by establishing disciplines around subsidies (Brown et al. 1996; Coleman and Tangemann 1999). Beyond substance, however, the Uruguay Round also raised questions relating to the CCP's decision-making process and power delegation.

Yet by the time the Nice Treaty entered into force, these conflicts were by and large resolved and the CCP was more streamlined and better equipped to face the challenges posed by the post-Uruguay Round environment. The pro-liberal preferences of European industry had increasingly swayed the European political class to accept the importance of speaking with a single voice in favor of trade liberalization to make the most of the new opportunities beyond the trade in goods (Young 2007). Several accounts of this transformative period emphasize the importance of the 'battle of ideas' between protectionists and market liberals arguing that the successful empowerment of the Commission by the turn of the century resulted from active collusion between the Commission and trade liberal Member States who sought to marginalize protectionists (Drake and Nicolaidis 1992; Meunier 2000; Meunier and Nicolaidis 1999; Nicolaidis and Meunier 2002; Woolcock 2005). While the question of whether the Commission's preference for trade liberalization was more motivated by structural conditions or internalized convictions can be debated even two decades after the end of the Uruguay Round (Siles-Brügge 2014) the EU's track record since then attests to its commitment to trade liberalization, even if this has come with some carveouts in the agricultural and services sectors (Young 2007; Young and Peterson 2014).

More interestingly, the literature on trade power delegation provides some insight into why the CCP retained its fundamentally output legitimate character during this tumultuous period. The overarching themes that becomes apparent through examining this period is the generally reactive nature in which the CCP evolved to meet new external challenges. The continuous tug-o-war over competence delegation between the Commission and the Council limited the focus of discussions around trade even as EU policymaking, in general, was moving in the direction of more transparency and input legitimacy by granting increasing powers to the EP (Rittberger 2012). The cycle of reactive changes was triggered by the magnitude of the task at hand, as Member States were faced with negotiating the Uruguay Round. As Woolcock (2005) points out, Member States' initial response to the complexities of the agenda was pragmatic, but by no means well thought through:

'[During the Uruguay round] In response to what was in effect an external and largely US-driven trade agenda member state governments pragmatically accepted that the Commission should act as the negotiator for the EU as a whole and were willing to leave aside the issue of legal competence until the ratification stage of negotiations.' (Ibid:238)

This initial decision prejudiced the Maastricht, Amsterdam and Nice Treaties which all centered around the question of just how much of this power the Commission was entitled to keep once the dust had settled. Given that the most fundamental of principal-agent rules were suddenly unclear after decades of certainty there was little room for considering anything outside of the most immediate questions of institutional design. While the Uruguay Round negotiations were concluded successfully, with the Commission and Member States becoming members of the WTO, the eight year negotiating journey was rife with conflict as Member States increasingly realized the importance of keeping tight controls over the Commission, lest it become a runaway agent crowding-out Member States from the WTO (Delreux and Kerremans 2010; Meunier 2000).

During the Maastricht IGC which coincided with the end of the Uruguay Round negotiations, the Commission tried to push Member States for an expansion of the scope of the CCP to 'include services, investment, and intellectual property rights on the grounds that these were part of the package of issues being negotiated in the Uruguay Round' (Woolcock, 2005:239) yet it's efforts gained little traction. Reflecting this tension, nine days prior to the signature of the Final Act of

the Uruguay negotiations the Commission turned to the ECJ to ask for clarification on whether the EEC had the right to conclude – in its own right – the GATS and TRIPS agreements⁶. In other words, the Commission had turned to the ECJ to ask whether it could keep the powers it had wielded during the negotiating period.

In presenting its case to the court the Commission acknowledged that the EEC had no explicit claim of competence over these items. However, it built its argument around the notion that Article 113 (Formerly Article 110) of the Treaty,⁷ which had remained substantively unchanged since the Treaty of Rome, implied that the Union was competent to exclusively negotiate and conclude *all types* of trade agreements, not only those relating to tariffs (Hilf 1995; Meunier and Nicolaidis 1999). Member States expressed strong counter opinions. Famously the United Kingdom took the view that the Commission's arguments were 'extravagant' (Hilf 1995:251).

The ensuing Opinion 1/94 of the court, which was delivered in under six months, determined that the competencies required to navigate the WTO were shared between Member States and the Commission. The Opinion established the Union's exclusive competence over the trade in goods and shared competences between the Union and Member States in both the areas of trade in services⁸ and the trade related aspects of intellectual property rights. The ECJ had effectively transposed the concept that exclusive EU and Member State competencies, as well as shared competencies, could be combined to create a single 'mixed' competence international agreement from the realm of Association Agreements which had employed this principle for some time in relation to foreign policy competences (Kuijper 1995; Meunier and Nicolaidis 1999).

The ruling was seen as a narrow interpretation of the broadly worded Article 113 (Kuijper 1995), and some feared that it would create confusion as to how the Union would be able to function in future WTO negotiations (Herrmann 2002). The ruling had no immediate effect on the Maastricht Treaty, leaving 'the articles on the Common Commercial Policy substantively

⁶ ECJ *Opinion 1/94* EU:C:1994:384

⁷ Treaty establishing the European Community

⁸ The Court only identified one mode of services delivery (cross frontier supply) out of the four modes listed in the General Agreement on Trade in Services (GATS) – that could be considered equivalent to the trade in goods, granting the EU.

unchanged’ (Gstöhl 2013:7). Yet the introduction of the concept of mixity had created a substantial shift as in practice it led to three different modes for concluding trade agreements that remain, to this day the basis of the CCP (Kleimann and Kübek 2016:8–9). Following the 1/94 ruling exclusive EU competence agreement, mandatory and facultative mixed agreements can all be concluded under the aegis of the CCP depending on what policy aspects of the new trading agenda the agreements touch upon.

Agreements containing provisions relating to EU exclusive competences only – as defined by Article 217 TFEU – are concluded as mandatory-exclusive agreements. In these cases, agreements can be ratified at the EU level, meaning (prior to the Maastricht Treaty) through unanimity in the Council and QMV voting subsequently. Since the entry into force of the Lisbon Treaty the EP must also approve these agreements with a simple majority.

In turn, agreements containing provisions relating to EU exclusive, shared competence and Member State exclusive competences – as defined under Article 4 of the TFEU – entail mandatory-mixity to give binding legal effect to all the provisions of the relevant agreement (as the EU is not competent to take upon itself obligations which it shares with Member States). Agreements that contain EU only as well as shared competences (but not exclusive Member State competences) are subject to facultative mixity. In other words, the legal basis for the ratification of such agreements is subject to a political decision by the Council as Member States (Kleimann and Kübek 2016)⁹. In all cases, it is the Commission that negotiates these agreements subject to Member State supervision and instructions as to how to proceed throughout the negotiations (Damro 2007).

Whereas today the Commission has the formal right to propose opening negotiations in the case of EU-only and shared competence agreements this was not automatically implied by the

⁹ Kleimann and Kübek (2016) note that this legal doctrine is not universally accepted amongst EU legal scholars – especially ‘etatistic’ ones. However, they make a compelling case for the legality of facultative mixity as they point out that Member States can decide to surrender or assert their right to conclude international agreements related to shared competences as: ‘there is no discernible legal obligation to include member states as independent parties to [such an] agreement. However, there is no requirement that would prevent EU institutions from including member states as parties to such an agreement [either]’ (Ibid:9).

1/94 Opinion. Following the Maastricht Treaty, the subsequent Amsterdam Treaty added an ‘enabling clause’ Article 133 (5) allowing the Council to enable with unanimity, the Commission to negotiate specific policy issues that fall outside of the remit of exclusive EU competences (Gstöhl 2013). Whereas the enabling clause gave Member States the option of enabling the Commission, it wasn’t until the subsequent Nice treaty that Member States transferred the right of initiative to the Commission, empowering it to propose negotiating mandates – with some limitations – on the trade in services and the commercial aspects of intellectual property (De Bièvre and Dür 2005:1291). While the relevant treaty provisions ended up being ‘rather unreadable and complicated’ (Gstöhl 2013:5) or ‘poorly drafted’ (Herrmann 2002:16) the Commission had clearly become an unavoidable and integral part of Union’s trade activities beyond tariffs.

As patchy and confuse as the system created by 1/94 was, the Court was seen to have struck a balance between the interests of the Commission and Member States. The balance was less about appeasing a pro-free trade Commission and anti-free trade Member States. Rather it was a balance that considered Member States’ unwillingness to empower the Commission fully in a broad range of policy issues that were just emerging on a global level. In effect, the Court left the door open for Member States to practice political discretion in determining the future character of the CCP while simultaneously giving the Commission the possibility of acting as a unified trade executive if Member States so pleased (Hilf 1995:94).

Weighing-up the changes from the start of the Uruguay Round negotiations to the Nice Treaty the evolution of the CCP fits well with our expectations on institutional change as discussed in Chapter I. Lacking sustained public attention to trade this period saw the battle of institutions unfold to determine how to respond to the new external challenges and opportunities presented by the shifting focus of multilateral trade negotiations. Beyond challenging several of the protectionist instincts of some Member States, the new trade agenda opened a new world of opportunities for Europe to define itself as a global trading power and seek economic gains in new sectors (Siles-Brügge 2011; Siles-Brügge 2014). Member States’ initial inclination to participate in this process with a single voice saw them empower the Commission

without considering legality. This decision led to a path dependent tug-o-war ultimately resulting in the Nice outcome.

The new world of trade did not, however, bring with it a fundamental change in the system of aggregating national preferences at the EU level. Not only was the liberal intergovernmentalist way of preference aggregation left untouched, it became an important guarantee for more protectionist Member States that their interests would remain an integral part of the package deals that define the EU's trade preferences (Damro 2007). Yet the two-level game dynamic was maintained in the CCP at a time when the scope of decision in the EU more generally was gradually changing in favor of the European Parliament.

The conservation of the status quo decision making system resulted out of the nature of treaty change in the CCP which focused on settling a fundamental question of power delegation, hence narrowing the focus of institutional change. Nevertheless, the broader question of how to input-legitimize the new trade agenda could not be avoided for long as it would eventually become one of the central questions during the European Convention.

3. Why the new trading agenda is so contentious

Having discussed the changes that did and did not take place in the CCP in the wake of the Uruguay Round, it is also important to touch on some of the roots of why the new trading agenda would become so publicly contested in the western world. Importantly, this section does not focus on the important body of literature which approaches free trade and the Washington Consensus more broadly from the point of view of decolonization and developing countries. Instead, the focus is on uncovering some of the commonalities in the criticisms that have been levelled at the liberal trade paradigm in the EU.

To start, I turn to the ideas of Pascal Lamy a former EU Trade Commissioner (1999-2004) and former Director General of the WTO (2005-2013) who has aptly and eloquently captured the main difference between the pre- and the post Uruguay Round trading environment. The idea that the creation of the WTO brought with it a fundamentally new trading architecture which was inherently more contentious because of its complexities was widely recognized shortly after

the creation of the WTO in the wake of the Seattle Riots (Barfield 2001; Esty 2002). The notion was further elaborated by Lamy (2015) who's main point is that whereas the process of reducing tariffs was relatively simple and predictable, the move towards global services liberalization and standards harmonization is more precarious and less calculable for politicians, industry, and society as a whole. Satisfying export and import interests through managing, and eventually eliminating protectionism has proven largely doable. As we have seen from the review above global trade policy has witnessed flares of protectionism in the 1960s, 70s, and 80s yet ultimately protectionism in the trade in goods became less prevalent and principled. As Lamy puts it:

'In the old world, when I was a tariff negotiator I knew my political equation: I had consumers with me who remained silent and I had producers against me who were vocal against increased competition in my domestic market.' (Lamy 2015:5)

However, in the new world of trade questions relating to regulatory cooperation and standards harmonization aimed at facilitating global value chains are more visible and complex which result in an erosion of the clear-cut output legitimate logic of the old world. As he writes:

'In the new world of trade the political economy is upside down. If I am in the business of regulatory convergence, I have producers with me because they are attracted by the prospect of a single standard which will enable them to realize economies of scale. Because if you remove the differences between two standards, you level the playing field and hence you provide them the sort of efficiencies that trade economists have demonstrated for a long time. But the price for that is that I have consumers against me. Or, more precisely, I have organizations that speak on behalf of the consumers (there is nothing like a referendum for consumers) – the consumer organizations – against me. Why? Simply because the business of the consumer organizations is to convince the people, its members, its followers on social networks, that if they were not doing their job then the people would be at risk. They are protecting the consumer, which is about promoting precaution.' (Lamy 2015:5)

Lamy's point ties perfectly into the conceptualization of legitimacy as proposed by Stillman. Different societies hold different value judgments about what is good and bad and have diverse preferences when it comes to weighing-up how to approach novel regulatory challenges. These approaches are difficult to change as they are rooted in beliefs and often myths which are entrenched in society and as a result in politics as well (Buonanno 2017; Laursen and Roederer-Rynning 2017). In turn, trade agreements aimed at reconciling divergent regulatory approaches will be difficult and contentious to conclude. Literature corroborates Lamy's point that organized

civil society plays an important role in not only communicating, but ‘manufacturing discontent’ (Bauer 2016a; Bauer 2016b) or otherwise actively framing negotiations to generate discontent (Jedinger and Schoen 2018; Siles-Brügge 2017) against the new trading agenda.

The need to defend the EU’s Precautionary Principle in the face of more risk based regulatory approaches applied outside of the EU has been one of the central issues that has fueled NGO pushback against the new trade agenda. From plant breeding techniques to regulating chemicals, the EU approaches novel regulatory challenges based on the precautionary principle which translates into a preference to limit or curtail the use of novel technologies which lack a robust safety record (Tosun 2013). The EU’s main trading partners, in turn, tend to apply a hazard-based approach to many of the same challenges meaning that unless risk can scientifically be proven new technologies are generally assumed safe. While the EU’s approach is often and widely criticized for stifling innovation and being unscientific (Foster 2000; Levidow, Carr, and Wield 2005) the fact remains that European consumers continue to attribute a high degree of importance to the precautionary principle. Not only is the principle enshrined in relation to environmental policy in Article 191 of the TFEU, it is referred to in secondary chemicals legislation (Milieu Ltd & T.M.C. Asser Institute 2011) and legislation on genetically modified organisms (European Commission 2017a). As a result, the EU’s new generation bilateral free trade agreements contain specific provisions that ensure both parties continued right to regulate in the public interest based on their own regulatory preferences (de Mestral 2015). Nevertheless, as several interviewees point out, this fact often carries little weight in what is oftentimes a post-factual discourse about trade as the public often fears that trade agreements will undermine the EU’s approach to regulating these challenges (Epst.Co1 2017; TPC4 2016).

Another major criticism against the new trading agenda is that it drives unfair competition as the liberalization of services flows, the dismantling of barriers to investment as well as the demolition of remaining tariffs and NTBs encourage ever more transnational production and value chains. This, in turn, translates into more losers in post-industrialized societies as goods production and services provision moves towards lower cost regulatory environments. An overwhelming majority of interviewees have acknowledged that trade will always have losers. Yet while some people might well lose out, on aggregate trade results in welfare gains for society

by lowering the price of goods and services (Baldwin and Forslid 2010) and incentivizing a shift towards more specialized high value-added economies (Krugman 1979).

The increasing public discontent with what is effectively globalization was already apparent in the run-up to the creation of the WTO. Famously when the United States had to walk-back concessions it made during the Tokyo Round (in 1979) of the GATTs to partially open-up its public procurement contracts to foreign suppliers, when it became apparent that this would negatively impact a number of small businesses in the U.S. (Baldwin 2005:52). Since the 1999 protests at Seattle criticisms in this vein have multiplied and in many parts of the world have developed into political movements capable gaining institutional representation. In European politics, this role is fulfilled by the European United Left/Nordic Green Left (GUE/NGL) group of the European Parliament which was created in 1995 based on a rejection of capitalist market economies and neoliberal economic policies.

Politicians from all sides of the political spectrum populists and non-populists alike have often played on these sentiments victimizing domestic labor forces as the losers of globalization. Memorably, in the United States, third-party Presidential candidate Ross Perot ran a platform of anti-free trade populism during his 1992 presidential bid to become the most successful third-party candidate in almost a century. Receiving near 19% of the popular vote, Perot epitomized this narrative during his presidential debate with George H. W. Bush when he envisaged mass job migration to Mexico as a result of the North American Free Trade Agreement (NAFTA) – which was a benchmark for the new generation trade agenda – talking about the ‘giant sucking sound’ job losses would create:

[Mexico] ha[s] no environmental controls, no pollution controls and no retirement, and [if] you [a corporation] don't care about anything but making money, there will be a giant sucking sound going south. (The New York Times 1992)

More recently, during the 2016 Presidential election campaign, both Bernie Sanders and Donald Trump ran presidential campaigns that emphasized the importance of *fair trade* that was mindful of U.S. sovereignty (feelthebern 2018). In turn, the Trump administration has consistently demonstrated its commitment to flout several fundamental institutional norms and customs in the international trade space in pursuit of fair trade. In Europe, this strand of populism

is equally virulent. The Front Nacional (Vinocur 2017) and the Communist Party in France (Ivana 2017), Jobbik in Hungary (Jobbik n.d.), have all made stands against free trade in general. While other European populists such as UKIP in the United Kingdom, or the PVV in the Netherlands have advocated for free trade, yet without the European Union. In wanting to renationalize trade-making competences from the EU they hope to pursue trade that is more closely suited to their sovereign needs while reversing the perceived drawbacks of the single market. Which has resulted, again, in the loss of manufacturing and service industry jobs which have flocked to Eastern-European Member States.

Wealthy western societies are clearly receptive to these narratives. A 2018 Pew survey (Stokes 2018) measuring attitudes towards globalization and trade is indicative of the contradictory nature of what might be considered common knowledge and public perceptions on trade. Pew's original dataset shows that while in general, 88% of the population in industrialized economies (N27) tends to believe that trade is beneficial, only 28% believe that trade decreases consumer prices, and only 31% believe that trade creates jobs. In other words, that trade translates into tangible benefits for them. As we will see subsequently, protests against the CETA and TTIP agreements were strongest in Germany and Austria, two of the most prosperous EU Member States (Epst.Co1 2017). And in the case of Germany, one of the most persistent 'winners' of globalization. Reflecting on the nature of this trade debate in the EU, one of the interviewed researchers from the European Parliamentary Research Services characterized the public debate around complex trade agreements as being: 'larger and trickier than ever before' (EPRS2 2017).

Turning back to the conceptualization of legitimacy elaborated in Chapter I, the point is this. Given a more complex trading agenda that increasingly effects values, society has clearly become more attentive to trade and is increasingly willing to problematize it based on emotional and economic arguments alike. This process challenges the in-group specific understandings of how things ought to be done and why trade agreements are desirable. The pursuit of output legitimate economic prosperity isn't possible in a context where, as a consequence society is asked to give-up embedded norms. The question of concern then becomes how the in-group will deal with this challenge?

4. Causal mechanism: responding to the public contestation of trade

Thus far in this chapter, we have established that the founding members of European integration created the CCP in order to secure lasting peace and economic prosperity. Throughout the 1960s, 70s and 80s Europe's commercial policy proved to be reactive to global developments in trade. While the EU was in general committed to the global agenda of gradual trade liberalization, there were periods of marked protectionism. The creation of the WTO signaled the emergence of a new trading agenda. One which moved global trade ambitions beyond tariff reductions towards regulatory cooperation. While liberal intergovernmentalist bargaining continued to set the exact boundaries of acceptable policy in the Council, the EU gradually acquired a strong neo-liberal character in terms of its policy preferences with Member States accepting the need to streamline the CCP.

While there might well have been little pushback against this process in the EU during the 1990s, society has started paying increasing attention to trade. Beyond a general frustration with globalization, objections to the increasing complexity of trade were based in emotions. While these fears did not immediately translate into public contestation in the EU in the wake of the Seattle Protests, there was a general awareness among the European political class that the new trade agenda would be more contentious than the previous one. Considering these observations, we can now develop a CCP specific causal mechanism. One which sets out a plausible answer to the Research Question - Does politicization of EU trade policy trigger EU institutions to pursue changes in policy goals, institutional arrangements, and modes of operation?

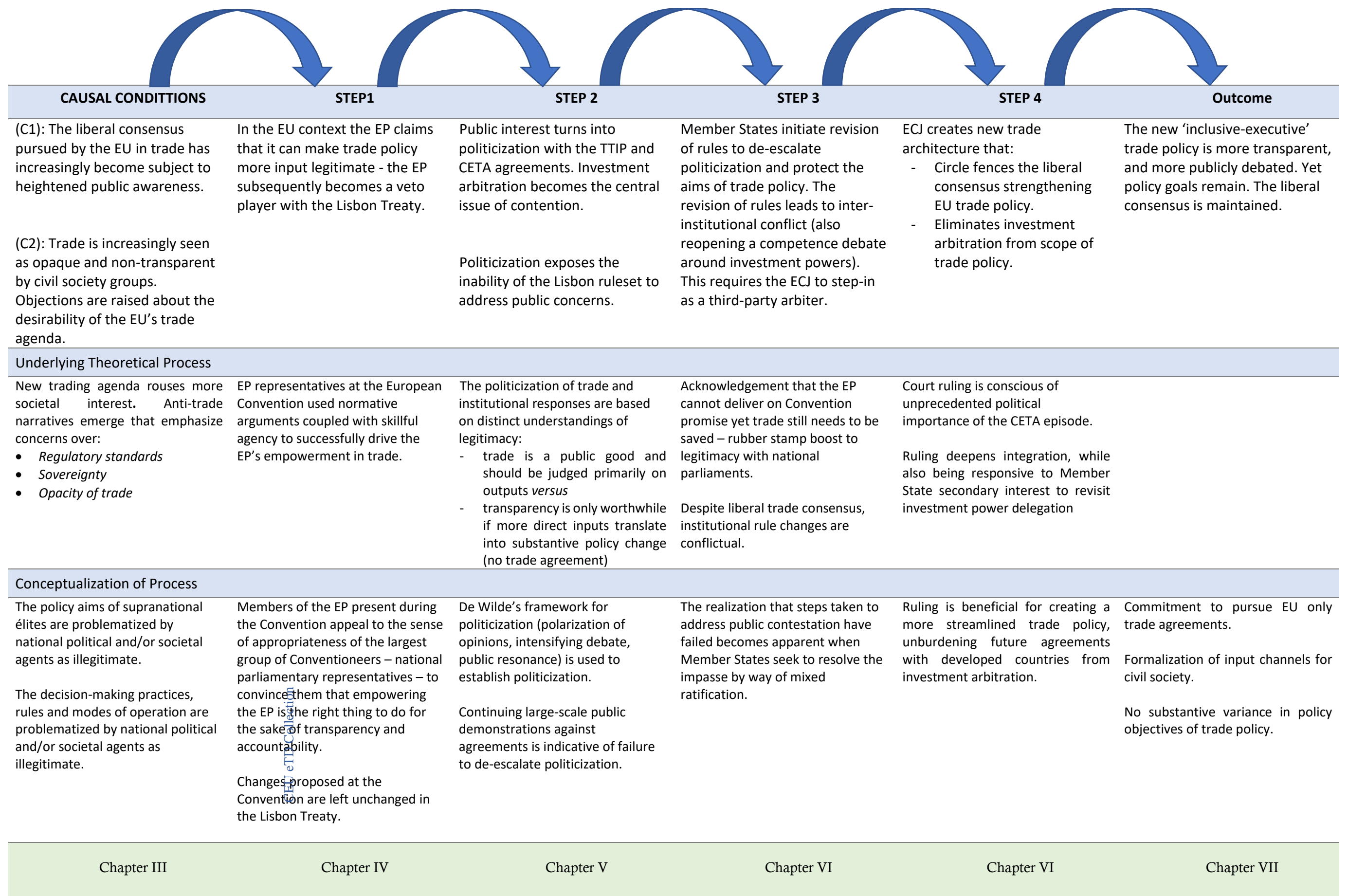
This is done in Table 2, which sets out four distinct steps that explain how the trade élite responded to building interest and subsequently the politicization of trade over time. Each step/expectation is justified by an underlying theoretical argument drawn from discussions in Chapters I and III and a brief conceptualization of how the expectation will unfold in practice. As I will argue in the subsequent chapter, the sense that something had to change in the EU was already apparent to much of the trade élite during the Convention on the Future of Europe (Step 1). Taking place between 2001 and 2003 this was a time when the European Parliament was still struggling to gain a more equal footing with Member States as a co-legislator of EU policies.

Against this backdrop, the Convention allowed for Parliamentarians to play-up the argument that they should be more involved in the CCP to make EU trade more transparent and accountable. Although as will be discussed subsequently, this was not the only reason that the EP succeeded in clinching a veto power. The Parliament's credentials as a legitimizing factor for trade would only be put to the test during the politicization of the CETA and TTIP agreements some while later (Step 2). Here the Parliament played a role in amplifying public concerns around these agreements. However, despite the calls of protestors to abandon these agreements the center-right – center-left coalition in the EP worked to save the CETA agreement from failure by accepting the Commission's agenda for reforming the agreements investment arbitration clause meaning that the politicization of the agreements continued.

In order to solve the situation, Member States sought to legitimize CETA by turning to their national parliaments for a rubber stamp of approval (Step 3) while simultaneously bringing to a head an old inter-institutional conflict around the delegation of investment powers to the Commission. Which similarly to the Parliament's veto, had made its way into the Lisbon Treaty by way of obfuscation. In turn, the ECJ stepped-in as a third-party arbitrator between Member States and the Commission to settle the competence debate and simultaneously provide a solution to the politicization of trade (Step 4).

The expectations set out by the causal mechanism fit with the theoretical expectations developed in Chapter I. Changes to the CCP will be driven by a desire to de-politicize trade and respond to public demands to make the CCP more transparent. However, the trade élite will resist pressure to implement substantive change to policy outputs. This struggle will translate into incremental change over time. As all processes of change, the metamorphosis of the CCP will witness its fair share of inter-institutional conflicts along the way.

Table 2: Main Causal Mechanism elaborated (author)



Chapter IV: Revisiting the European Convention: the promise of input legitimizing trade¹⁰

‘The more amiability and esprit de corps there is among the members of a policymaking ingroup, the greater the danger that independent critical thinking will be replaced by groupthink’ – (Janis 1971:85).

One of the clearest impressions I had from interviewing former participants of the Convention on the Future of Europe was that regardless of the role they played during the proceedings, Conventioneers felt like they were doing something of historic importance. After all the European Constitution was seen by many commentators at the time as the final chapter of European Integration. Something that would put an end to the perpetual institutional metamorphosis of the EU.

Of course, the Constitution as such never materialized. While it is true that the Lisbon Treaty has carried on much of the substance of the failed Constitutional Treaty, today further treaty change remains a distinct possibility as the EU struggles to come to grips with several crises (Márton 2018b; Rittberger and Blauburger 2018). The Convention, in turn, is but a distant footnote. Perhaps somewhat ironically the Convention itself took place in the old building of the European Parliament, which today houses the Committee of Regions on Rue de Belliard in Brussels. A body that holds little power and garners even less public interest than the Parliament. Yet in the context of the ‘Constitutional Moment’ (Allen 2003) many of the participants of the Convention turned to the EP to create more direct inputs and transparent throughputs for EU policy making. A phenomenon which extended to the EU’s trade policy as well.

This chapter looks at how Member States came to accept through the drafting process as a *fait accompli* the push by European Parliamentarians to move beyond a simple reliance on output legitimacy in trade. Behind this acceptance lied the realization that with the increasing interest

¹⁰ A version of this chapter has been published as a standalone article in *European Politics and Society*. See: Márton (2018) for reference.

in trade the indirect understanding of in- and throughput legitimacy would not be enough to provide this policy with enough openness and transparency to successfully navigate the new world of trade. Importantly, the main argument presented here is that this realization was not based on a reasoned debate on the merits and drawbacks of free trade or the new trading agenda. Instead, the peculiarities of the Convention as a venue allowed MEPs to effectively pursue the EP's institutional self-empowerment with Member States struggling to find credible arguments to oppose a more direct understanding of in- and throughput legitimacy.

To be sure, most participants of the Convention that dealt with this aspect of the Constitution operated under an optimistic assumption that the increasing societal interest in trade would be appropriately met by the EP's increased involvement. Indeed, the liberal consensus remained a foregone conclusion in the minds of many, who even acquiesced to the Commission's push to expand the scope of trade competence delegation to include foreign direct investment (FDI) – which would later be the basis for the public contestation of trade (Meunier 2017). In the end, much of the Constitutional Treaty that was produced by the Convention became the basis of the Lisbon Treaty. The resulting trade architecture strengthened the liberal consensus while expanding the institutional role of the EP in the hopes that it would be able to make the EU's trade outputs more input- and throughput legitimate. An assumption that would be disproven subsequently.

This Chapter deals with 'Step 1' of the causal mechanism elaborated at the end of Chapter III. Considering the complexity of the Convention venue itself (which lasted over a period of almost two years with over 200 participants) this chapter employs a separate causal mechanism. This allows for a more detailed evaluation of the claims being made. Strengthening the overall argument of the dissertation. The remainder of this chapter is divided into three parts. First, I propose a causal mechanism reflective of the peculiarities of the convention. Secondly, I delve into three different working groups and the plenary session of the proceedings. Thirdly, I look at how the draft Constitution was adopted by Member States and how after two failed referenda became the basis of the Lisbon Treaty.

1. A causal mechanism for the Convention venue

Taking place between 2001 and 2003, the Convention on the Future of Europe was an attempt at reforming the process of formal EU treaty change with participants ultimately producing a draft Constitutional Treaty which became the basis of the Treaty of Lisbon (Barrett 2008). By creating what was seen to be a more democratic and transparent venue for deliberation European élites sought to induce a constitutional moment in the hopes of spurring public attention and involvement in the affairs of Europe (Allen 2003; Hoffmann 2002). In this vein, the Convention consisted of 105 regular and (102) substitute members, who following some initial disputes on their exact status, participated on equal footing with regular members (Schönlau 2007). The Convention was led by 1 chair, 2 vice-chairs, 56+(56) national parliamentary conventioners (NPC), 28+(28) national government conventioners (NGC), 16+(16) Members of European Parliament (MEP) and 2+(2) Commissioners (Closa 2004:192). Work took place in eleven working groups and a plenary chamber which was open to the public. The Convention was a far cry from the closed-door deal making characteristic of previous IGCs.

The body was led by Valéry Giscard d'Estaing who with the help of a Preasidium – the Convention's governing body – was tasked by the Laeken Declaration of Member States with producing a document surmising the ideas of the Conventioneers to be used as a point of reference for the ensuing IGC where heads of state and government would eventually decide the fate of the Constitutional Treaty. Yet, it soon became clear that the Convention, under Giscard's guidance would stop nothing short of producing a fully-fledged Draft Constitution (Closa 2004) which being accepted by Member States became the basis of the Constitutional Treaty. In sum, the Convention was an intricate and unique venue for change. It opened the door for MEPs, national parliamentarians and the Commission to influence treaty change (Christiansen 2002). Some participants, however, were better suited to do so than others.

The discussion in Chapter I highlighted the importance of conceptualizing institutional change geared to respond to external pressures as a prolonged and dynamic processes. To reiterate the expectation formulated in the Causal Mechanism (Table 2 [p.89](#)), the argument of

the dissertation is that the Convention was the initial station in this dynamic process. Despite the increased role of the EP in the CCP resulting (partly) out of obfuscation tactics by MEPs, the appeal MEPs arguments had to most Conventioneers sense of appropriateness resulted in the rule change's acceptance even by Member States who accepted that increasing the EP's role might be a good way to anticipate the increased public salience of trade. An expectation that was eventually dashed once the contestation of trade came full circle with the CETA and TTIP agreements.

The argument of this chapter is that MEPs were especially well prepared to pursue their goal of institutional self-empowerment owing to several structural peculiarities afforded them by the venue. These are reviewed momentarily. However, without wishing to re-open the theoretical discussion the compatibility of different new institutionalist lenses, it is important to clarify the expectations this chapter is based on. The theoretical justification for the individual steps of the mechanism are further justified in *Table 3*:

- Agency requires pre-formulated preferences – actors taking part in processes of institutional change will have pre-formulated preferences as to the desired outcomes of change. These preferences can be individualistic or altruistic.
- The venue matters – both proceduralist and substantive norms will impose limits to actors' limits for preference maximization. Consequentialist behavior will not unfold in a void, with actors having to take account of the normative environment they are in. The distribution of resources will also limit or enable actors.

By corollary:

- Preference-maximizing action – consequentialist behavior can be expected of any agent with strong pre-formulated preferences. Given the constraint of the venue, primarily individualistic actors will have to appeal to the substantive norms set by the venue in order to ground their preferences in appropriateness. By extension, primarily altruistic

actors will have to be prepared to bargain within the confines of appropriateness seeing that individualistic motivations cannot be ruled out.

As we have already seen above, mechanisms rely on causal conditions. In this case, MEPs were enabled through the presence of three such conditions.

The *first causal condition* concerns the Convention as a structurally biased venue favoring European élites over NPCs. From a lack of adequate resources (offices & support staff) to a lack of adequate expertise in many cases, NPC's were highly reliant on political group meetings that took place throughout the proceedings (Schönlau 2007). These, however, were dominated by a few charismatic leaders and did not provide unbiased access to information for NPCs (Magnette 2004). This point is substantiated by (NPC 2016) when talking about the difficulties that he and many of his fellow Conventioneers faced in grasping the sheer scale of the exercise, admitting to having a narrow issue focus with his opinions being overwhelmingly based on the political direction of the chairman of his political group. As Van Hecke (2012) points out, national parliamentarians were dominantly 'socialized' and 'co-opted' (:845) by MEPs in their respective political groups becoming reliant on not only their expertise but also their perceptions. The representatives of national governments and the EP did have agendas and were in much better positions to peruse them. Both because of their structural advantages (the Convention took place in the building of the EP where MEPs had their offices while governments could rely on their permanent representations) and because of their familiarity with EU jargon and legal texts (Schönlau 2007). Albeit the EC was represented we can largely discount Commissioners ability to effectively pursue their institutional goals as in many cases they lacked institutional support for what were effectively personal agendas which were often at odds with individual directorate generals' institutional agenda (Beach 2003). Also, there was a general disposition in the Praesidium – the Convention's governing body – and its Presidency, in particular, to push for more rather than less integration (PRES 2016; Tsebelis and Proksch 2007). This is the most certain of our conditions as there is no counter argument being presented in the literature (Allen 2003; Closa 2004; Magnette and Nicolaïdis 2004).

The *second condition* concerns the institutional agendas of the Member States, the EC and the EP with relation to modifying the institutional framework of the CCP. The EP was the only EU institution which had a clearly developed and stated aim in this regard before the Convention started. This was formulated in a 2001 resolution in the run-up to the Convention:

'The [EP] Draws attention (...) to the pressing need for it to be more closely involved - as a factor for democratic participation and scrutiny - in the common trade and external economic relations policy, as regards both the framing of policy and the negotiation and conclusion of agreement' (European Parliament 2001).

Taken together with the observation that there is a general tendency for most of the constituent political groups within the EP to coalesce around goals of Parliamentary empowerment (Hix, Kreppel, and Noury 2003) we can be very certain that the EP (or a majority of its constituent MEPs) had a conscious institutional agenda for changing the CCP. The Commission meanwhile was concerned with consolidating the advances it had made during the previous treaty modifications and sought to increase the scope of its powers within the liberal agenda. Which it achieved through empowering itself in the area of FDI (Meunier 2017).

The *third condition* concerns democratic traditions in European representative democracies where the ratification of external treaties – either to do with trade or other issues – is generally subject to parliamentary scrutiny and approval (Weiler, Haltern, and Mayer 1995). Looking back at the evolution of the CCP the gradual empowerment of the Commission as a negotiator had meant a simultaneous encroachment on these national parliamentary functions. Not fully eliminating their role but transferring more and more areas into the realm of community competence had meant taking more and more decisions on concluding agreements in the Council (Gstöhl 2013). Although national constitutional setups differ, this has in many cases meant that national governments could bypass their legislatures with greater ease. Informational gatekeeping and closed-door council bargaining generally frustrates national legislatures (MacCarthaigh 2007). Indeed, Crum (2005) argues that the Convention was underpinned by the general notion that the EP should assume responsibility for the democratic functioning of the Union once Member State legislatures competences end. Participants of the Convention acted in this spirit endeavoring to make nothing less than a Constitution based on European democratic

traditions (PRES 2016). Following this line of reasoning, we can assume that national parliamentarians would share an understanding, or would hold a belief bias that it is appropriate to have parliamentary scrutiny over executive-led trade negotiation. By corollary I also expect NPCs to be sympathetic to arguments advocating for increased EP involvement in the CCP.

The causal conditions can be summarized as:

- **(C1)** The Convention was structurally biased to favor MEPs, Member States, and Commissioners in terms of resource availability and access to information.
- **(C2)** The EP had a – common – organizational level goal of modifying the CCP to include a veto.
- **(C3)** NPC's coming from different national legislatures shared a belief as to the appropriateness of having parliamentary scrutiny over executive powers of trade negotiation.

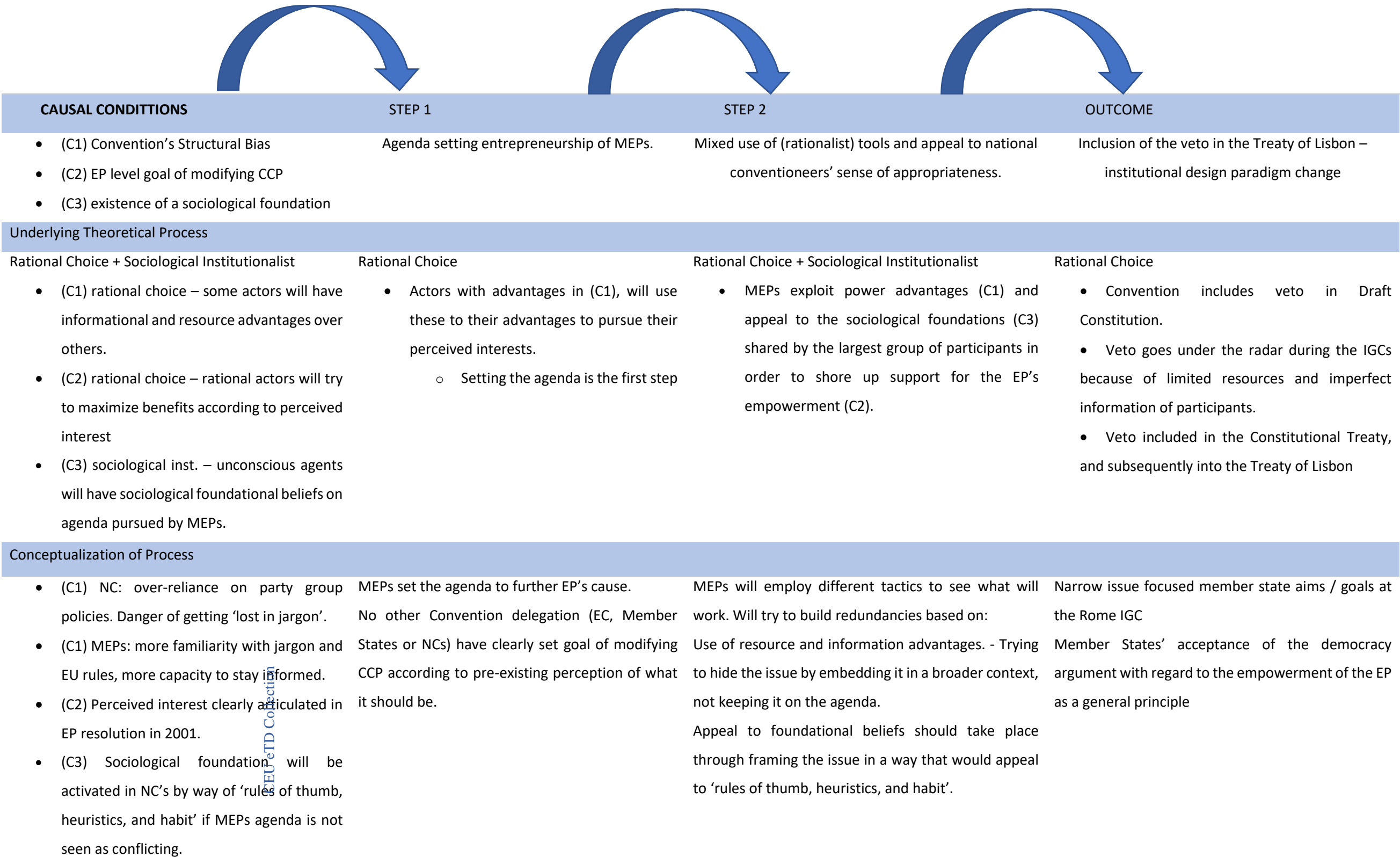
Taken together, these three empirically observable causal conditions are in line with the assumptions drawn from the new institutionalist literature. At the start of the Convention, MEPs came prepared with pre-formulated preferences while NPCs shared an ingrained bias. The venue itself, enabled MEPs while imposing high barriers to NPC participation. The third theoretical assumption, the consequentialist pursuit of preferences remains unaddressed. Yet the causal conditions allow for the formulation of a plausible causal mechanism to (dis)confirm the third theoretical assumption and explain the empowerment of the European Parliament.

- **Causal Mechanism:** because of resource and informational asymmetries (C1) and a shared sociological foundation amongst NPCs (C3) MEPs were put in a privileged position to pursue the EP's institutional preference of self-empowerment (C2) through agenda setting at the Convention (S1) which they did through (S2) a mixed use of (rationalist) tools and an appeal to national conventioners' sense of appropriateness to reach the inclusion of the veto (O).

The causal conditions the two steps and the outcome are theoretically and empirically conceptualized in *Table 3*, and the expected observable manifestations for steps 1 and 2 (S1 and

S2) are further developed in *Table 4*. Observable manifestations are not developed for the causal conditions as we already have a high level of certainty here.

Table 3 The EP's empowerment, Causal Mechanism elaborated (author)



1.2 Agenda setting and a mixed bag of tools: unpacking steps 1 and 2 of the mechanism

As Table 3 elaborates, the causal mechanism builds on the theoretical insights of two brands of institutionalisms and the three causal conditions extrapolated above. As such, the first step of the mechanism assumes that MEPs, as consequentialist benefit maximizing agents of the EP at the Convention, will represent the EP's pre-stated goal of institutional empowerment. In order to do so they – MEPs as a cohesive group – need to set the agenda of the proceedings and push for the acceptance of the EP's empowerment. We can expect to see MEPs practice bargaining and a reliance on their informational and resource advantages *vis-à-vis* other conventioners.

However, theory tells us that strands of appropriateness – such as the expectation of having the formal rule-making process and its outcome be reflective of the norms of democratic accountability and transparency – do play a role next to rationalist bargaining. Indeed, the EP is seen to have used appeals to similar logic of appropriateness during previous rounds of formal treaty change, well before the Convention venue made norms such a central consideration (Nicolaidis and Meunier 2002; Rittberger 2012). That considered it would be unreasonable to expect MEPs to not try to use a mixed bag of tools at the Convention. It is indicative that even the initial framing of the EP's desire to modify the CCP was based on the EP being an important 'factor for democratic participation and scrutiny' (European Parliament, 2001). So, we should expect MEPs to consciously frame an increase in the EP's powers as a democratizing factor. This, in turn, should activate belief biases (Evans 2008) in NPCs that as a 'rule of thumb' favor Parliamentary control over executive-led trade negotiations. Agenda setting (S1) and (S2) are operationalized in *Table 4*.

Ever since the Treaty of Maastricht had taken significant steps towards empowering the EP to become a more significant player in EU policymaking the indirect relationship between input and throughput legitimacy and the Union's policy outputs were increasingly seen as untenable by many in the political establishment (PRES 2016). The Convention as a venue provided the Parliament an excellent opportunity to highlight the anomaly that still existed regarding its role in the CCP, where it had no contractual rights to get involved in setting / debating or approving

the EU's trade policy¹¹. The Parliamentarians taking part in the proceedings successfully positioned themselves as a bridge between the apparent increased public attention to trade, and the general desire to make policy more responsive to public inputs.

| Operationalization of observable manifestations | |
|---|--|
| STEP 1 | STEP 2 |
| <ul style="list-style-type: none"> MEPs will support the goal of empowering the EP in their interventions - no one will speak against it. <ul style="list-style-type: none"> Institutional roles should trump national roles. MEPs should remain a coherent cohort. The proposal to give an explicit veto right to the EP will originate from MEP(s). | <p><i>Rationalist Tools</i></p> <ul style="list-style-type: none"> Obfuscation of veto, embedding it in hard to understand jargon Use of bargaining when legitimacy of veto is called into question <p><i>Appeal to appropriates</i></p> <ul style="list-style-type: none"> Presenting (and repeating) syllogisms: democratic control over trade agreements is politically necessary + the EP provides democratic control functions = veto is needed. |

Table 4 Operationalization of observable manifestations of S1 and S2 (author)

Having grounded the CM in theory and having established the expected observable manifestations, in the subsequent part I go on to test for the presence of the mechanism during the Convention. While observable manifestations have only been developed for (S1) and (S2) in *Table 2*, evidence to further substantiate the presence of the three causal conditions (C1), (C2) and (C3) is also pointed out. This section also touches upon why the EP veto made its way past the two IGCs that were necessary to approve the Constitution and why the veto remained unchanged in the Lisbon Treaty.

¹¹ With the one-off exception of the ratification of the Uruguay Round where the EP's approval was required by political decision of the Council (Young and Peterson 2014:33).

2. Complex agency through obfuscation and an appeal to appropriateness

The Convention was comprised of eleven thematic working groups (WG) and a plenary chamber. The working groups started their work between June and October of 2002. Each group was tasked with producing a final report which would then go on to be debated in plenary before being integrated into the draft Constitution. This, in turn, was adopted by the Convention in July of 2003. There were three WGs that discussed topics relevant to the institutional structure of the CCP: WGIII on the Legal Personality, WGVII on External Action and WGIX on Simplification.

2.1 Working Group III on the legal personality: where shared ideas become apparent

It was in this working group that the question of modifying the EP's powers in relation to adopting international trade agreements first came up. Participants overwhelmingly agreed that giving the EP more power was desirable. A closer look at the observable manifestations highlighted in Table 2 lend credibility to the existence of the third causal condition (C3). Conventioneers shared a strand of appropriateness relating to the role of parliamentary involvement in trade policy making.

The initial tone of the discussion in WG III was set by contributions from legal advisors of the Council, Commission and the EP. All three pointed out the practical difficulties associated with having parallel legal personalities for the European Communities and the need for more effectiveness in speaking with once voice vis-à-vis negotiating partners (WG III 2002a). The EP was only scantily mentioned. The head of the Council's Legal Service referred to the fact that granting legal personality to the EU, would not automatically modify the role of the Parliament in adopting trade agreements (Ibid:10). Nonetheless, as soon as the Group discussions started, the German Government Conventioneer suggested granting the EP more involvement in the conclusion of agreements proposing that: 'the Council and, if necessary, the European Parliament, would decide once negotiations had been concluded whether the outcome (...) should be accepted (...)' (WG III 2002b:2). What the term 'decide' meant was not elaborated upon. The first draft resolution of the WG, however, seemed already to clarify this by asserting

that there was a ‘need to consult the Parliament’ (WG III 2002c:11) as ‘at the political level (...) it seems difficult to justify [the EP’s] exclusion’ (Ibid). Although the draft text also acknowledged that this was ‘not directly linked to giving explicit legal personality to the Union’ (Ibid). No further discussion on the issue took place. The final resolution of the group recommended extending the Consultation procedure to the adoption of international trade agreements (WG III 2002d).

While MEPs were present in the WG they did not submit written interventions to the issue. The German Government representative’s agency, however, is in line with the literature’s claim that there was a strong pro-supranationalizing bias amongst the German political élites in general (Kohler-Koch 1999). Considering how the role of the EP was brought up - with specific reference being made to ‘the political level’ – and considering that Conventioneers recognized that modifying the rules of EP involvement was not linked to the question of the legal personality lends a great deal of credibility to the existence of (C3). Furthermore, NPCs were rather active on a variety of topics in WG III but did not raise objections to the expanding the EP’s involvement. This also provides added confirmation to the argument that NPCs accepted the appropriateness of the belief that the EP should have a stronger role in overseeing international agreements. As (ComLS 2016) recalls the need for some sort of Parliamentary control over trade was seen to be essential by members of the WG in recognition of the effects of previous rounds of treaty making which had ‘reduced or even eliminated’ (ComLS 2016) national parliaments’ involvement in the CCP. A continuation of this tendency was thought to be contrary to the aims of the Convention which sought to propose rules that would live up to expectations of democratic scrutiny and transparency (NGC 2016; PRES 2016).

The recollection of these two sources undoubtedly conveys the spirit of the Convention and the ‘constitutional moment’ well. Yet the point they make here, of how the systematic exclusion of national parliaments through past treaty changes was untenable was not so obvious to the trade élite itself. Recalling the discussion in Chapter III, emerging after the creation of the WTO, the liberal policy and institutional consensus gave no serious consideration to making the link between input and throughput legitimacy and policy outputs more direct. The *indirect* understanding implied by the liberal intergovernmentalist mindset dominated the commercial policy.

2.2 Working Groups VII on External Relations and IX on Simplification: a use of distinct tools

A closer examination of the developments in these two working groups reveals how MEPs agency in furthering the common organizational goal of empowerment built on rationalist tools and an appeal to NPCs shared belief (C3). On the one hand, MEPs exploited their resource advantages by embedding the EP veto in a complex jargon-laden rule change in WG IX. On the other hand, MEPs continued to garnish support for the EP veto through appealing to the same logic of appropriateness that became manifest through in WG III. A closer look at the developments here – through a focus on the observable manifestations highlighted in Table 2 – lend credibility to (S1) and (S2).

In late September of 2002, at the very start of the proceedings in WG VII, in a written contribution German MEP Elmar Brok asserted that: ‘The Council shall conclude agreements, after the assent of the European Parliament has been obtained, when the agreements cover a field for which the codecision procedure is required for the adoption of internal rules’ (WG VII 2002a:5). Whereas the final report of WG III suggested consultation and a better flow of information to the EP, Brok’s suggestion of the use of the assent procedure - an up or down vote on a Commission proposal – was a call for a veto right. As such, it was Brok who placed the veto on the agenda. Rosén (2016) suggests that the veto was advocated for by a strong Commission – MEP alliance. While it is certain that the Commission subscribed to the normative foundation of the need to empower the EP (ComLS 2016), Commissioner Lamy did not support the assent procedure. Speaking in mid-October – following Brok’s proposal he suggested Consultation powers, saying that the EP’s role should be modified ‘as Giuliano Amato’s group [WG III] suggested’¹² (WG VII 2002b:7). In other words, he called for consultation.

As (NGC 2016) recalls, the question of increased EP involvement was not a high salience issue during the initial discussions and national parliamentarians were mostly inactive and uninvolved. This shows in the discussions leading-up to the first Draft Final Report of the WG VII, which were

¹² ‘j’espère que la Convention saura donner ce nouveau pouvoir au Parlement européen comme le groupe de Giuliano Amato l’a recommandé’ (WG VII 2002b:7).

mostly concerned with the question of global leadership. In this light, it is unsurprising that the document did not make specific mention of the veto calling instead for a single legal personality for the EU in negotiations while underlining that the legal personality: ‘would not necessarily involve changes to the specific arrangements of the procedures’ (WG VII 2002c:11). Here again, Brok, this time supported by three other MEPs and a national MP, called for two amendments to the text. The first one asking for a drastic expansion of QMV decision making in the Council stating that: ‘QMV should be the norm in the field of external action of the Union, including the whole CFSP, with the unique exception of defense issues (...) the introduction of co-decision for legislative acts and assent for any international agreement’ (WG VII 2002d:12). The second one asking that the ‘EP assent on any international agreement concluded by the Union, at least for those having legislative or budgetary implications’ (Ibid:15). Proposing a practical blanket extension of codecision to CFSP – which clearly emerged as the most controversial issue of the discussions in WG VII – was bound to be rejected. Sure enough, it did not appear in the second Draft Final Report. Proposing a veto right for agreements entailing legislative or budgetary implications was also a blanket exigency. An extreme position seeing that any international agreement would have at least one of these two implications. This was also dropped from the second Draft Final Report.

However, expanding QMV voting in the council to the CCP and in turn, linking codecision to all areas of QMV and calling for Parliamentary control of treaties based on QMV decision by way of the assent was already being discussed in WG IX on Simplification by the time that Brok proposed these changes (WG IX 2002a). The discussions in WG IX were steered by individual and group contributions made by Conventioneers at the start of the Convention. This expansion of QMV and its linkage to codecision and the assent procedure for international agreements was placed on the agenda by Dutch European Peoples’ Party (EPP) MEP Maij-Weggen based on an EPP discussion paper (EPP Group 2002). that was elaborated by EPP MEPs and circulated throughout the Convention by Brok. Here only the Finish Government representative in WG IX called for an EP ‘opinion’ in place of the assent procedure. Nonetheless, the final draft remained unmodified. Similarly, in WG VII, only the Finish and Swedish Government representative raised concerns about expanding the EPs powers to the assent procedure fearing that such a degree of

EP involvement would make the EU more protectionist (ComLS 2016). Nonetheless they ‘did not pursue the argument’ seeing that ‘nobody had valid arguments to contest such [an] alignment (...) of carrying over the principle of equal footing between the Council and EP for legislative matters’ to the CCP (ComLS 2016). In its final report (WG IX 2002b) WG IX adopted the Maij-Weggen approach in late November. This effectively provided the EP with the veto it sought as it proposed expanding codecision to the CCP and required all international agreements relating to codecision policy areas to be voted on by the EP.

Nonetheless, the Final Report of WG VII stated that: ‘some members pleaded in favor of an EP assent on any international agreement in matters of international trade policy’ (WG VII 2001:30). This, a narrower wording, made the veto in the case of trade agreements perfectly specific while dropping any reference to codecision, legislative or budgetary implications. But seeing the developments in WG IX, this plea was effectively made redundant. This is something that Brok and fellow MEPs would undoubtedly have had to be aware of, seeing that the Political Group meetings took place throughout the Convention and that Brok and Maij-Weggen both belonged to the EPP. Nonetheless, led by Brok, MEPs consistently kept pushing for the explicit adaptation of ‘trade’ whenever the question of international agreements came up (WG VII 2002d; WG VII 2002a; WG VII 2002e). As such, pushing for specific empowerment in trade agreements by Brok and fellow MEPs despite the proposed rule change already passing into the plenary by way of another WG lends credibility to S2’s claim that MEPs will employ different tactics in an effort to build redundancies. Bork’s constant reference to trade can be interpreted as an appeal to (C3). The degree of success that Brok and supporters had in making the issue of empowering the EP specifically in trade ‘stick’ becomes apparent by looking at what happened during the plenaries.

2.3 Plenary sessions

By the time the plenary sessions had started NPCs felt that they could identify more with MEPs than their own government representatives. As (PRES 2016) recalls there was a general feeling amongst NPCs that supporting MEPs and their proposals would make for a more democratic and transparent draft Constitution. The developments during the Plenary debates highlights this

point seeing that National Conventioneers coalesced around MEPs appeal to appropriateness when calling specifically for empowerment in the realm of trade agreements. Together with the fact that the eventual Draft Constitution reflected the proposals of WG IX on Simplification instead of spelling out trade agreements as such lend support to (S2)'s assertion that two sets of tools were employed by MEPs to reach their stated goal of attaining the veto.

It was in the Plenary debates that Conventioneers had an opportunity to discuss the Final Reports of the individual WGs. During the discussions on the final report of WG VII in December (on the 16th and the 20th), no substantive discussion took place on the role of the EP in adopting international agreements. Yet, while the summary of the debate on the 16th mentions some members, the summary from the 20th cites many members arguing for a larger role for the EP. Based on these debates the Convention Secretariat proceeded to draft the relevant parts of the Draft Constitution. This was completed by early May. What is extremely telling are the proposals and amendments that Conventioneers tabled to the Draft Constitution following the meeting on the 20th.

The Draft Constitution proposed expanding the legislative procedure to include the 'framework laws required to implement the common commercial policy' (The European Convention Secretariat 2003:105) in Article 24. Here there was a clear lack of support for a concerted effort by the Swedish and Finish Conventioneers to take the adoption of framework laws out of the legislative procedure. Only four Conventioneers signaled their support (Ibid:106). However, there was a very clearly observable clustering of European and National Parliamentarians around the explicit exigency to give the EP the right to assent any international trade agreements. Even though article 33 (7) predicated on the Maij-Weggen approach already granted the EP the right to assent to agreements concerning policy where the legislative procedure applied (Ibid:135). Seeing the lack of support for changing Article 24 (2), the exigency of 61 (!) Conventioneers to include a specific reference to 'trade agreements' seems to carry particular importance (Ibid:139). Out of these 61 Conventioneers, 20 were MEPs, 39 MPs while only 2 were representatives of national governments. Out of the 14 amendments tabled to modify 33 (7) – all of which proposed specifically adding 'trade agreements' in addition to 'agreements covering fields to which the legislative procedure applies' – 13 originated from

MEPs, while only one was tabled by an MP. This provides added credibility to the claims that MEPs had a resource advantage over MPs (C1) and that they pushed for the same goal regardless of party affiliation (C2). Furthermore, the events that took place during the plenaries also support the assertion that MEPs were actively setting the agenda and that they tried hedging by effectively pushing for redundancies in the treaty in order to make sure that the desired institutional rule change would stick.

The notable exceptions here are the two-two MPs from Finland and Sweden who opted to support the amendments of their government representatives in the effort to modify Article 24. However, two Finish MEPs were among the 20 MEPs who pushed for adding ‘trade agreements’ to article 33 in opposition to the national stance. In the end, the Draft Constitution included – what later became Article 218 in the Lisbon Treaty – in Article III-217 that: ‘The European Parliament’s consent shall be required for (...) agreements covering fields to which the legislative procedure applies.’ (European Convention, 2003:174). As such, ‘trade agreements’ were not separately enumerated as an item, where the assent/consent of the EP would be required. The Maji-Weggen approach that was already present in the Final Report of WG IX turned out to be the one that the Draft Treaty followed. Nonetheless, the conscious push by MEPs pursuing the specific agenda item of trade was by no means irrelevant, as they managed to rally a large amount of support, and practically no opposition towards it. This, in turn, is a highly unique and certain piece of confirmatory evidence towards confirming S2. National parliamentarians support a clear and unmistakable push towards granting the EP the veto because of the effects of (C3): their shared belief in the appropriateness of having parliamentary oversight.

Also, the lack of attention paid to the more legally complex jargon-heavy approach that was in effect elaborated in WG IX can be explained with the resource disparities of national conventioners and the obfuscation caused by this. Even if any NPCs would have grasped what was being proposed in WGIX the absence of any substantive discussion can at the very least lead us to conclude that the issue was simply not seen to be problematic.

Nonetheless, rallying support behind the call to include trade agreements gave for an easier and more visible platform. The dominance of the institutional roles, as opposed to national

allegiances, is also a noteworthy development which lends additional strength to the implicit assumption behind (C3), namely that the EP found a natural ally in disenfranchised national parliamentarians.

3. IGCs and the Member States

Following the Convention, the Draft Constitution was out of the hands of the Conventioneers. It had to be ratified by a traditional closed-door IGC at Rome. Hence, there was no more room for Convention participants to actively influence the outcome as a unified body (PRES 2016). At Rome, the Treaty was rejected due to a Spanish and Polish veto. Tsebelis (2005) identifies the debate on how to change the triple majority rules of QMW in the Council as the principle cause here. Farrell & Héritier (2007) further points out that during the ensuing background discussions on how to salvage the Treaty, it was the EP's increased budgetary powers that were at the center of concerns of more intergovernmental Member States, not the EPs increased role in ratifying international treaties. These issues persisted in remaining front and center during the subsequent Brussels IGC in 2004 which ended up adopting the Draft Constitution with significant modifications in the area of QMV voting, also curtailing the EP's budgetary rights. Nonetheless, the linkage between the QMV – codecision and the EP's right to ratify international treaties relating to these policies remained untouched. We need not look far for a plausible explanation for this outcome.

If experience with past IGC has taught us anything, it is that these negotiations do not take place under perfect information due to limited resources and time constraints. This was also the case with the Rome and Brussels IGCs which were accompanied by a strong sense of urgency and political pressure (Desmond 2004). Under such circumstances negotiating parties strive for outcomes that satisfy the concerns of all Member States, seeking the smallest common denominator. Problematic issues are dealt with once they come up. In the end, formal treaty changes are best seen as incomplete contracts (Moravcsik 1993) insofar as they cannot address all possible contingencies. The EP's veto right was simply not addressed, and its ramifications were not fully comprehended by élites until the rejection of the Anti-Counterfeiting Trade Agreement (ACTA) agreement in 2012, some 3 years after the Treaty of Lisbon took effect

(Matthews and Žiková 2013). The point is substantiated by (Minister 1 2016) who describes the IGC behaviors of Eastern-European members in particular as being focused on singular issues. For instance, in Minister1's home country there were absolutely no discussions about questions of institutional design. The role of the EP or indeed the issue of QMV were not discussed at all on a national level.

Although the Draft Constitution was rejected by French and Dutch voters in popular referenda the eventual Treaty of Lisbon is widely understood to be a demystified version of the Constitution with little if anything changing in terms of the substance of the treaty (Barrett 2008; Piris 2011). Perhaps this lack of attention paid to the details of the proposed treaty is not all that surprising given the general attitude of Europe's political élite following the failure of the Draft Constitution at the polling stations.

There was a general sense of disappointment. After all, the French and the Dutch governments had campaigned *for* the Constitution, not against it. It had been populists that had turned the referendum into a question about Turkey's accession and national sovereignty (NPC 2016). Those that took part in the drafting process had developed a sense of ownership for the end product. As such, the attitude of élites was a proactive one. They wanted to stay as close to the original text as they could. As such, the informal 'Amato Group', comprised of a number of former participants of the Convention and other influential member state politicians such as Europe and Foreign Ministers. At the core of it's mission the group aimed to:

'...elaborate a new proposal as close as possible to the pre-existing constitutional treaty, avoiding the let's say, disruption of what we had done, and limiting the elimination of what could be politically difficult to accept to a few clauses.' (PRES 2016)

Owing in part to the work of this informal group, which effectively redrafted the entire treaty was signed on the 13th of December of 2007 in Lisbon, Portugal entering into effect nearly two years later on the 1st of December of 2009. With that, the European Parliament had gone from being an observer of the commercial policy to being a *defacto* veto player.

4. A new burden for the EP

The European Convention laid the groundwork for the EP to gain a new responsibility with the entry into force of the Lisbon Treaty. A new responsibility which would soon transform into a burden: legitimizing trade. Taking place only four years after the 1999 Seattle Riots against the WTO the Convention seemed to produce an outcome that was reflective of a need to start paying more attention to input legitimacy in trade policy. Amidst the constitutional moment the unique Convention venue produced majority support for the idea of expanding what had previously been a narrowly defined understanding of trade legitimacy to include a parliamentary leg. Even if the institutional consequences of this were not broadly discussed or even understood.

The Parliament's empowerment is a testament to the skillful agency of its MEPs that took part in the proceedings. Firstly, by embedding the EP veto in the complex rule change linking the expansion of QMV to the expansion of codecision MEPs took advantage of obfuscation that resulted from resource and informational asymmetries that were in their favor. Secondly, by appealing to national Conventioneers' belief that there needed to be parliamentary control over the ratification of international trade agreements MEPs could build significant and credible support for the EP veto in the working groups and the plenary. The fact that there was a parallel push for the same institutional rule change in two distinct venues meets expectations of rational agency insofar as we would expect consequentialist actors to exploit all their comparative advantages to further their agenda.

The subsequent chapter deals with 'Step 2' of the causal mechanism elaborated in Chapter III. It answers the questions of when and how the substance and procedural aspects of the commercial policy went from being *simply* contested to being politicized following the entry into force of the Lisbon Treaty. As I will show, the EP did take an active role in responding to this shift by establishing new pathways of throughput legitimacy to monitor the Commission and feed policy inputs into the negotiating process of CETA and TTIP. Nevertheless, the EP's eventual preference to salvage rather than block trade at a time when it was facing public backlash meant that it would not be able to reconcile public dissatisfaction with its own policy preference. In turn, this would lead to the burden of imbuing these two heavily contested agreements with legitimacy

being passed-on, if only temporarily, to Member States legislatures.

| Evaluation of evidence confirming causal mechanism | | |
|---|--|---|
| [Causal Conditions] | [S1] | [S2] |
| Convention's Structural Bias (C1) EP level goal of modifying CCP (C2) shared appropriateness (C3) | Agenda setting entrepreneurship of MEPs | Mixed use of (rationalist) tools and appeal to national conventioners sense of appropriateness |
| <p><u>(C1) Convention's structural bias against National Parliamentary Conventioneers (NPCs)</u></p> <p>(LU/HC): Uncontested assertion of lack of infrastructural support for NPs in the literature (<i>secondary literature</i>).</p> <p>(LU/HC): NPs reliance on political groups for access to information and interpretation of policy questions (<i>secondary literature + corroborated through primary interview data</i>).</p> <p>(LU/HC): NPCs Lack of familiarity and comprehensive understanding of subject matter (<i>secondary literature + corroborated through primary interview data</i>).</p> <p>(LU/HC): Uncontested assertion of MEPs home turf advantage in terms of infrastructural support (<i>Secondary literature</i>)</p> <p><u>(C2) EP level goal of modifying CCP</u></p> | <p>(LU/HC): General tendency for the EP to act as a unified actor when pursuing institutional self-empowerment (<i>secondary literature</i>).</p> <p>(LU/HC): EPP Convention Group Discussion Paper from 2002 November: '...the conclusion of the agreements shall be decided on by the Council, acting by qualified majority on a proposal from the Commission and with the advice and assent of the European Parliament.' (<i>primary document analysis</i>).</p> <p>(LU/HC): MEP Elmar Brok puts the EP veto on the agenda in WG VII in proposing an amendment to the WG's draft report: 'The Council shall conclude agreements, after the assent of the European Parliament has been obtained, when the agreements cover a field for which the codecision procedure is required for the adoption of internal rules' (<i>primary document analysis</i>).</p> | <p><u>WG IX on Simplification</u></p> <p>(HU/LC): Framing, content and wording of the proposal of MEP Maij-Weggen conducive to obfuscation of the veto: 'Does the Working Group confirm the approach emerging from the meeting of the Convention on 12 and 13 September, namely to reserve, the assent procedure solely for the conclusion of international agreements (see article 300 (3) of the TEC)? (...) In the EPP Discussion Paper on the Constitution the procedure under article 300 TEC is modified so that it better reflects the institutional balance. This is especially clear with regard to the special committee assisting the Commission during the negotiations. The relating article in the EPP Discussion Paper reads as follows: (...) The Council shall act unanimously and with the advice and assent of the majority of the members of the European Parliament when (...) agreements</p> |

| | | |
|---|--|--|
| <p>(LU/HC): Stated organizational level preference: EP Resolution (2001/2022(INI): '[The EP] Draws attention (...) to the pressing need for it to be more closely involved - as a factor for democratic participation and scrutiny - in the common trade and external economic relations policy, as regards both the framing of policy and the negotiation and conclusion of agreements; takes the view that its involvement is essential now that the national parliaments no longer have any powers in the sphere of EU trade policy;' (<i>primary document analysis</i>).</p> <p><u>(C3) shared appropriateness</u></p> <p>(HU/HC): WG III on the Legal Personality agreed that 'at the political level (...) it seems difficult to justify [the EP's] exclusion' (<i>primary document analysis</i>).</p> <p>(LU/HC): No participants raised objections to the desirability of expanding the EP's involvement in CCP in WG III on the Legal Personality (<i>primary document analysis</i>).</p> | <p>(LU/HC): During proceedings in WG VII and IX, not a single MEP raises objection to EP agenda (<i>primary document analysis</i>).</p> <p>(LU/LC): strong cohesion of MEPs – institutional role most important (<i>primary document analysis + corroborated through primary interview data</i>)</p> | <p>entailing amendments of an act adopted under the procedure referred to in Article 95 [the codecision procedure]' (WG IX 2002a:5). (<i>primary document analysis</i>).</p> |
|---|--|--|

Table 5 Evaluation of Evidence Presented to support CM in Chapter IV (author)

| Evaluation of evidence confirming causal mechanism | |
|---|---------|
| [S2 (continued)] | |
| Mixed use of (rationalist) tools and appeal to national conventioners sense of appropriateness | |
| <p><u>WG VII on External Action</u></p> <p>(HU/LC): Elmar Brok, use of bargaining tactics when proposing extreme position at X, followed by small concessions at X1 and X2 (<i>primary document analysis</i>):</p> <ul style="list-style-type: none"> - X: 'QMV should be the norm in the field of external action of the Union, including the whole CFSP, with the unique exception of defense issues (...) the introduction of co-decision for legislative acts and assent for any international agreements' - X1: 'EP assent on any international agreement concluded by the Union, at least for those having legislative or budgetary implications' - X2: 'Some members pleaded in favor of an EP assent on any international agreement in matters of international trade policy' <p>(HU/LC): Constant referral to EP veto on trade deals in specific, as such appeal to (C2) (<i>primary document analysis</i>).</p> <p>(HU/LC): Swedish and Finish Government Conventioneers abandonment of opposition to granting the EP the veto in WG VII in absence of 'a valid argument to contest [the veto]' (<i>interview with LA</i>).</p> <p><u>Plenary</u></p> <p>(LU/HC): Lack of support for Swedish and Finish Government Conventioneers proposal to exclude the EP from assenting international commercial agreements.</p> <p>(HU/LC): Amendments tabled to Article 33 of the Draft Constitution: 'Extend the requirement for the European Parliament's assent: To trade agreements' which was supported by 61 Conventioneers, 20 of which were MEPs, 39 NPCs and only 2 Government representatives.</p> | Outcome |

(HU/LC): Remarks of Presidium Member on general dynamics of Conventioneer participation: ‘At the end of our works (...) you could draw a line among us, and on the one side you found the representatives of governments, and on the other side representatives of national parliaments and the European parliament [at the start of the proceedings] positions were mostly by country and there was a distance between national parliaments and the representatives of European parliament. But little by little the institutional role became more and more relevant (...) representatives of national parliaments, sympathized more with positions of the members of the EP.’ *(interview with PRES)*.

Table 6 *Evaluation of Evidence Presented to support CM in Chapter IV (cont. author)*

Chapter V: Testing the post-Lisbon arrangement; the public contestation of CETA through ISDS¹³

‘[the contestation of ISDS was] the most high-profile flexing of the European Parliament’s new muscle since the application of the Lisbon Treaty, after the rejection of ACTA’ – Member of European Parliament (EP4 2017)

This Chapter traces the CETA case from the start to the finish of the negotiations. It does so to test the validity of Step 2 of the causal mechanism elaborated in Chapter III ([p.89](#)). Recalling the conjectures being made here, the expectation is that the heightened interest in trade policy should come full circle, turning into politicization through CETA and related TTIP agreements. A turn of events that should serve as a watershed moment in the evolution of the CCP. Most importantly, despite EU institutions implementing several improvements to the transparency of the negotiating process and the EP and the Commission working towards improving the investor-state dispute settlement (ISDS) provisions in these agreements, the protests continued. This, it is argued, exposed the shortcomings of the post-Lisbon institutional rules to deliver on the promise made at the Convention that through parliamentary involvement trade would become more input legitimate.

The chapter is elaborated in the following order. Firstly, I reflect on the origins and importance of ISDS in shaping the public debate around the TTIP and CETA agreements, arguing that it was ISDS that effectively enabled the contestation of trade to gain public momentum. Secondly, I establish the politicization of the CETA and TTIP agreements with the help of de Wilde’s framework, as elaborated in Chapter I ([p.21](#)). Thirdly, I trace the institutional responses of the Commission and the EP to this contestation.

The exercise in process-tracing reveals several important findings. The initial responses to the public’s growing criticisms of these agreements came from the European Commission and

¹³ Parts of this chapter will appear in the forthcoming publication: Márton, ‘How the debates around trade policy helped rebalance the executive-legislative relationship in favour of the European Parliament’ in Fromage and Herranz-Surrallés Eds, *Executive-legislative (Im)balance in the European Union*, London: Hart Publishing.

the Parliament. The center-left Socialists and Democrats Group (S&D) which chaired the EP's trade committee tried to channel public concerns into the negotiating process while the Commission dedicated a significant amount of resources to foster dialogue with the public. As the degree of public dissatisfaction with the agreements became more apparent, the Commission and the center-left – center-right grand coalition that dominated the EP, worked together to reform ISDS while also introducing several procedural improvements to the transparency of negotiations. Notwithstanding these changes, public pressure did not subside. While investment arbitration had become more transparent and better suited to fulfil objective standards of accountability and transparency, politicization continued to question the policy aims of the liberal consensus. A turn of events that would eventually lead Member States in the Council to question the viability of the Lisbon Treaty's rules to deliver on their trade agenda.

The chronicle of events suggests that while it was principally ISDS that was used to rally the public against the perceived dangers of these agreements – due in no small part to well organized NGOs (Eliasson and Huet 2018; Bauer 2016a) – the underlying substantive criticisms of CETA and TTIP continued to be incompatible with the EU's trade agenda. In other words, even though protesters focused on ISDS they rejected the agreements in general. This finding resonates with the claim made in Chapter I that there are parallel understandings of what is legitimate and what is not and that these diverse standards of legitimacy will be hard to reconcile with each other. Anti-trade voices will not only want more transparency for transparency's sake, as the findings suggest. Rather they will want a more input responsive trade policy that translates into more appropriate outputs, mirroring their preferences. Of course, the main obstacle to reconciling these opposing views, in this case, is that the most appropriate output in the mind of the groups contesting CETA and TTIP would have been no agreements at all. On the other hand, the trade in-group would have seen the failure of the agreement as something 'traumatic' (TPC2 2016).

The main takeaway from this chapter is this; increased public interest in trade is not easily addressed by EU institutions despite a constructive approach to resolving public concerns. The CETA and TTIP agreements made it apparent that there existed an alternative view to the élite perception that increasing the number of trade agreements equals creating more public goods

for Europeans. The public contestation signaled that a sea change was needed in the recently minted institutional structure of the CCP if the liberal consensus in trade was to be safeguarded. It appeared that the faith (implicitly) placed into the European Parliament's capacity to input legitimize the commercial policy through its involvement in monitoring and approving agreements was misguided. The CCP's post Lisbon institutional transformation was just beginning.

Recalling the causal mechanism elaborated in Chapter III on the liberal consensus, the expectation is that following the Convention the public contestation of trade will come full circle. In turn this will; test the empowerment of the EP as a means of legitimizing trade and by corollary test the resilience of the CCP, as a means of delivering on the liberal trade consensus under increased public interest. Table 7 presents the second Step of the Causal Mechanism along with expected observable manifestations which are further unpacked here to provide even more clarity as to what evidence will support the claim I am making.

| [Step2] | Observable manifestation; | Unpacked |
|---|---|--|
| <p>Public interest turns into politicization with the TTIP and CETA agreements. Investment arbitration becomes the central issue of contention.</p> <p>Politicization exposes the inability of the Lisbon ruleset to address public concerns.</p> | <p>De Wilde's framework for public contestation (polarization of opinions, intensifying debate, public resonance)</p> <p style="text-align: center;">+</p> <p>Inability of EU institutions to de-escalate public contestation</p> | <ul style="list-style-type: none"> * Public concerns are raised about the substance of and the procedures around the CETA and TTIP agreements. ISDS becomes a central focus of concerns. * Based on competences gained through the Convention, the EP's International Trade Committee amplifies public concerns calling for more transparency and change to ISDS. * Despite substantive changes to process (increasing transparency) and substantive changes to investment dispute resolution, public contestation remains. |

Table 7 *Details of expected observable manifestations for Steps 2 & 3 of Causal Mechanism*

1. Setting the scene: the quiet before the storm

This part of the chapter sets the scene for understanding the eventual public contestation faced by the CETA and TTIP agreements, at the heart of which we find fears relating to regulatory sovereignty and non-European standards. Fears that were galvanized by the prospect of an ISDS mechanism. The public reaction to CETA and TTIP continues to be referenced in the ‘EU trade bubble’ in Brussels as a watershed moment. One which definitively brought trade out into the open, challenging the post-WTO agenda.

The start of negotiations between the EU and Canada was announced during a bilateral summit in November of 2009, following a yearlong scoping exercise and one month before the entry into force of the Lisbon Treaty. There was little if any public attention paid to these initial developments. The Commission’s communication on CETA was dry and lackluster, emphasizing the volume of the trade in goods, services and FDI between the parties.

Beyond setting out to tackle most remaining tariff and non-tariff barriers, through the scoping exercise (European Commission 2009) the parties set out to; eliminate most remaining tariffs, tighten regulatory cooperation, move beyond voluntary cooperation in standards harmonization in the area of goods trade, harmonize existing standards beyond what had been achieved at the WTO level¹⁴, and include substantive rules on ‘investment pre- and post-establishment’ (ibid:6). The parties also agreed to include some type of sustainable development chapter based on corporate social responsibility practices and International Labour Organization (ILO) conventions. The scoping paper also noted in the same paragraph that ‘early liberalization

¹⁴ Including: addressing Technical Barriers to Trade (TBT) even beyond what had been agreed at the WTO level (in the TBT Agreement), including a separate chapter on Sanitary and Phytosanitary (SPS) issues beyond the WTO SPS agreement, opening up central and local government procurement markets beyond the planned scope of the WTO’s Government Procurement Agreement (which only entered into force in 2014) and going beyond the provisions of the TRIPS agreement on Intellectual Property Rights protections (European Commission 2009).

of environmental goods and services should be provided for as part of market access commitments' (ibid:7) – meaning an ambition to liberalize for instance the extraction and processing of and trade in fossil fuels.

In view of the large volume of FDI flows (the EU is the second largest investor in Canada and Canada the fourth largest in the EU), the aim of including investment provisions in the agreement was understandable. Yet, the exact meaning of this was not specified at the time. However, it was clear that CETA would be the first agreement to try and make use of the EU's newfound investment competences pursuant to the new Article 218 TFEU taking effect with the Lisbon Treaty.

All in all, considering the policy objectives of the liberal consensus, these ambitions were not surprising. The agreement was touted by the Commission as the first 'New Generation' agreement (European Commission 2009) meaning that the scope would move well beyond only the trade in goods. However, while tariff and non-tariff barriers, technical barriers to trade, regulatory harmonization are all areas where the WTO had been active since the Uruguay Round, investment facilitation, and related investment dispute settlement were not. While undoubtedly part of a liberal attitude to globalization, these aspects of investment policy had evolved outside the purview of the WTO in a more bilateral manner arguably not forming part of the liberal consensus that Member States had come to settle on amongst themselves throughout the 1990s.

Even so, with the entry into force of the Lisbon Treaty, the EU became competent to negotiate on investment matters and the competence transfer did not stir any public pushback from Member States. Talks between the EU and Canada started soon after the November announcement in 2009. As is customary for international negotiations, talks took place behind closed doors (EC1 2016; EC2 2017; TPC5 2016). The negotiating directive, or mandate of the Commission – which it receives from the Council, containing the key offensive and defensive objectives of the EU – was not made public either. Yet as is now known, since the post-facto publication of the negotiating mandate, Member States did *not* envision including an ISDS chapter in the CETA agreement as negotiations started (The Council of the European Union 2009). Only to modify the mandate later, instructing the Commission to do so once TTIP negotiations

started¹⁵ (The Council of the European Union 2011). To understand why this was the case I turn to the United States and the North American Free Trade Agreement (NAFTA).

1.1 Understanding investor – state – dispute settlement

Entering into force between the United States, Canada, and Mexico in 1994 NAFTA had for a long time been a benchmark as to the scope and depth that could be achieved through a comprehensive preferential trade agreement – only to be replaced by the United States Mexico Canada Agreement (USMCA) in 2018.¹⁶ NAFTA was the first developed-developed country agreement to employ an ISDS mechanism between the parties (in Chapter 11). This had a profound effect on the United States' approach to future FTAs. In the period between the entry into force of NAFTA and its replacement by USMCA, U.S. trade policy adopted a uniform approach pushing for the inclusion of ISDS in its bi- and multilateral trade agreements (Byrnes 2007; Hufbauer 2016).

Such mechanisms traditionally evolved to protect developed country investors against precarious legal and political systems in developing countries by providing extra-national legal remedies in the form of arbitration (Miles 2013). ISDS clauses had routinely been present in bilateral investment agreements (BITs) ever since the first Bilateral Investment Treaty (BIT) was concluded in 1959¹⁷. The number of BITs in force rose to over 3000 by 2007 (UNCTAD 2015), and as of 2012, approximately 93% of BITs contain ISDS provisions (Gaukrodger and Gordon 2012:10). While BITs created the legal possibility of having reciprocal claims being made on behalf of nationals of both signatories, this was not the case in practice, because of the usually unidirectional flow of FDI from developed to developing countries. NAFTA changed that. As a very frank, and formerly classified report from the Congressional Research Service of the U.S. Congress from 2003 writes:

¹⁵ The Commission conducts negotiations based on negotiating directives which are issued by the Council and provide the Commission with guidelines and acceptable outcomes for agreements under negotiation in accordance with Article 218 of the TFEU.

¹⁶ The USMCA has widely been interpreted as a reduced ambition agreement compared to NAFTA in many regards. One noteworthy change is that it eliminated investor-to-state dispute settlement arbitration from the scope of the agreement.

¹⁷ The first BIT was concluded between Germany and Pakistan in 1959.

'Chapter 11 of the North American Free Trade Agreement (NAFTA) affords various protections to investors of one signatory nation having investments in the territory of another. Such foreign-investor protections exist in the large majority of modern bilateral investment treaties, but NAFTA is different. NAFTA is apparently the only instance where such protections, including a mechanism for resolving investor-state disputes by binding arbitration, have been made available for use against the United States by countries (Mexico and Canada) that invest heavily in the U.S. NAFTA, that is, has created not only the legal possibility of investor claims against the United States, but the actual occurrence of them as well [sic!].' (Meltz 2003:1).

The above excerpt illustrates that while ISDS may well have been the norm in BITs for several decades, NAFTA set a novel precedent. In the run-up to the CETA and TTIP negotiations such arbitration was seen to be a fundamental part of BITs between the majority of international trading powers and especially the EU and the US who had both benefitted enormously from investment arbitration in the past (Kuijper et al. 2014).

As mentioned above, since the declassification of the CETA negotiating mandate we know that Member states had originally not instructed the Commission to include an ISDS mechanism in CETA. However, the negotiating directives were modified in 2011 to include ISDS. The change of heart in relation to Canada is not necessarily surprising if one considers that Canada and the EU had both taken part in the eventually abandoned Multilateral Agreement on Investments between OECD countries negotiated between 1995 and 1998 and had been negotiating the Trade and Investment Enhancement Agreement (TIEA) since 2004. However, it is also important to see that the NAFTA model that the United State brought to the TTIP negotiations influenced the EU's approach to CETA.

While this was not uncontended in the Council as evidenced by the below quote, the NAFTA precedent of merging investment into trade agreements was seen by several Member States as the benchmark for new FTAs, something that the EU had to follow. Following this precedent, in turn, was seen by the Commission as an early step in developing an EU *acquis* in the field of investment policy. In other words, the modification of the CETA mandate meant moving towards a more uniform approach toward investment policy (Lavranos 2013).

'We had a big debate about investor protection in the Council when we discussed the mandate for TTIP. And there was a big group of Member States that was very reluctant to have ISDS included in the mandate (...) my colleagues at the ministry, they deal with ISDS and they are experts of the field.'

They were very critical and warned us to be careful from the beginning. They said: "be careful, and if possible, avoid ISDS and investment protection in the agreement". But that was not feasible, it was not a realistic approach, because of the benchmark idea behind TTIP.' (MS Trade Expert 2016)

Despite the infancy of EU level investment policy, EU member states were not newcomers to the practice of making use of ISDS claims. Based on the approximately 3000 BITs that EU member states were party to, until 2014 a total of 128 ISDS claims (out of 608 known claims globally) were filed against EU member states. However, the majority of these claims (99) were intra-EU claims, originating from new member state EU investors (European Commission 2015a). In turn, the 29 claims made by third parties originated from investors from 'Russia, Norway, Switzerland, India, Israel, Turkey, Lebanon, US and Canada' (Ibid). Furthermore, EU investors from EU15 countries had already been prolific users of ISDS mechanisms themselves. The fact that the Dutch, British, German, French, Italian and Spanish investors had been responsible for roughly 40% of all known ISDS claims until 2014 speaks to this point (Ibid). Indeed, in the 1990s BITs proliferated the investment relationships between the EU15 and the new democracies of Europe as well, which were subsequently kept in place after the 2004 big-bang expansion of the EU.

In other words, while ISDS was not unfamiliar to EU Member States, the pilot projects for an EU level investment policy were based on the NAFTA precedent – the American way. TTIP negotiations are little more than an unpleasant memory, as the Council formally voted to nullify the TTIP negotiating mandate in 2019. However, at the time when negotiations started in 2013, the Commission promoted the idea of a 'deep and comprehensive' agreement for the two largest economies in the world. Not only did the parties' ambitions extend to the reduction of non-tariff barriers and barriers to investment, but TTIP was also intended to include a chapter on regulatory cooperation and standards harmonization, similarly to CETA. The Economic impact assessment prepared for the Commission by the Center for Economic Policy Research went so far as to envision a new regulatory hegemon;

'...where the EU and the US act as a regulatory hegemon, there is scope for setting de facto common, global standards' (Centre for Economic Policy Research 2013:29)

These ambitions were quickly thrust into the spotlight as they played on the fears and distrust many Europeans felt towards the ‘American way’ to policymaking in general and the United States Federal Government in particular (Buonanno 2017; Laursen and Roederer-Rynning 2017). While negotiations with Canada continued in secrecy throughout 2009 – 2014, TTIP’s *draft* (!) negotiating mandate had leaked to the public in May of 2013 one month before it was issued by the Council (see *Figure 6*) making it apparent that ISDS was to be included in that agreement. This acted as a catalyst for anti-trade NGOs to play on European’s fears by using ISDS to illustrate how American corporations would alter Europeans’ way of life.

The Australia – Philipp Morris arbitration case was particularly helpful for anti-trade NGOs to build this narrative. Australia was one of the first countries to introduce ‘plain packaging’ tobacco legislation in 2011 aiming to make cigarette packaging less misleading and smoking less palatable. The legislation included several unfavorable measures for the tobacco industry, most importantly it introduced uniform packaging, color, and font requirements to prevent consumers from associating different colors with different strength cigarettes. A practice used by tobacco manufacturers to associate certain lighter color shades with less harmful cigarettes as most developed countries had introduced bans on labeling cigarettes as ‘ultralight’ or ‘light’. In addition, the legislation mandated uniform guidelines for the placement and appearance of brand names, effectively banning the use of logos (Australian Government Department of Health 2019).

While Australia had successfully concluded an FTA with the United States without an ISDS mechanism in 2004 despite strong pressure from the US to include ISDS, Philipp Morris International was able to bring an arbitration claim against Australia for copyright infringement through its Hong Kong subsidiary. Something it was able to do because of the presence of an ISDS agreement between Australia and Hong Kong. Philipp Morris’ claim was eventually rejected by the arbitrators in 2015 and the Australian legislation was left in place (Knaus 2017).

Nonetheless, in 2013 as the negotiating mandate for TTIP leaked, the Australian example was used by anti-free trade activists and NGOs to convey an overall criticism of the liberal consensus. A criticism that identified the objective of regulatory cooperation and harmonization

as being synonymous with a corporate agenda to abolish regulatory sovereignty and ISDS as this agenda's enforcement mechanisms. The two together, made for, as one vocal opinion writer at the Guardian put it; 'a full frontal assault on democracy' (Monbiot 2013).

Groups that had specialized in contesting issues of international trade in the past yet had failed to gain much traction in Brussels for lack of public interest in trade (Dür and De Bièvre 2007) adopted this messaging after seeing that it resonated well with the public (Eliasson and Huet 2018). The specter of U.S. corporations effectively suing EU Member States to stop them from regulating in the public interest and to recoup lost profits played on Europeans' feelings of anti-Americanism and anti-globalism. Especially in the Netherlands, Germany, Austria, and Belgium, countries that were most affected by anti-TTIP protests.

2. Establishing politicization

Following the leak of TTIP's draft mandate, the politicization of ISDS and through it that of TTIP was all but instantaneous. The CETA agreement's negotiating mandate and negotiating texts did not leak to the public until 2014 (see: Figure 6). Yet as CETA negotiations wrapped-up, around 120 anti-globalization advocacy groups released a 'public plea for sanity' warning about the dangers of ISDS in CETA, claiming that CETA would follow in the footsteps of TTIP because of the NAFTA precedent (Corporateurope.org 2013). Once the finalized CETA agreement leaked to the public, confirming the presence of an ISDS mechanism in CETA, these two agreements became fused. Thus, these NGOs effectively transferred the arguments being made against TTIP to the Canadian agreement, branding it the 'little brother' of TTIP, a message that was driven home hard through using a joint 'STOP-TTIP/STOP-CETA' logo during protests (see Picture 1).

Fueling fears from ISDS these anti-globalization groups painted ISDS as an enforcement tool for 'corporate sovereignty' which together with standards harmonization and regulatory cooperation would have devastating effects on everything from EU food quality to the environment. These quotes from two of the largest anti-TTIP and CETA campaign NGOs and the far-left GUE/NGL group in the EP are illustrative of the type of reasoning employed to connect ISDS to other negative consequences.

'CETA's provisions on investment protection, coupled with its weak protection of the environment, may undermine or have a regulatory chill impact on future sustainable climate and energy policy...' (Corporatееurope.org 2017)

'Based on the 44 legal cases for which data are available, mining companies have sued governments for a total of EUR 50.3 (USD 53) billion. If CETA's investment chapter goes into effect, Canadian mining companies will be able to threaten and file similar lawsuits in all 28 Member States.' (Corporatееurope.org 2017)

'TTIP would have enormous effects on our democracy, the rule of law, consumer and environmental protection, and even on the provision of public services, such as our health service, education, and culture. (...) Additionally, private companies would be given the possibility of suing states before private arbitration tribunals if the states enact laws which have a negative effect on the investments and profit expectations of the company.' (Stop-ttip.org n.d.)

'investor-state dispute settlement (ISDS) mechanisms, have now become a billion dollar business for law firms specialised in suing governments. It weakens sovereign states and public authorities' ability to put in place regulations and laws that protect the public interest by allowing companies to attack laws designed to protect citizens. Companies can claim that a government's actions are lowering their products' expected profits or attacking their intellectual property.' (GUE/NGL 2015:7)

While it is most certainly true that anti-TTIP and CETA arguments pointed to the dangers that harmonizing standards and strengthening regulatory cooperation would bring Europeans such as; chlorine-washed chicken, GMO foodstuff, privatized healthcare and shale gas extraction near inhabited cities – ISDS was the overarching frame used by anti-trade narratives to generate animosity against TTIP and CETA. Not for nothing, as Eliasson & Huet (2018) have shown stoking fears against ISDS was in fact identified by anti-trade civil society organizations as a good tactic to amplify resistance to TTIP with the help of a professional market research consultancy. In this vein:

'ISDS was quickly deemed a useful target which could be drastically simplified to the general public in order to garner attention and raise awareness of TTIP (...) 'Allowing corporations to sue governments in secret courts over policies they don't like' and 'threatening public services' tested well, and became mantras continuously repeated in protests and panel discussions, in YouTube videos, tweets, position papers, reports, and press releases.' (Eliasson and Huet 2018:105)



Picture 1: Protesters in Berlin Germany brandish stop TTIP and CETA signs in 2016. The two agreements became fused in the public debate (BBC.com 2016)

That considered ISDS is as good a proxy when using De Wilde's framework (De Wilde 2011), to establish the politicization of these agreements as any other. Recalling Chapter I three steps are needed to be able to talk of public contestation:

1. **Firstly**, a polarization of opinions on policy must occur.
2. **Secondly**, this must be followed by an intensified debate with stakeholders committing resourced to advance their opinions.
3. **Thirdly**, the polarized and intensified debate must achieve some sort of public resonance.

As discussed in Chapter I, these are relatively intuitive categories. Establishing the presence of polarized opinions in relation to a policy idea, a piece of legislation or even an international treaty is done easily by simply looking at the publicly available opinions of political groups, industry stakeholders, NGOs, etc. Establishing whether a debate based on polarized opinions intensifies or not, and to what extent stakeholders commit resources for advancing their opinions is somewhat more difficult. Given that policymaking and related lobbying activities are rarely transparent it would be easy to imagine situations in which polarized debates between political parties, or parties and industry, or parties and industry and NGOs intensify out of the public eye with no apparent way of measuring the amount of financial, political or other resources being committed to advance an argument.

However, establishing public resonance for a policy debate is relatively unproblematic if we simply equate public resonance with a well identifiable observable manifestation. It would be hard to argue, for instance, that sustained protests of a certain size (measured through press coverage for instance) would not constitute the public resonance of a polarized debate. Protests in turn and by default imply an intensified debate with resources being committed by protesters and protest organizers to counter what they perceive to be a problematic policy item.

In the subsequent, I take stock of these three steps in relation to CETA and TTIP, the evidence used to do so is presented in (Table 8).

Table 8: Evidence used to establish politicization of TTIP and CETA according to the framework of De Wilde (2011)

| Condition | Evidence |
|---|--|
| Polarization of opinions <i>Second half of 2013 to early 2014</i> | <ul style="list-style-type: none"> - Since NAFTA precedent, U.S. trade policy prefers the inclusion of ISDS mechanisms in FTA agreements. - European BITs and European companies are prolific users of ISDS. - TTIP includes ISDS from start of negotiations. CETA mandate is modified to include ISDS in 2011, signaling a uniform EU position on ISDS. <p style="text-align: center;">-Versus-</p> <ul style="list-style-type: none"> - Anti-ISDS civil society groups, opinion pieces in mainstream online media, and center and far left politicians contest the benefits and desirability of including ISDS mechanism in TTIP and CETA seeing it as a threat to regulatory sovereignty, environmental protection, and a gateway lower standards etc... |

| | |
|---|---|
| Intensification of debate <i>First half of 2014</i> | <ul style="list-style-type: none"> - European Commission launches public consultation to gauge stakeholder and public opinions on ISDS in TTIP yielding the highest response rate of any public consultation to date. - The consultation includes several explanations allowing for a better-informed decision about ISDS. <p style="text-align: center;">-Versus-</p> <ul style="list-style-type: none"> - Anti-globalization advocacy groups organize mass automated negative responses to the consultation, totaling 97% of the final answers. |
| Public resonance <i>Between 2014 - 2017</i> | <ul style="list-style-type: none"> - Sustained anti-CETA and TTIP protests between 2014 and 2017 widely covered in reputable media outlets. |

The polarization of opinions occurred with civil society advocacy groups, and opinion pieces in respectable and mainstream media outlets such as Forbes, the Economist and the Guardian warning about the dangers of ISDS;

'If the trade agenda is the proverbial airplane that is down an engine and losing altitude, throwing ISDS out of the cargo hold to lighten the load is the best way to reduce the chance of a crash.' (Ikenson 2014).

'IF YOU wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe' (The Economist 2014).

'Remember that referendum about whether we should create a single market with the United States? You know, the one that asked whether corporations should have the power to strike down our laws? No, I don't either.' (Monbiot 2013).

Professional advocacy groups that had been active on a variety of issues in the past decades (most prominently groups like Corporate Europe Observatory or Global Justice Now) campaigning along an anti-globalization agenda were quick to express anti-ISDS opinions. As already mentioned above in November of 2013, some 4 months after the initial leak of the TTIP draft mandate and a month after the conclusion of the CETA negotiations, 120 such advocacy

groups signed a joint declaration (Corporatееurope.org 2013) warning of the dangers of arbitration calling for it to be dropped from the CETA and TTIP (while at the time it was still not apparent that CETA would have an ISDS).

At the crux of the arguments presented by these various policy entrepreneurs was the insistence that ISDS mechanisms were detrimental to the sovereign rights of Member States. They argued that the very specter of large multinational corporations filing claims against a sovereign state could inhibit the political willingness of national governments to regulate in the public interest. Furthermore, these policy actors argued that developed-to-developed (i.e. with a strong rule of law) country arbitration was not necessary in the first place given that any potential dispute could be solved using well-functioning national courts. Which in turn would guarantee the safety of investments and the rights of Member States.

Further concerns had to do with the lack of transparency of arbitration in general. Critics were quick to point out that there often were no conflict of interest rules for the selection of arbitrators, that settlements between parties did not have to be made public, and that there were no appellate mechanisms in place (Corporatееurope.org 2014). As soon as early 2014, the center-left S&D Group started contesting the legitimacy of ISDS in CETA and TTIP as well much along the same line of reasoning as we shall see below. So, thus far there seems to be little doubt that the Commission's and by corollary the Council's intentions of the desirability of including an ISDS mechanism in the TTIP and CETA agreements was heavily contested already in 2013, thus signaling a polarization of opinions.

The intensification of the debate was quick to follow with anti-trade NGOs committing significant resources to raise public awareness and steer the public discussion on ISDS. Perhaps the best indicator of the success of these civil society groups was the outcome of the Commission's public consultation on ISDS. The consultation was opened in March of 2014, almost two months before the first major protest against ISDS took place in Brussels, thus supporting De Wilde's conjecture that intensification comes before public resonance. The consultation questionnaire asked 12 opinion questions (i.e.: 'what is your opinion of') on the 'modalities for investment protection in TTIP' (European Commission 2014). The questions covered all those

issues that had been raised during the polarized debate ranging from the very *raison d'être* of including investor-to-state dispute settlement in the agreement, to transparency, to the possibility of including an appellate mechanism.

In the consultation questionnaire, the Commission – when it could – provided or examples of what an already negotiated ISDS mechanism would eventually look like in TTIP. Ironically it did so by referencing parts of the concluded CETA text. Technical terms such as ‘most favored nation status’ or ‘national treatment’ were also explained in detail. The consultation indicates a clear committal of resources on behalf of the Commission to engage with perceived public concerns in an accessible manner.

The fact, that the consultation, in turn, yielded the highest response rate in the history of EU public consultations signals a committal of resources on behalf of anti-globalization campaigners who organized mass automated responses through websites (i.e. respondents only had to give their personal information to a pre-filled set of negative responses to the questions being asked). The consultation ended in July. Evaluating the results in early 2015, the Commission concluded that:

‘The vast majority of replies, around 145,000 (or 97%), were submitted through various on-line platforms of interest groups, containing pre-defined, negative answers.’ (European Commission 2015b)

Unsurprisingly anti-TTIP campaigners interpreted the result as a clear victory and an affirmation that ISDS was seen to be undesirable for Europeans. In the Commission, there was a feeling that while the consultation had been hacked by anti-globalization campaigners (EC2 2017), it at least provided some extra time to think about possible ways of addressing the perceived public concerns.

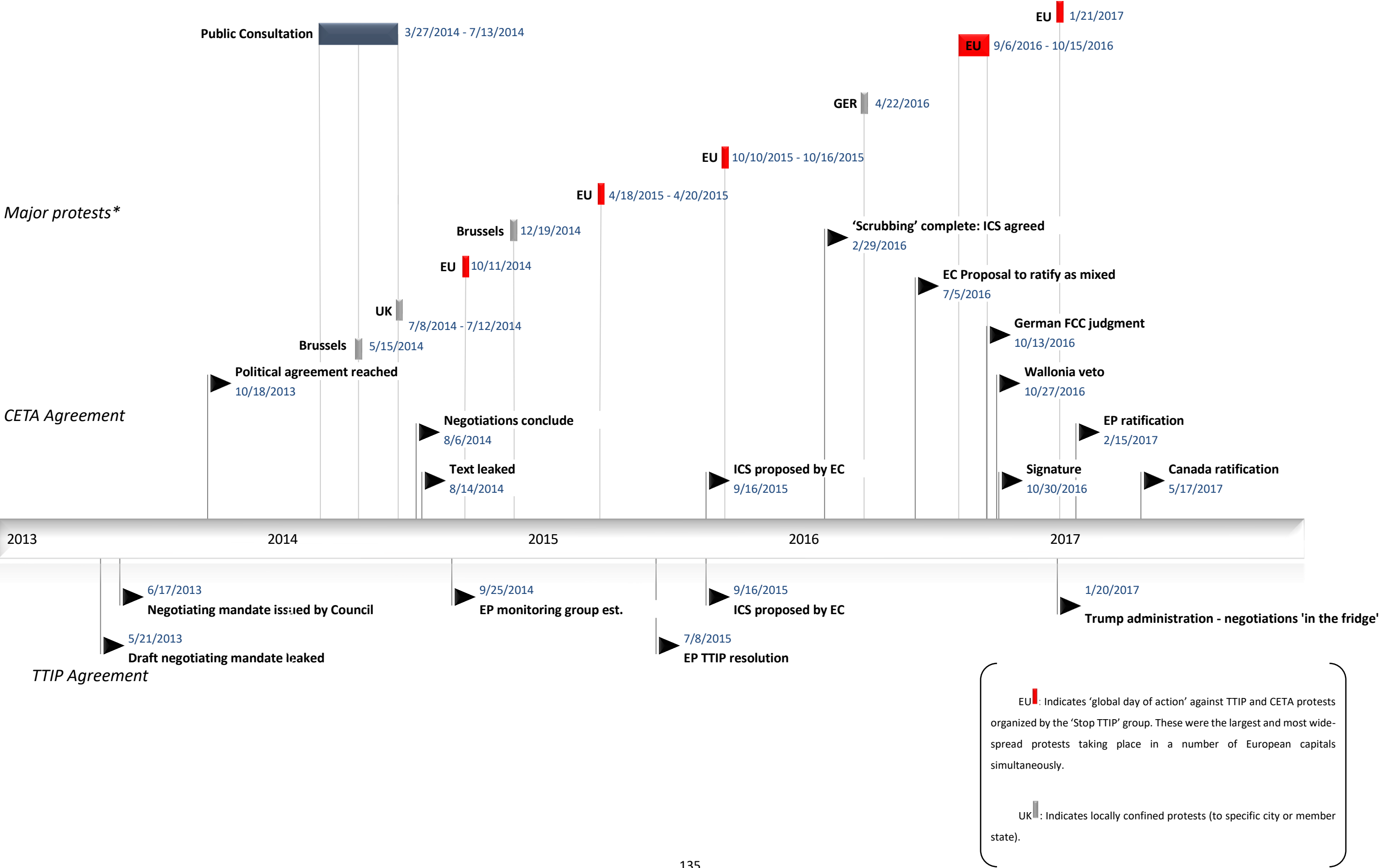
In other words, in early 2014 there was a clear intensification of the debate on the supranational level. This amounted to two well identifiable polarized opinion camps. On the one hand the European Commission as the negotiator of the agreements implicitly supported by the Council which had approved the TTIP and CETA negotiating mandates. On the other hand, the anti-trade advocacy groups, contesting the inclusion of ISDS on ideological grounds. Both these

camps committed resources aimed at amplifying their opinions in the public eye. The public consultation, together with its in-depth explanations of what the origins, uses, and benefits of ISDS were, was not an opinion-neutral exercise, rather an effort at educating the public on an otherwise obscure and rather technical subject matter. The organized ‘hijacking’ of this consultation also clearly amounted to a committal of resources.

The public resonance of the polarized and intensified debate manifested itself in the form of a wave of sustained protests taking place in European capitals between 2014 and 2017 directed against both TTIP and CETA. Figure 6 provides an overview of these major¹⁸ protests during this period along with a timeline of the major developments in relation to both agreements, while pictures 2-4 provide a better appreciation for the scale of these protests. Unsurprisingly, these manifestations were organized by the same anti-trade advocacy groups and far-left activist NGOs that had contested the inclusion of ISDS in the CETA and TTIP agreements to begin with.

¹⁸ While ‘major protests’ is a somewhat arbitrary category, the standard applied here is reporting on the protests in one of two different online platforms: Euractiv.com and TheGuardian.co.uk.

Figure 6 Timeline of major events in TTIP and CETA negotiations / ratification 2013 – 17 (author)





Picture 2: Protest in London in 2014 (Pressenza 2014)



Picture 3: Protest in Hannover in 2016 April (Eckardt 2016)



Picture 4: Protest in Brussels 2016 September (Gutteridge 2016)



Picture 5: Protest in Berlin 2016 October (Schmidt 2016)

3. Amplifying the debate: putting the EP to the test

As discussed in Chapter IV with the entry into force of the Lisbon Treaty the EP gained a veto right over international trade agreements along with a right to stay immediately and fully informed of the progress of the ongoing negotiations (as laid out in Articles 207 & 218 of the TFEU). As established in Chapter IV on the European Convention, the empowerment of the EP came about through the skillful agency of European Parliamentarians who partially obfuscated the rule change but also appealed to a broader sense of democratic legitimacy of Conventioneers. Arguing that the EU's trade policy would become more input legitimacy and transparent through the involvement of the EP.

This section of the chapter continues to trace the evolution of the CETA case after it became politicized. In specific, I focus on the role of the EP in amplifying and subsequently trying to address politicization with the help of the Commission. Through the exercise in process-tracing two important findings come to light. Firstly, evidence suggests that the EP used ISDS's politicization to push for a consolidation of its post-Lisbon powers. Meaning that the EP successfully expanded its involvement in monitoring negotiations and feeding policy input to the Commission – something that formally, it had no right to do. Secondly, while the center-left S&D were initially at the forefront of vehemently opposing *any* form of investor-state arbitration, as the Commission increasingly engaged with the EP, the S&D along with the center-right EPP group worked together with the Commission to substantively reform the ISDS proposal and 'save' the CETA agreement.

These findings lend credibility to the conjectures made in Chapter I that on aggregate, the trade elite – including the center-right and center-left quasi coalition steering the EP during this period, is supportive of the liberal consensus and the Commission's agenda of concluding more free trade agreements. Moreover, these findings also support the expectation that under conditions of politicization institutional rules become fluid and subject to change.

3.1 A problem-solving attitude

In response to the sustained protests, the debate within the EP's INTA committee continued to intensify alongside the protests with the S&D group echoing the concerns of civil society

groups (Martin de la Torre 2014; Tuttlies 2014). Socialist INTA MEPs and six Socialist trade ministers were the first to adopt the arguments of the anti-trade campaigners, reiterating that ISDS mechanisms were unnecessary between democracies (EP1 2015; EP2 2015; EPa1 2015; Martin de la Torre 2015). In April of 2015, two of INTA's S&D MEPs went so far as to say that they would not vote for any agreement containing any shape or form of investor-to-state dispute settlement (EP1 2015; EP2 2015). Yet the center-right EPP adopted a 'wait and see' attitude towards the issue, not expressing such a degree of firm opposition towards ISDS, yet not ruling out that arbitration practices could be made better (EP3 2015).

The S&D's staunch opposition to ISDS came as a surprise to many working in the field of trade policy (EPRS1 2015). As already pointed out, ISDS was nothing new in the EU. Member States were already party to around 3000 BITs, the majority of which contained ISDS, a mechanism that had been around for some 50 years (Kuijper et al., 2014). Moreover, precisely in anticipation of addressing the question of what strategies to follow when negotiating investment and investment protection chapters in the post-Lisbon legal context, the Commission released a Communication in 2010 entitled: 'Towards a comprehensive European international investment policy' (European Commission 2010). Here the Commission argued in favor of employing ISDS mechanisms in future agreements claiming that:

'Investor-state is such an established feature of investment agreements that its absence would, in fact, discourage investors and make a host economy less attractive than others.' (:10).

In response, the EP's 2011 Report on the Communication – endorsed *unanimously* in INTA – voiced support for ISDS and the proposition of basing EU investment on best practices from the Member States, also noting the potential benefits for SMEs (Arif 2011). Nonetheless, the S&D group echoed the criticisms of anti-trade pressure groups in the EP agenda throughout the course of 2014 and 2015. During this period (EP1 2015; EP2 2015), the S&D's communication repeatedly emphasized the importance of giving voice to public concerns as voiced by civil society claiming that:

'the Socialists and Democrats are responding to the thousands of constituents and the many civil society organisations that have raised their concerns.' (Martin de la Torre 2015).

Beyond the general concerns regarding ISDS raised by the S&D, MEPs across isles started voicing criticisms against the unsatisfactory nature and degree of EP's involvement in

the negotiations (EP1 2015; EP2 2015; EPa1 2015). The Commission, which bore the brunt of the EP's criticisms seeing that the Council preferred to limit contact with the EP (TPC1 2016; TPC3 2016; TPC4 2016), had not forgotten the lesson of ACTA from some years earlier. ACTA, a US-led plurilateral international agreement on combatting counterfeiting was agreed between the parties in 2012. This was not an FTA, yet as an international agreement, it too had to be voted on by the EP in accordance with its new post-Lisbon powers. While the EP was initially supportive of the aims of ACTA parliamentarians were not closely consulted during the negotiating process. The agreement came under heavy public contestation for fears of how it would affect internet privacy and once the agreement was presented to parliament, MEPs vetoed it despite significant US pressure on the EP to ratify the agreement (Matthews and Žiková 2013).

The ACTA precedent had clearly shown that the EP would not shy away from the veto (EC1 2016; EC1 2017; EC3 2017). MEPs concerns regarding informational gatekeeping, evasiveness or neglecting to keep the Parliament fully informed were systematically addressed by the Commission following ACTA. Moreover, as CETA's and TTIP's contestation amplified, by all accounts, DG Trade shared a pragmatic understanding that the EP needed to be heard and appeased as much as possible early on lest it practices its veto again (EC1 2017; EC3 2017).

In response to these concerns, and in no small part due to what Commission officials describe as the constructive attitude of the INTA Committee's Socialist Chair Bernd Lange, the two institutions expanded upon and established a number of formalized practices once the public contestation of ISDS occurred in order to develop more concrete instruments to satisfy the EP's contractual right to 'be fully and immediately informed' of developments as per Article 218 of the TFEU (EC1 2017; EC2 2017; EC3 2017). This was done through building on the provisions set out in two inter-institutional agreements (IIA) between the EU institutions. Such agreements gained prominence following the Maastricht Treaty with the aim of specifying the procedural aspects of how the institutions work together to fulfill their treaty obligations to each other.

The two IIAs that came into force following the Lisbon Treaty – the 2010 Framework Agreement Between the European Parliament and the European Commission (European Union 2016) and the 2016 Interinstitutional Agreement on Better Law Making (European

Union 2016) - included specific provisions relating to the role of the EP in trade negotiations. The 2010 agreement set out the type of information that the Commission would (and would not) make available to the INTA Committee membership during the negotiations of agreements. The IIA also established the 'reading room' format for sharing confidential materials with the EP – such as proposed negotiating texts, agreed amendments, timetables for the conclusion of negotiations and signature, etc. The 2016 agreement, in turn, contained less detail on international agreements, simply affirming the rights of all institutions.

As the CETA and TTIP agreements gained traction the EP and the Commission looked to fill the 2010 IIA with a more specific meaning. Two developments stand out in particular. Firstly, and most importantly the practice of setting-up INTA 'monitoring groups' was reinvigorated with regard to TTIP (EC1 2017). Secondly, INTA MEPs and staff received access to restricted EU and even consolidated negotiating documents – which detailed the positions of the negotiating partners – in a secure reading room (EPa3 2017; EPa4 2017).

Monitoring groups had been established by INTA and the Commission during the previous 7th legislative cycle – in relation to the EU-Korea FTA – to keep the EP informed of negotiating developments and provide for a two-way channel of communication with the Commission negotiators (INTA Committee 2014). The TTIP monitoring group proved to be immensely popular amongst INTA MEPs, the otherwise generally ad-hoc meetings became standard fixtures before and after each negotiating round on TTIP (EC1 2017; INTA Sec 2016).

With the help of these regular meetings which took place in parallel to the ongoing protests, and which were by all accounts, forums of genuine debate and discussion the positions of INTA MEPs and the Commission gradually shifted. The concerns of civil society echoed by the S&D that ISDS was not appropriate for the EU became widely accepted by the EPP, the Commission and a growing number of Member States (EC1 2016; TPC2 2016; TPC7 2017). Nonetheless, instead of adopting a no-ISDS position, as was advocated for by anti-trade NGOs by late May of 2015 the INTA Committee had reached a compromise in putting forward a motion for a resolution on TTIP. Effectively setting out a proposal that can only be described as constructive, as it aimed to address the main criticisms against ISDS while preserving the wider institution of investor-state arbitration in these two agreements.

No doubt the proposal reflected the EPP's and at least a part of the Liberal ALDE Groups' more favorable opinion on the merits of arbitration in principle (Schaake 2014). The text agreed upon by INTA called for any proposed arbitration mechanism to be more transparent and to provide guarantees of states' rights to regulate in the public interest (Lange 2015). Although the proposed resolution enjoyed the support of the grand coalition of the S&D and the EPP in Committee, on the day of the planned plenary vote EP Presided Schulz postponed the plenary vote, citing the large number of amendments that had been submitted to the text (Von Der Burchard, De La Blume, and Barigazzi 2015). The postponement was seen to be indicative of the divisions within the broader parliamentary S&D group, seeing that all but one socialist INTA member had supported the compromise between the EPP and the S&D (ibid). Nonetheless, in July the EP adopted a resolution which was substantially unchanged (European Parliament 2015) relating to TTIP and the future of negotiations containing ISDS clauses.

With the passage of the resolution, MEPs, including those that had earlier vowed to veto any such mechanism has explicitly accepted the validity of having investor-state arbitration in these agreements. The Commission acted swiftly, developing a new approach to arbitration; the Investment Court System (ICS) (European Commission 2015c). Announced in September of 2015 and formally proposed to the US in November, the ICS was presented as a new way to guarantee the rights of investors to bring claims against states, while also addressing concerns over the right to regulate, transparency, the selection of judges, and introducing an appellate mechanism. While the resolution was on the TTIP in name, INTA made it clear that the ICS system would have to be applied to CETA in order for the Canadian agreement to pass muster (EP1 2017; EP7 2017).

The Commission obliged, and proposed the changes to the Canadians, even though the negotiations had concluded almost a year ago in August of 2014. Nevertheless, the proposed changes were accepted by Canada shortly after (European Commission 2016b). The Commission unveiled the legally 'scrubbed' CETA text in late February of 2016 touting the new ICS system as the state of the art in investor to state dispute settlement. The Commission also took the opportunity to emphasize its' intent of incorporating the new system into the general pillars of EU investment policy going forward (European Commission 2016b). Indeed, the ICS was seen by the Commission as satisfying all the concerns of protesters. It was

transparent and accountable. The ICS proposal introduced a permanent court, with strong conflict of interest rules, permanent judges, and an appellate mechanism.

The Commission went so far as to implicitly acknowledge that the earlier ISDS system was not in full accordance with the general principles of the rule of law. As Commission Vice-President Timmermans put it:

'With our proposals for a new Investment Court System, we are breaking new ground. (...) With this new system, we protect the governments' right to regulate, and ensure that investment disputes will be adjudicated in full accordance with the rule of law.' (Ibid)

Trade Commissioner Malmström further reiterated this criticism of ISDS in welcoming the new system:

'Today, we're delivering on our promise – to propose a new, modernised system of investment courts, subject to democratic principles and public scrutiny' (Ibid)

However, despite this substantive policy change, the public contestation of investor to state arbitration persisted (see: Figure 6) and CETA was increasingly seen as becoming 'toxic' (EP9 2017). There was a sense of exhaustion in the Council and the Commission as well. Nevertheless, the shift from ISDS to ICS was widely seen to be an accomplishment of the EP. Modifying a significant policy element of an already negotiated agreement was a significant milestone in better establishing the EP as co-principal of the Commission. While Commission officials emphasized the constructive attitude of their Canadian counterparts they also acknowledge the institutional significance of the policy change for the EP (EC1 2017; EC2 2017; EC3 2017). The change to ICS was evaluated by almost all¹⁹ MEPs and EP staffers as a clear victory:

'We as a Committee, put political pressure on the Commission so we can practice effective control over the contents of the negotiations. Since ACTA the Commission knows, that if they don't fulfill our expectations, we will veto them' (EP3 2017).

'While ICS is still a form of class justice, the change is, a victory for the EP as an institution' (EP8 2017).

'[the contestation of ISDS was] the most high-profile flexing of the European Parliament's new muscle since the application of the Lisbon Treaty, after the rejection of ACTA' (EP4 2017).

¹⁹ The exception being the opinion of one of the Political Group Advisors from the Greens group (PA 2017) who evaluated the change from ISDS to ICS as being: 'a victory for the Socialists'.

'ICS is a clear victory for the EP [although] the EC also claims it for itself. But it's a step in the right direction, little by little the EP will become more than the junior negotiating partner that it is now' (EPa3 2017).

'The EP put out its resolution on TTIP in 2015, and it managed to shift the Commission's agenda from ISDS to ICS. This was a sign that the Commission started to take the EP seriously' (EPa4 2017).

In addition, the results of the elite questionnaire ([p.52](#)) seem to support the notion that the EP's involvement in pushing for change was seen by MEPs and the Commission as a step towards strengthening the legitimacy of CETA. In line with the arguments made by MEPs during the European Convention. Figures 7-9 report the responses of elites to the question: 'In your opinion, did the increased involvement of the European Parliament in the CETA negotiations - pushing for policy change from ISDS to ICS, calling for increased transparency, etc. - make the end result more legitimate?'

It is clear from the results that Member State delegates to the TPC were the least convinced that the EP's involvement did improve the agreements' legitimacy (see Figure 9), while 4 of 4 Commission Officials (see Figure 8) and 11 of 13 MEPs thought that their involvement did lend greater legitimacy to CETA (see Figure 7). Member State's skepticism foreshadows what happened next.

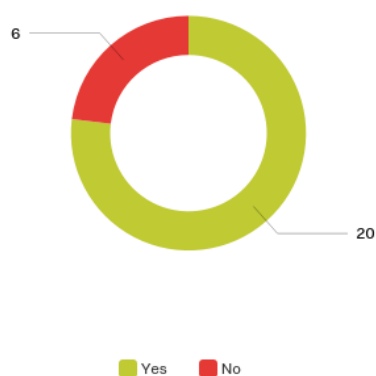


Figure 7 Responses to questionnaire Q3, all respondents (N26), INTA MEPs (13), Perm Rep TPC Deputies (9) and DG Trade Officials, DHU and HU (4)

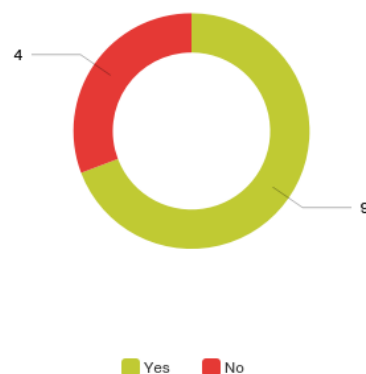


Figure 8 Responses to questionnaire Q3, partial respondents Perm Rep TPC Deputies (9) and DG Trade Officials, DHU and HU (4)

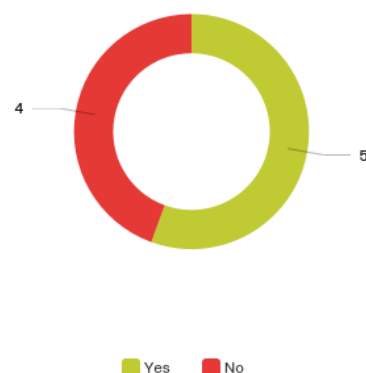


Figure 9 Responses to questionnaire Q3, partial respondents Perm Rep TPC Deputies (9)

Despite the attempts to constructively address public concerns and reform ISDS, protests across Europe continued (see Figure 6). In a somewhat unexpected turn of events, MEPs responded by increasingly distancing themselves from the policy arguments of the very same NGOs and civil society actors that they had relied upon to intensify the polarized debate within the EP. The shift in opinion here is especially striking in relation to the S&D. Official spokespeople on trade had continuously emphasized the role of the EP in giving voice to the: ‘many civil society organisations’ (Martin de la Torre 2015) in the fight against the undemocratic ISDS, with the sentiment being reiterated by MEPs on several occasions (EP1 2015; EP2 2015). However, after the change to ICS, Socialist’s increasingly claimed that NGOs

were professionally organized, possibly foreign-funded, and unreasonable (EP4 2017; EP7 2017). The sentiment of disillusionment was shared by NGOs, with communications detailing how the EP had betrayed the people (S2B Network 2015; StopTTIP 2015; War on Want 2015).

3.2 Close, but no cigar

This chapter has systematically updated our confidence in Step 2 of the dissertation's causal mechanism. The exercise in process-tracing has shown how the politicization of the CETA and TTIP agreements unfolded through the debate around ISDS. It has also shown the nature of the EP response to addressing this phenomenon. On the one hand, the EP used the ISDS debate to drive several procedural changes to the CCP with the aim of increasing the Commission's parliamentary accountability and strengthening its own role in the negotiating process. On the other hand, the constructive EP approach taken toward addressing the public's concerns over ISDS is indicative of how the center-left and center-right coalition in Parliament continued to support the overall aim of saving CETA.

The reception to the Parliament's and the Commission's response underscores how clashing views on trade policy are not all that different from clashing views on trade legitimacy. The trade elite's apparent failure to adequately address politicization, in this case, was not so much the result of a lack of effort or commitment. On the contrary. If anything, the INTA Committee and the Commission made significant procedural changes that did increase parliamentary accountability, in line with the spirit of the Convention. Moreover, the shift away from the classical ISDS regime in favor of a more democratic arbitration system also required a large degree of self-reflection and work as it meant openly admitting that ISDS was not up to EU standards.

The apparent inability of the policy changes to arbitration to quell public distrust reflects the nature of politicization as a standalone input as opposed to a momentary shock. Instead of serving as a formative moment, where thinking about 'how to do things' was fundamentally altered – by the introduction of new norms, or new bargains – the reaction to politicization betrayed a struggle to *save* and *salvage* an agreement that was thought of as being fundamentally good and desirable – including by the majority of the EP. This strengthens the claim that responding to politicization is not something that is done easily

when the fundamental understanding of what constitutes a good, acceptable and legitimate policy outcome is so divergent between the policy in-group and those protesting trade.

The European Convention was likely considered to be a formative moment by its participants, where policy-makers of the day sought to preempt the legitimacy debate in trade by introducing a new decision-making framework. The reality of CETA and TTIP, however, highlighted that the EP alone was ill-equipped to address public concerns over trade. While from the point of view of its own empowerment and from the point of view of throughput legitimacy the EP did a good job at leveraging the politics of these agreements in its (and the public's favor) the demands of protesters that investment arbitration be dropped from these agreements altogether was simply outside the realm of political reality at this time.

The Commission was still operating under negotiating mandates that expressly instructed it to include investment arbitration provisions, and the EP's grand coalition was focused on establishing some precedent for influencing substantive policy rather than indefinitely stalling CETA. Member States, in turn, shied away from presenting counter-narratives on trade to their electorates to convince them of the merits of their approach.

In this sense, we can say that the EP was the largest institutional winner of the initial contestation of CETA and TTIP although on a whole the trade policy élite as an in-group failed to address the root causes of public contestation. Nevertheless, Member States as the primary principles of trade would shortly come to blame the EP for leaving them with the feeling of 'close, but no cigar'. As they turned towards the issue of CETA's ratification the Council would come to realize that the CCP needed further substantive change in order to save the flagship CETA agreement from failure. By turning to national parliaments to rubber-stamp the agreement, Member States sought to boost the agreement's legitimacy but also looked to bring to a head an inter-institutional conflict around investment power delegation which had been left unaddressed in the aftermath of the Lisbon Treaty changes. This, in turn, would result in the need for the ECJ to step in as a third-party arbiter to resolve this conflict and provide a workable solution to addressing how the élite should deal with the politicization of trade going forward.

| | Evidence |
|------------------|---|
| [Step1] | <p>(HC/HU) TTIP/CETA become politicized through ISDS.</p> <p>(HC/HU) Polarization of opinions: Clear preference on behalf of EU to move towards NAFTA model on investment protection between developed countries. Negotiating mandates of TTIP/CETA include aim of concluding investment chapters with ISDS.</p> <p>(HC/HU) Intensification of debate: Anti-globalization advocacy groups start communications campaign to raise awareness about perceived dangers of ISDS. European Commission launches public consultation on ISDS. The questionnaire provides information on the benefits of ISDS. Anti-globalization groups organize to flood consultation with negative responses with the help of pre-defined answers.</p> <p>(HC/HU) Public resonance: sustained wave of protests across EU against TTIP/CETA.</p> |
| [Step2] | <p>(HC/LU) S&D group echoes the concerns of civil society groups contesting ISDS chapter of CETA, importance of giving voice to concerns on EU level (Martin de la Torre, 2014; Tuttlies, 2014 + interview data)</p> <p>(HC/LU) ICS changes substantive parts of ISDS – addressing many of the publicly contested elements. S&D, which found any form of investment arbitration to be unacceptable at the start of ISDS contestation support ICS, which is still a form of arbitration (interview data).</p> <p>(HC/LU) MEPs, Commission Officials and members of the TPC Committee in the Council all corroborate that the shift from ISDS to ICS can be credited to the EP (interview data).</p> |
| [Step 3]: | <p>(LC/HU) A number of TPC members attest to the notion that the EP failed to boost the legitimacy of the CETA agreement, despite change from ISDS to ICS (interview data).</p> <p>(HC/HU) Protests continue on after the ICS system is proposed to replace the ISDS system – See Timeline (Figure 6).</p> <p>(HC/LU) A number of TPC members share the understanding that involving national parliaments to a larger degree in the CETA case in particular and the CCP in general, will increase the input legitimacy of CETA and future agreements (interview data).</p> |

Table 9: Summary of evidence to update confidence in [Step1 - 3]

Chapter VI: What next? Inter-institutional conflict and mediation by the ECJ^{20 21}

‘[Following the ECJ ruling] trade agreements will be easier to conclude. This way we will be able to avoid difficult political debates’ – Member of European Parliament (EP9 2017)

The Commission’s and the EP’s efforts to quell public anxieties in relation to CETA by increasing transparency and reforming investment arbitration failed. As protests continued across the EU following the last-minute modifications of the agreement’s arbitration clause, Member States’ fears grew that CETA might eventually be rejected by an increasingly polarized EP. Despite having been standoffish towards engaging head-on with politicization in the past a sense of urgency took hold of the Council. Something had to be done to ‘boost’ the legitimacy of CETA and ‘fix’ trade policy.

The exercise in process-tracing reveals that the proverbial silver bullet to this problem was ratifying CETA as a mixed competence agreement. A choice that would both allow for national parliaments to effectively rubber-stamp the agreement with their seal of approval while also giving Member States a chance to further a competence debate, they had been having with the Commission on investment. Arguably the foremost cause of the vehement public contestation of trade, the delegation of investment competences to the EU level had also been the source of much inter-institutional debate after the Lisbon Treaty took effect. Similarly, to the EP’s empowerment in trade, this power transfer originated from the Convention on the Future of Europe almost by ‘accident’ (Meunier 2017:593) by way of skillful EP agency and obfuscation, slipping past Member States.

While the Commission and Member States had been at odds regarding what constituted *mixed*, as opposed to *EU only* competences in the past, the competence dispute over investment led the Commission in 2015 to call on the ECJ to settle the question

²⁰ Parts of this chapter (under heading ‘2. Why investment competences were already contentious’ and heading ‘3. Opinion 2/15’) will be appearing in a forthcoming publication: Márton and Szilágyi-Gáspár, ‘Creeping Member State Powers in the EU’s Common Commercial Policy: The Curious Case of Investment Protection’ in Nagy Ed, *Global Values and International Trade Law*, London, New York: Routledge.

²¹ Parts of this chapter will appear in the forthcoming publication: Márton, ‘How the debates around trade policy helped rebalance the executive-legislative relationship in favour of the European Parliament’ in Fromage and Herranz-Surrallés Eds, *Executive-legislative (Im)balance in the European Union*, London: Hart Publishing.

definitively in relation to the EU-Singapore FTA. At the time when CETA was put forward for ratification, the ECJ had not yet delivered a ruling on the case. By all accounts, the eventual ruling on the Singapore FTA (Opinion 2/15) took into consideration Member States' clearly expressed preferences on investment in relation to CETA, while also keeping the interests of broader EU trade policy at heart.

Opinion 2/15 effectively delivered a bargain between Member States and the Commission. It empowered the EU in all competence areas except for investment arbitration and portfolio investment – to the displeasure of the Member States, while also 'renationalizing' investment competences – to the displeasure of the Commission. The 2/15 ruling created a framework for a qualitatively different type of EU trade policy, giving the trade in-group the possibility to pursue the liberal trade agenda more efficiently, without having to worry about national level parliamentary ratification in the future.

As will be discussed in Chapter VII, the Commission's subsequent decision to drop investment arbitration from the remit of new generation FTAs, and instead focus on EU only competence agreements – and Member States' acceptance of this – clearly reaffirms the trade in-group's preference to keep trade policy as simple and streamlined as possible. By sidelining national parliaments this new approach also gave a definitive answer to the question of what constituted a sufficient level of input legitimacy for trade agreements.

This chapter traces Steps 3 and 4 of the causal mechanism elaborated in Chapter III ([p.89](#)). Recalling the claims being made here, our expectation is that following the failure of the EP's and the Commission's efforts to de-politicize CETA, Member States will push for a revision of the existing rules to further boost the legitimacy of the agreement. In turn, this should lead to a new framework for the trade policy through the intervention of the ECJ. One which is better suited to circle fence the core purpose of trade, while also ejecting the most contentious part of the post-Lisbon agenda – ISDS. Table 10 unpacks the observable manifestations that will update our confidence in these claims.

| [Step3] | Observable manifestation; | Unpacked |
|--|---|---|
| <p>Member States initiate revision of rules to de-escalate politicization and protect the aims of trade policy (mixed ratification).</p> <p>Revision feeds into inter-institutional conflict. Requiring the ECJ to step-in as a third-party arbiter.</p> | <p>Acknowledgement that the EP cannot deliver on Convention promise yet trade still needs to be saved – rubber stamp boost to legitimacy with national parliaments.</p> <p>Despite liberal trade consensus, Lisbon rules on investment are conflictual.</p> | <ul style="list-style-type: none"> * Discussions in the TPC acknowledge that the change from ISDS to ICS through the involvement of the EP is insufficient to ‘legitimize’ CETA. * National parliaments seen as an easy ‘rubber stamp’ solution to legitimacy problem. * The legality of investment competences is disputed between the Commission and Member States. |
| [Step4] | Observable manifestation; | Unpacked |
| <p>ECJ creates new trade architecture that:</p> <ul style="list-style-type: none"> - Circle fences the liberal consensus strengthening EU trade policy. - Eliminates investment arbitration from scope of trade policy. | <p>Court ruling is conscious of unprecedented political importance of the CETA episode.</p> <p>Ruling deepens integration, while also being responsive to Member State secondary interest to revisit investment power delegation.</p> | <ul style="list-style-type: none"> * Ruling is understood to be of ‘constitutional’ importance for trade policy framework. Ruling delivered by Full Court. * Ruling allows Commission to negotiate and conclude agreements as EU only without investment arbitration – which had served as the way for anti-trade NGOs to politicize agreements in the past. * Ruling further defines incomplete rules on investment power delegation. |

Table 10 Details of expected observable manifestations for Steps 3 & 4 of Causal Mechanism

1. Searching for a legitimacy ‘boost’

Despite the politicization of CETA and TTIP becoming increasingly clear and visible in domestic politics as early as 2014 with repeated marches numbering in the tens of thousands, national governments in the most affected national arenas did little to address public concerns and present a positive counter-narrative to the one being presented by anti-trade NGOs (Garcia-Duran Huet and Eliasson 2017). Even though Member States supported the opening of negotiations with both Canada and the United States with the Council explicitly endorsing the aim of including an investment arbitration clause in these agreements.

Figures 10-12 report further results of the élite questionnaire conducted to triangulate opinions on the CETA debate and its ratification amongst EU élites (p.52). Responses to the question of: ‘In your opinion, did national governments do enough to communicate the expected benefits of CETA to their electorates?’ are indicative of this lack of engagement of European electorates on behalf of Member State governments. Out of a total of 29 respondents from the three institutions, 19 thought that Member States did in fact not do enough to communicate with the electorate (Figure 10). Commission Officials and MEPs were the most negative in this regard as none of the 4 Commission Officials and only 5 out of 15 INTA MEPs thought that Member States’ efforts were sufficient (compare Figures 10 and 11). Even when looking at TPC Deputies, who represent Member States (Figure 12) only half of them were of the opinion that Member States efforts at communicating the benefits of CETA were sufficient to counter politicization.

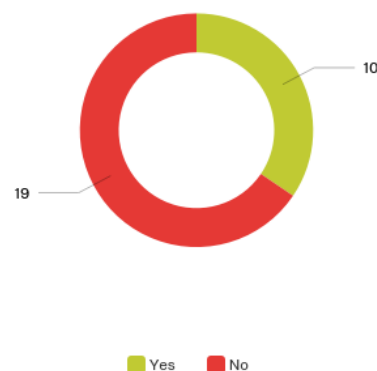


Figure 10 Responses to questionnaire Q1, all respondents (N29), INTA MEPs (15), Perm Rep TPC Deputies (10) and DG Trade Officials, DHU and HU (4)

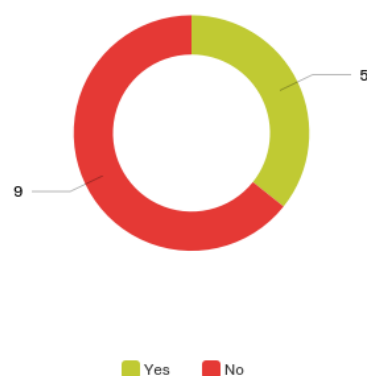


Figure 11 Responses to questionnaire Q1, partial respondents (N14), Perm Rep TPC Deputies (10) and DG Trade Officials, DHU and HU (4)

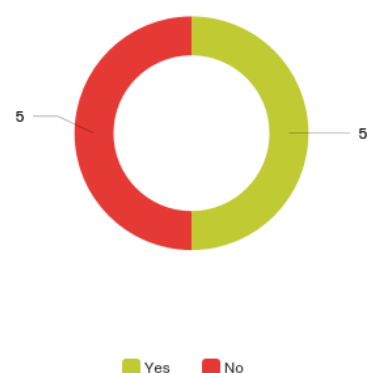


Figure 12 Responses to questionnaire Q1, partial respondents (N10), Perm Rep TPC Deputies (10)

The German Government reaction was especially telling in this regard. Germany was the single most heavily contested national arena, with the Commission deciding to focus most of its – limited – communication efforts here to support the German Government in addressing fears, dispelling myths and conveying the facts of the CETA and TTIP agreements (EC2 2017; EC4 2017). Yet, one Senior Commission official involved in this effort describes the lack of German Government engagement with the Commission in public forums and info sessions as ‘spectacular’ and ‘very challenging’ (EC4 2017). Government representatives

routinely canceled appearances – they had previously agreed to undertake together with the Commission – leaving the Commission, at the last minute, in the awkward position of having to advocate for CETA and TTIP in front of a domestic forums (EC4 2017) as opposed to providing expert support for German Christian Democrats to make the case for CETA.

In addition to this apparent apathy, Bauer (2016a) points out, that the German Federal Ministry for the Environment actually financed one of the main anti-TTIP campaign organizing NGOs: ‘Forum Umwelt und Entwicklung’ (:74). All while the EP together with the Commission tried to work towards addressing public concerns relating to investment arbitration to salvage the Canadian agreement. Furthermore, the Council, as the institutional principal of the Commission never publicly called into question the desirability of CETA (or TTIP for that fact). That said, it is difficult to not see this apparent lack of effort as anything else than a lack of a sense of urgency on behalf of Member States to address the concerns of the public.

The standoffish approach of Member States changed after it became apparent that efforts by the Commission and the Parliament to address public contestation would not deescalate the situation. The Commission unveiled the legally ‘scrubbed’ CETA text in late February of 2016 also announcing that Canada had accepted the change to ICS even though the agreement had already been finalized over two years ago (European Commission 2016b). This meant that the agreement could now move on to the ratification phase. As discussed in Chapter V, the ICS arbitration model was seen by the Commission as satisfying all the concerns of protesters as it was more transparent and accountable than the old model.

In fact, in the Council’s TPC, Member States increasingly felt that not much more could be done to respond to calls for more transparency, and openness since CETA had become as good of an agreement as it would ever get. TPC members saw themselves and the EU trade élite as a whole as having done more to address concerns over transparency and legitimacy than ever before. Beyond the change to ICS, the Commission had made a vast amount of previously classified negotiating documents public, and through the involvement of the EP the negotiations were seen to have gained an unparalleled level of democratic oversight. As such, it is not all that surprising that a sense of frustration took hold over the Council (TPC1 2016; TPC3 2016; TPC4 2016; TPC5 2016; TPC6 2017; TPC7 2017) and the Commission (EC1 2016; EC1 2017; EC2 2017; EC3 2017; EC4 2017) as protests continued following the finalization of CETA.

Importantly, CETA became more than just a trade agreement. In its finalized form CETA was seen by the trade community as *the* state of the art ‘gold standard’ agreement (European Commission 2016a) delivering on the liberal consensus. It was feared that blockage of CETA would send EU trade policy reeling. These frustrations are captured well by one TPC officer in particular:

‘I don't think there has been a lot of things we hid there actually, contrarily to public perception (...) Between the leaks and the transparency which was getting higher by the day, almost. People really wanted CETA to go through, and were willing to accommodate some of our principles and the usual way of working, and to be flexible on that, to get it [CETA] through, because it would have been really traumatic for EU trade policy, had been CETA totally blocked’ (TPC2 2016).

As shown by the quote, the sense of frustration was essentially directed at the ability of the CCP as an institution to adequately respond to protests. While this frustration did not call into question the benefits of EP involvement in bettering the eventual policy outcome, or making the process itself more throughput legitimate, it clearly signaled dissatisfaction with the adequacy of the post-Lisbon rulebook. It had become clear that *in lieu* of a proactive engagement strategy with dissatisfied and vocal civil society on a national level, trade contestation could not be successfully addressed through merely increasing the involvement of the EP.

This sense of frustration meant that the Council turned to national parliaments in an effort to seek an additional boost to CETA’s input legitimacy. One TPC interviewee captures well the type of argument shared almost unanimously in the Council at the time²²:

‘The EP has no say in the mandate process, so it's their only way to shape negotiations, to influence them via resolutions. I think they did that responsibly. [But] Politically, it's also rather evident that there (...) was so much public intention and debate, and so many questions of transparency, questions of accountability in the process... [that there was a] greater need, let's say, for parliamentary debate, also at the national level. [If] we have a national parliaments on board, (...) there's very deep and overall democratic scrutiny.’ (TPC2 2016).

The preference of giving national parliaments a larger role in the ratification process was premised on a strong assumption in the Council that involving them would mostly be a

²² By multiple accounts of interviewees, Italy was the only Member State that (vocally) opposed the idea of mixed ratification, arguing that it was contrary to efficiency. Interviewees attribute this to the personal convictions of Carlo Calenda, Italy’s then Minister of Economic Development (the portfolio that oversees trade) (EPa2 2017; EPa3 2017; TPC3 2016; TPC5 2016).

communications exercise as the support of national legislatures was all but taken for granted, given continuing government level support for CETA.

'The EP doesn't really adequately represent citizen's interests. [National parliaments] can help sell [sic!] the message and explain the benefits of the agreements to the public (...) [they] won't hinder us, they are selling mostly our view. [Giving] everyone a sense of involvement, [is] worth it. It shows that we are not living in a federal super state. It quells anxieties.' (TPC6 2017)

'The EP will never be legitimate (...) it's best to have national interests be well considered and aim for the broadest possible compromise. This was the opinion with the competence issue. [This way] national parliaments can bring legitimacy [to the agreement].' (TPC7 2017)

Interestingly, the results of the élite questionnaire show that the preference for national parliamentary involvement in the decision-making process was shared by INTA MEPs yet not shared by senior DG Trade Officials (see: Figures 13 - 15). This is perhaps best explained by the already mentioned burden that DG Trade faced in acting as a conduit between the Council and the EP in aggregating the latter's interests and red lines to the TPC. However, the majority of TPC Deputies, DG Trade Officials, and INTA MEP respondents shared a skepticism about the capacity and capabilities of national parliaments to contribute to the substantive policy debates in the CCP (see: Figures 15-18). This further supports the point made above, that the exercise of involving national parliaments was mainly conceived of as rubber stamp to boost legitimacy rather than a conduit for broadening the policy debate on trade even from the point of the EP.

'National parliaments' involvement is ok, but it's better to have clear rules for their involvement. There should be some degree of monitoring for them, the same way that we have, and there should be some way for them to express their views, but they shouldn't be able to just come up with new demands and change the outcomes of negotiations at the very end of the process' (EPa2 2017)

Responses to the question Q4: 'In your opinion, does having national parliaments as more of an institutionalized fixture in trade policy making (with national parliaments drawing red lines during the negotiation of future mixed competence agreements) benefit the Common Commercial Policy in terms of legitimacy?'

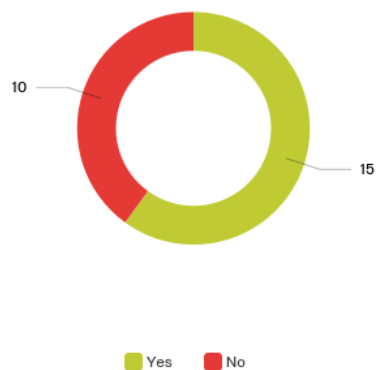


Figure 13 Responses to questionnaire Q4, all respondents (N25), INTA MEPs (12), Perm Rep TPC Deputies (9) and DG Trade Officials, DHU and HU (4)

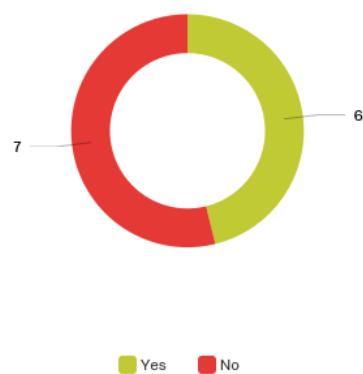


Figure 14 Responses to questionnaire Q4, partial respondents (N13), Perm Rep TPC Deputies (9) and DG Trade Officials, DHU and HU (4)

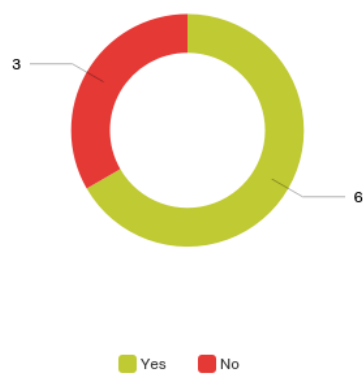


Figure 15 Responses to questionnaire Q4, partial responses (N9), Perm Rep TPC Deputies (9)

Responses to the question Q5: 'In your opinion, do national parliaments have the adequate capacity & knowledge to contribute to substantive policy debates in trade?'

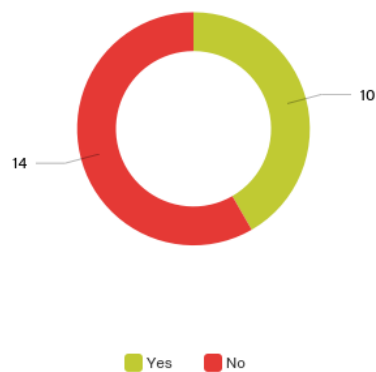


Figure 16 Responses to questionnaire Q5, all respondents (N24), INTA MEPs (12), Perm Rep TPC Deputies (9) and DG Trade Officials, DHU and HU (3)

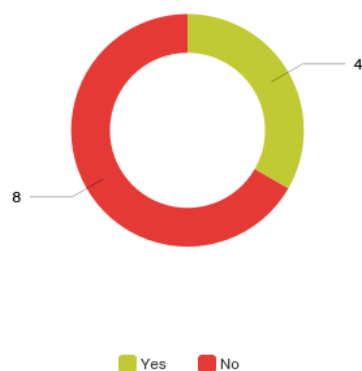


Figure 17 Responses to questionnaire Q5, partial respondents (N12), Perm Rep TPC Deputies (9) and DG Trade Officials, DHU and HU (3)

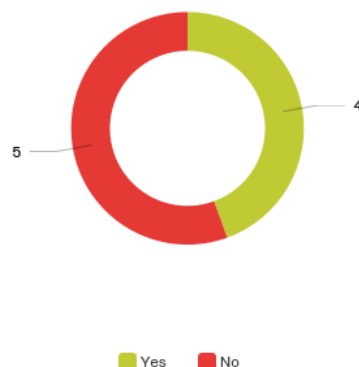


Figure 18 Responses to questionnaire Q5, partial respondents (N9), Perm Rep TPC Deputies (9)

In the run-up to the eventual submission of CETA for ratification, Commission President Juncker remarked that: ‘None of the member states have a problem with the content of this agreement’ and that an EU only submission would not prevent national governments from asking their parliaments how to vote in the Council (Vincenti 2016). Despite these remarks and the logic underlying them – that enhanced parliamentary control could be exercised without opting for a lengthier ratification process – the Commission submitted the concluded CETA agreement to the Council for a mixed ratification procedure on the 28th of June 2016. This decision was attributed to the Council making clear to the Commission that submission of CETA as an EU-only agreement would be overruled by the Council (ibid). Yet it is difficult to disregard the broader context here. The decision on how to ratify CETA took place at a time when the ECJ was already considering the question of competence mixity in relation to the EU – Singapore agreement and was seen to be waiting on the resolution of the CETA debacle before delivering a ruling (EP Officials 2017; National Agent 1 2017; National Agent 2 2017). Nevertheless, after it’s submission, the agreement was ready to be signed by the EU and Canada.

In the final moments before signature, however, contestation flared yet again, this time in the Belgian region of Wallonia. The ‘Wallonia incident’ showcased two things. Firstly, just how salient an issue investment arbitration continued to be for anti-trade activists despite the choice for national parliamentary ratification, and secondly, just how fragile the EU’s capability to deliver on its post-Lisbon trade agenda was owing to the Byzantine nature of its internal decision-making procedures.

1.2 The Wallonia episode: a warning sign

Owing to the consociational nature of Belgium, all five Belgian parliaments (four sub-national and one national) must give their consent to the Federal Government for it to be competent to sign an international agreement. In the case of a mixed ratification process, where a trade agreement must be endorsed unanimously by all Member States, the failure by any Member State to endorse the signature of the agreement on behalf of the EU means that the agreement cannot move to the ratification phase. In the case of an EU-only agreement, the European Union can, in theory, sign and ratify FTAs through QMV voting in the Council. Yet CETA was submitted for mixed ratification.

Importantly, the act of signing an agreement precedes its ratification. Yet ‘In order to circumvent [the] long ratification procedure’ (Van der Loo 2016:n.a.) implied by mixed ratification in the CETA case²³ the parties decided to provisionally apply the non-mixed competence elements of the agreement following the EP’s ratification of CETA. This means that while the ratification process is ongoing, most of the obligations and rights negotiated under CETA effectively entered into force. So, while the authorization of the Commission by all Member States to sign an agreement does not prejudice the outcome of the ratification procedure, which gives national parliaments yet another chance to vote on the agreement it is by no means trivial.

The Socialist Government of Wallonia (population of 3.5 million) led by Paul Magnette during this period understood the significance of this very well and used the disproportionate leverage of Wallonia over the signature process in Belgium to champion the concerns of anti-trade groups. As the Belgian Federal Government (which at the time was composed of a 4-party coalition that did not include the Walloon Socialist Party) sought authorization to sign CETA from Belgium’s constituent legislatures in November of 2016, the Walloon Parliament rejected authorizing the signature of CETA. In the parliamentary debate preceding the vote, Walloon Minister-President Magnette said the following:

‘I consider this as a request to reopen negotiations so that European leaders could hear the legitimate demands which have been forcefully expressed by an organized, transparent civil society.’ (de la Baume 2016)

²³ Ratifying the non-controversial mixed competence EU-Korea FTA (KOREU FTA) took five years.

As discussed above, at EU level there was a sense that trade decision-makers had already addressed all legitimate civil society concerns and that CETA had come to represent nothing less than the gold standard in transparency and quality for new generation FTAs. Yet in order to appease Wallonia, which at this point could have single-handedly destroyed CETA, the agreement's Joint Interpretative Instrument, a legally binding document that 'specifies how several provisions of CETA should be interpreted, but it does not alter the text of the agreement' (Van der Loo 2016:n.a.) was modified before the signature to include what can only be described as a number of redundant guarantees on parties' right to regulate, uphold commitments made in the agreement, and ensure the transparency and accountability of the ICS tribunal. As Van der Loo notes:

'The only innovative element [was] that the EU and Canada [had] agreed "to begin immediately further work on a code of conduct to further ensure the impartiality of the members of the Tribunals", including on the method and level of their remuneration and the process for their selection.' (Van der Loo 2016:n.a.)

Beyond tweaking the Interpretative Instrument, seizing the moment, Member States and EU institutions also adopted a total of 38 statements and declarations attached to the Council Minutes on the decision to sign CETA (The Council of the European Union 2016). These statements and declarations are non-binding for Canada. They are internal EU documents attached to Council minutes and not to the CETA agreement itself. The declarations fall into two broad categories. On the one hand, several declarations reiterate the obvious in areas that hold special relevance in specific national contexts. Member States made a total of 13 statements of this nature. For instance, Bulgaria and Romania both made statements 'recalling the commitments' in CETA to work towards visa-free travel. Greece stated that the level of protection afforded Greek FETA Cheese was lower than what it wanted, and that the CETA outcome would in no way prejudice Greece's preference for stricter intellectual property right protections for FETA in future agreements.

More interestingly, another group of declarations speak to the broader point of just how turbulent the institutional rules surrounding trade were at the moment when CETA was signed. Member States found it necessary to make declarations:

- On how the signing and provisional application of CETA as an agreement:

- did not prejudice their competences to regulate the criminal enforcement of intellectual property rights, regulate copyrights, pursue separate agreements on transport services beyond the content of the CETA agreement;
- did not mean that environmental and labor provisions in CETA, the mutual recognition of professional qualifications, or the protection of workers were EU competences;
- Reminding the Commission that the EU procedures would apply:
 - to the process of adopting an EU position in the Joint Committee of CETA;
 - to the process of terminating the provisional application of CETA in the case of a failure to ratify the agreement;

In turn, the Commission made similar institutional declarations, pointing out that:

- CETA did not prejudice Member States' right to regulate;
- The Commission did not agree with Member States' decision to ratify CETA as mixed given that in the Commission's view the agreement fell entirely under the purview of EU competences.

These observations strengthen the arguments made through the Causal Mechanism in two ways. Firstly, that despite the seemingly settled legal framework governing EU trade policy in the post-Lisbon period, the rules were anything but settled with the CETA episode acting as a watershed moment. Secondly, these statements were a public expression of the political preferences of Member States and the Commission at a time when the ECJ was actively considering how to shape the competence rules of the CCP in relation to the Singapore FTA.

Following the modification of the Interpretative Instrument, the Walloon Legislature gave its consent to the Belgian Government on the 28th of October 2016 and CETA was signed by the European Union and its Member States on the 30th. The European Parliament ratified the agreement a few months later on the 15th of February. Yet the Wallonia episode was widely commented as being an embarrassing demonstration of incompetence for the EU. The Economist's Charlemagne column captures this sentiment eloquently.

'the EU's credibility as a trade negotiator rests on its ability to speak for its members. Without that, the world's largest consumer market starts to lose its allure. The agonising course of CETA

will not quickly be forgotten by potential partners. If boning up on the niceties of Belgian regional politics, or the details of national referendum laws, becomes a prerequisite for negotiating with the EU, they will start to wonder if it is worth the bother.’ (Charlemagne 2016)

In line with this sentiment, the Wallonia Episode provided the trade élite with a very important takeaway: namely that the ambition to keep delivering on the far-reaching trade agenda was incompatible with a continued reliance on mixity at a time when trade had become so publicly contested. It became apparent that future trade agreements might become unworkable if national politics could continue to play such a pronounced role as in the case of CETA:

‘The Wallonia episode showed Member States that mixity might not always be in their interests. It is effectively a weapon that can be turned against Member States.’ (EC5 2017)

‘Belgium and the Wallonia incident was the only really unexpected occurrence. But that was more about national politics as well. Magnet wanted to screw Jean-Michelle for ousting the Socialists from the federal coalition. [...] The whole CETA episode left a feeling that this is not something that anyone wants repeated.’ (Council Sec 2017)

‘In the case of CETA, Wallonia - a region of 3.5 million citizens - held back an agreement supported by EU governments representing over 500 million people. If the European Parliament’s role is side-lined, as it was in this case, Europe’s ability to make decisions is undermined and special interest groups, regions and states can hold the process hostage. This, I believe, is the real source of illegitimacy.’ (EP4 2017)

‘The same complicated way of negotiating trade that we have now, will prove to be ineffective and impossible in even shorter time frames as we have been declaring now. The timescale for businesses is crippling as well.’ (EP6 2017)

Following the signature of CETA national level ratification procedures could finally start and the ECJ could now look upon the CETA case as a whole, before rendering its ruling on Opinion 2/15.

Before moving on to discuss the court ruling, it is worth asking and answering the question of how exactly investment competences were transferred to the EU level in the first place to appreciate that the delegation of these powers was already a contentious issue amongst Member States before ISDS thrust investment into the public eye. While CETA demonstrated the debilitating effects that mixity and moreover a public debate could have on the EU’s ability to be a credible and decisive trade partner, the Commission’s push to solidify its exclusive competence over FDI in the run-up to CETA, and Member States’

resistance to these attempts also highlighted that the post-Lisbon rules needed to be revisited as they were contentious. This debate would also eventually be settled through the intervention of the ECJ, which in this sense cleared the CCP of almost all its institutional uncertainty that had it had accumulated since the Lisbon Treaty took effect.

2. Why investment competences were already contentious

As discussed in Chapter V the EU gained competence over FDI with the entry into force of the Lisbon Treaty where Article 207 of the TFEU cites ‘foreign direct investment’ as an EU competence right along tariff rates and the trade in goods. This act of power-delegation meant that the scope of FTAs could include standalone investment chapters – including rules on arbitration, something that has come to be considered as a staple of Bilateral Investment Treaties (BITs) since the appearance of the first BIT in 1959 (Miles 2013).

As discussed in the previous chapter ([p.123](#)), international investment law had developed separately from international trade law. The two were not fused. However, beyond bringing ISDS mechanisms to developed-developed country investment relationships, the NAFTA precedent also incorporated this staple element of BITs into what was arguably the most ambitious regional FTA of the day. As the global trading system shifted towards more comprehensive FTA agreements in the post-WTO period the incorporation of investment into trade policy might well have seemed like the logical next step to take (Titi 2015).

Indeed, writing shortly after the entry into force of the Lisbon Treaty, some legal scholars welcomed the inclusion of FDI within the scope of the CCP arguing that it restructured the division of powers between the EU and the Member States and ‘simplifie[d] a once complex set of rules and contribute[d] significantly to the development of a common foreign investment policy’ (Villata Puig and Al-Haddab 2011:294). Along these lines, already in 2010 then Trade Commissioner Carel De Gucht made the Commission’s intentions clear:

‘Experience has led the Commission to believe that the best way forward to integrate investment into the common commercial policy lies in broader trade negotiations.’ (De Gucht 2010:3)

However, despite this seemingly clear-cut competence transfer and the Commission’s early determination to merge investment policy into the CCP, the very transfer of these competencies was itself a contentious affair. In the face of the Commission’s efforts to

‘Europeanize’ BITs in the aftermath of Lisbon, Member States already started pushing back coming to question what exactly the new scope of Article 207 allowed the Commission to do.

2.1 Transferring investment competences to the EU level

The story of how investment powers were delegated to the EU level is eerily similar to the story of how the EU acquired a veto over trade agreements. Though obfuscation and skillful agency originating at the Convention. Meunier, in line with the claims made about the EP in this dissertation (Chapter IV), argues that the transfer of investment competences to the EU level: ran counter to the preferences of the Member States and occurred by stealth ‘as a result of Commission entrepreneurship and historical serendipity’, instead of intergovernmental bargaining and pressure groups (Meunier 2017:594).

The Commission’s attempts to include the protection of foreign investment on the negotiating agendas for the Maastricht, Amsterdam and Nice Treaties ended in failure. Yet, the European Convention on the Future of Europe opened a window of opportunity for the Commission to include FDI in the text of the Constitutional Treaty with the help of the Secretariat of the Praesidium of the Convention, obfuscating these changes past national delegates (Meunier, 2017:601-603). Article 207 paragraph 1 of the TFEU was in fact a carbon copy of Article III 315 of the failed Constitutional Treaty (Cremona 2003:1363). While Working Group (WG) VII of the Convention on external action did not make any recommendations to include FDI in the CCP following the work of the WG, the Secretariat of the Praesidium included FDI in the text of the Draft Constitution at the insistence of the Commission, without consulting with the WG (Meunier, 2017:601-603). Later on, some members of the WG argued against these changes (Heathcoat-Amory 2003), however, the Convention’s Plenary ultimately adopted a draft constitution proposing the transfer of FDI to the EU level.

Similarly, to the EP veto, the inclusion of investment competences also slipped through the cracks following the failure of the Constitutional Treaty, to make its way all the way to the Lisbon Treaty. As one former member of the influential Amato Group recalls, in the process of repackaging the Constitution for reuse as the Lisbon Treaty, the group of seasoned European politicians overlooked the fact that investment had long been regarded, and deliberately kept separate from trade:

'[We] did not consider modifying the actual substance of the agreement (...) We probably didn't notice investment. Even though we should have, since it is such an outlier. Investment is clearly a domestic economic instrument. So, it makes no sense to include it based on the argument that it has to do with trade.' (Minister2 2017)

Even before the issue of ISDS in trade agreements came to occupy center-stage in the political debate, Member States realized that their mistake with tensions between the Commission and Member States becoming apparent once as the Commission started exercising its newfound competence in relation to BITs.

The Commission's attempt to solidify its investment competences came in 2012 when the Commission proposed Regulation 1219/2012 'establishing transitional arrangements for bilateral investment agreements between Member States and third countries' (Grandfathering Regulation). The proposal identified BITs as an exclusive EU competence based on Article 207's reference to FDI. The Commission's original proposal envisaged the introduction of an authorization procedure for grandfathering-in existing BITs concluded by Member States contingent on the Commission's determination that these were compatible with the *aquis* and given they:

'Did not constitute an obstacle to the development of the Union's policies relating to investment, including in particular the common commercial policy' (Lavranos 2013:9)

This created resistance from Member States who disputed the necessity of grandfathering-in their BITs in the first place and did not take kindly to the idea of the Commission screening agreements which they had negotiated independently since the late 1950s²⁴. As Lavranos notes, Member States saw the proposal as the Commission equating its FDI competences with BITs in order to use the Regulation as:

'A tool, which has the sole purpose of solidifying and expanding the powers of the European Commission rather than sorting out a perceived or framed legal "problem"' (Lavranos 2013:5)

Indeed, this Member State resistance resonates well with the above expressed opinion of (Minister2 2017) as well as that of Strik (2014:chap. 1) who both point to Member States' deliberate circle-fencing of investment protection from Europeanization ever since the outset of integration. This meant deliberately keeping BITs on the grounds of public

²⁴ Which, according to Lavranos would also have been a violation of the extended interpretation of Article 351 of the TFEU which protects Member States' international treaty commitments made before accession based in case law (Lavranos 2013).

international law rather than merging them into the broader commercial policy. However, seeing how investment had indeed been transferred to the EU level, there was little Member States could do other than try to fight the Commission proposal within the confines of the legislative process. The eventual compromise on the Grandfathering Regulation was milder as it introduced a 'replacement' based system whereby Member State BITs continued to remain in force until they are replaced by EU level BITs.

Yet the Commission's attempts to Europeanize BITs, and Member States' realization of what this would mean for their long-standing investment regimes opened a wider more academic debate²⁵ which highlighted just how contentious the interpretation of the Lisbon Treaty's investment provisions were. As Reinisch notes, Member States experience with investment policy after Lisbon quickly:

'led to lively academic debate about the scope of the new EU investment powers. On the one hand, it was argued that the EU's investment powers would be limited to aspects concerning the admission of investments and not extend to traditional investment protection once an investment was made. On the other hand, the express choice of the term FDI was interpreted as limiting the EU's powers to FDI, excluding portfolio investments traditionally covered by modern investment treaties. Both limitations would lead to a situation of de facto shared control between the EU and its Member States, as they would require so-called mixed agreements to be negotiated and concluded by both the EU and its Member States.' (Reinisch 2013:181).

Unsurprisingly, the broadly defined debate on investment competences made its way to the Court of Justice in several instances. It would be hard to overstate the importance of Opinion 2/15 as it was this case where the ECJ comprehensively considered how to fill the gaps left by the Lisbon Treaty in relation to investment arbitration. As is subsequently discussed, this ruling brought significant clarity in most of the outstanding issues discussed above allowing the CCP to move forward based on more certainty. While not discussed here in detail, it is also worth noting the one important issue that Opinion 2/15 did not address, namely the legality of intra-EU BITs. The importance of the 2/15 ruling increases if one compares it to the Court's response to this latter issue. As it were, the Achmea Case²⁶ on intra-EU BITs increased uncertainty and dumbfounded many of the same people that praised the decisive clarity delivered by Opinion 2/15. In turn, the most recent ruling in relation to these

²⁵ For arguments favoring a narrow interpretation of the EU's Lisbon investment competences (i.e. arguments in favor of Member States) see: (Wehland 2009). For arguments favoring a wider interpretation of the Lisbon treaty see (Woolcock 2010)

²⁶ Case C-284/16 Republic of Slovakia v Achmea NV of the Netherlands

institutional debates - Opinion 1/17²⁷ - did little more than reaffirm the ECJ's findings in Opinion 2/15 when it established that the investment arbitration clause of CETA (a mixed agreement) was, in fact, compatible with EU law.

3. Opinion 2/15

The ECJ's ruling on Opinion 2/15 as will be argued for the remainder of this chapter, lead to the birth of a new framework for the entire CCP. A new framework that was not conceived in a vacuum, but rather was in part a reaction to the very visible politics of the CETA episode. While EU legal and EU integration scholarship are of a general consensus that the Court is an autonomous actor (Stone Sweet 2010) and not a mere extension of 'powerful Member State interests' (Garrett 1995) or an unquestioning agent of supranationalism (Sandholtz and Stone Sweet 1998:chap. 1), there is also a body of scholarship that, taking this view as a starting point, nonetheless is interested in the degree to which the Court can be constrained (Carruba, Gabel, and Hankla 2012; Carrubba, Gabel, and Hankla 2008) or enabled (Stone Sweet and Brunell 2012; Stone Sweet and Brunell 2013) by turbulent political debates (Dehouse and Paterson 1998; Ritter 2005).

While this is an evolving field of research there is certainly enough evidence to state with confidence that the ECJ is not altogether ignorant of the political context in which it operates. Adding to this the general observation that the ECJ has in important constitutional questions showed a discernable integration bias over the long and storied history of its rulings, helps contextualize the outcome of the ruling without suggesting that the Court is an openly political agent.

3.1 EUSFTA

The EU-Singapore FTA (EUSFTA) was the first post-Lisbon FTA that the EU negotiated and concluded with a comprehensive investment chapter that contained an ISDS clause. In line with the general trend set by the NAFTA precedent, Member States authorized the Commission to negotiate such a comprehensive agreement with Singapore in 2009.

²⁷ ECJ *Opinion 1/17* C-369/2

Negotiations were concluded on the 17th of October 2014. In the run-up to the conclusion of talks, a difference of opinion emerged between the Commission and Member States regarding the legality of how the EUSFTA should be ratified. Whereas the Commission held that based on Article 207 TFEU the agreement should be concluded as an EU-only agreement (entailing only European Parliamentary ratification) most Member States held that ISDS was a shared competence, and as such the agreement should be ratified as a mixed agreement.

This difference of opinion resulted in the Commission turning to the ECJ on the 10th of July 2015 based on Article 218(11) of the TFEU, asking it to determine whether the EUSFTA could be concluded as an EU-only agreement or not. Specifically, the Commission asked the ECJ the following questions:

‘Does the Union have the requisite competence to sign and conclude alone [the EUSFTA]? More specifically,

–which provisions of the agreement fall within the Union’s exclusive competence?;

–which provisions of the agreement fall within the Union’s shared competence?; and

–is there any provision of the agreement that falls within the exclusive competence of the Member States?’ (Court of Justice of the European Union 2017)

The Court ruling reflected the constitutional importance of these questions beyond the EUSFTA, bringing much-needed clarity not only to the issue of investment competence delegation but also to changing the status quo created by Opinion 1/94. In this sense, Opinion 2/15 became *the* authoritative piece of jurisprudence for the CCP, moving institutional change forward. A point that senior Commission, EP, and Member State officials all emphasized when talking about the ruling:

‘[The ruling] follows the trend after Lisbon (...) The Court probably thinks that there is no real possibility of having Treaty Change any time soon. As such, this Opinion is meant to be authoritative. (...) They provided clarity.’ (EC5 2017)

‘The ruling in the end, was a Constitutional ruling. It prevents slipping back on trade and it allows for the development of a system based on stability.’ (EP Officials 2017)

‘We see the opinion as being definitive. It brings clarity after the post-Lisbon uncertainty.’ (National Agent 1 2017)

'It is the case, that Lisbon brought with it an uncertain situation. It was clearly time for the Court to give clarity in terms of what is and what is not mixed.' (National Agent 2 2017)

Beyond agreeing on the ruling's significance, Member States and the Commission, of course, had significantly opposing views about the competence debate itself. There were four substantive competence questions the Court considered; provisions on transport services provision, ISDS, portfolio investment and sustainable development (an umbrella term used by the EU to include provisions on labor rights and environmental sustainability in FTAs).

3.1 Arguments of the Commission

In presenting its case to the Court (Court of Justice of the European Union 2017) the Commission was of the view, that since the Lisbon Treaty had explicitly transferred investment competences to the EU level in Article 207 TFEU, the only two issues that could *possibly* qualify the EUSFTA as a non-EU exclusive agreement were the provisions on cross-border transport services provisions (a competence that had indeed *not* been explicitly transferred to the EU level) and non-direct foreign investment (also known as portfolio investment²⁸) which was not specifically mentioned by Article 207, yet had generally been considered as a constituent part of FDI by investors and regulators alike, as acknowledged by the Court.

While acknowledging these two points, the Commission argued that the EUSFTA could nonetheless be concluded as an EU-only agreement, because of the provisions of Article 3(2) TFEU. This article embodies the Court's long-held ERTA Principle which originates from a 1971 landmark ruling²⁹ that established two important precedents. Firstly, that the European Communities (and subsequently the Union) were not only competent to enter into international commitments in areas explicitly mentioned by the treaties but also in areas where external competences could be implied from competences conferred upon the EU internally. Secondly, that when the EU had exercised its internal competences to create common rules it was pre-empting Member States' external action in relation to these rules.

²⁸ Is the act of: 'investing in the financial assets of a foreign country, such as stocks or bonds available on an exchange' (Maverick 2019:n.a.)

²⁹ *European Agreement on Road Transport*. Case 22-70 Commission of the European Communities v Council of the European Communities.

This principle, since reaffirmed by the ECJ several times, is mirrored in Article 3(2) TFEU which states that:

*'The Union **shall also** have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, **or in so far as its conclusion may affect common rules or alter their scope.**'* Article 3(2) TFEU (emphasis added).

In relation to the EUSFTA's transport services commitments contained in Chapter 8 of the agreement (granting access for specific transport services provision to Singapore), the Commission argued that these could come to affect existing secondary legislation³⁰ on transport services within the EU, hence invoking Article 3(2) of the TFEU. In other words, the Commission was arguing that so long as the primary aim of the agreement was not to conclude an international transport agreement (which fell under the common transport policy, a mixed area), but only to ensure the uniformity of internal EU transport regulations, the Commission had an implied competence to conclude the EUSFTA's transport-related parts. Indeed, the scope of the EUSFTA did not contain provisions on establishment – i.e.: it does not 'open-up' the EU's transport services market. Rather the provisions mostly relate to the supply of auxiliary services related to transport.

In relation to non-direct foreign investment (or portfolio investment) the Commission once again invoked Article 3(2) and the ERTA principle. However, here, instead of pointing to the possible secondary legislation that commitments made under the EUSFTA could come to affect, the Commission additionally pointed to Article 63 TFEU. This article prohibits Member States from imposing restrictions on the free movement of capital within the Single Market. Tying Articles 3(2) and 63 together, the Commission argued that since it was competent to enforce Article 63 vis-à-vis Member States, and since provisions on portfolio investment concerned the movement of capital across borders, it could claim exclusive external competence based on Article 3(2).

³⁰ Namely: Regulation 4055/86 EEC on the freedom to provide maritime transport between Member States and between Member States and third countries; Regulation 1071/2009 EC establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator; Regulation 1072/2009 EC on common rules for access to the international road haulage market; Regulation 1073/2009 EC on common rules for access to the international market for coach and bus services; Directive 2012/34/EU establishing a single European railway area.

The Commission did not submit further observations to other elements of the envisaged EUSFTA agreement. The European Parliament's observations were a reiteration of the Commission's arguments.

3.2 Arguments of Member States

In relation to transport services, Member States argued (Court of Justice of the European Union 2017) that the commitments contained within the EUSFTA fell into the shared competence category between them and the EU according to Article 4(2)(g) of the TFEU which specifically mentions transport as a shared competence. Member States also submitted arguments in relation to environmental protection, social protection, and intellectual property rights protections, arguing that these were shared competences between the EU and Member States, seeing how these provisions 'have no link' with international trade (ibid).

Member States took an even more critical view of the Commission's argument relating to portfolio investment. To make the argument that portfolio investment was an *exclusive* Member State competence firstly, they pointed out that Article 207 did indeed not specifically confer any competences on the EU regarding non-direct investment. Secondly, they argued that the Commission's reasoning was simply 'not consistent with the Court's case-law' on ERTA which in their reading only applied to secondary legislation when referring to the EU's capacity to pre-empt Member States' external action through the creation of common internal rules. In other words, they argued that the TFEU could not be referred to as a 'common rule' under Article 3(2) and as such it could not lead to implied external competences. One National Agent representing a large Member State during the proceedings called the Commission's Article 63 argument 'extremely dubious' (National Agent 2 2017), a sentiment shared by other observers of the case as well (EP Officials 2017). Furthermore, Member States argued that ISDS was again, not specifically transferred to the EU level by Article 207 making it an exclusive Member State competence.

3.3 The AG opinion and the Court's ruling

As is customary procedure, the ruling of the ECJ was preceded by the Advocate General's (AG's) Opinion. While some literature suggests that the AG's Opinion is mostly a good indication of how the ECJ will eventually rule (Arrebola, Mauricio, and Portilla 2016), there is

also another strain of literature that argues that AG's tend to be more politically sensitive to the interests of Member States, (Frankenreiter 2018) and less pioneering in their legal argumentation than the Court. For instance, Clément-Wilz (2012) shows that a number of landmark rulings that moved integration forward were delivered by court rulings that went against the AG's arguments. In fact, this is precisely what happened in the case of Opinion 2/15.

AG Sharpston delivered an Opinion arguing that the EUSFTA could only be concluded as a mixed agreement, seeing how investment-dispute arbitration, non-direct foreign investment, services trade provisions, government procurement, trade and sustainable development provisions and the non-commercial aspects of intellectual property rights were, in her argumentation all shared competences (Court of Justice of the European Union 2016). According to Ankersmit, Sharpston's Opinion reflected the new political reality of EU trade policy;

'[The findings of Sharpston] may be to the dismay of proponents of agreements such as TTIP and CETA who would like to see a 'swift' ratification process, but one may wonder whether pushing through such controversial agreements at EU level is politically desirable for the EU in the first place.' (Ankersmit 2017).

The AG herself acknowledged the possible implications her Opinion would have if followed by the Court when she pointed out that a trade policy based on mixed agreements would inevitably be more 'cumbersome and complex' (Court of Justice of the European Union 2016:para. 565) and that such a model may come to 'undermine the efficiency of EU external action and have negative consequences for European Union's relations with third countries' (Ibid). Nonetheless, AG Sharpston claimed that these were political, and not legal considerations that 'cannot affect' (Ibid. para 566) the question of competences.

The Court (Court of Justice of the European Union 2017) eventually found that all the traditional trade-related areas - market access for goods, trade remedies, barriers to trade, customs and tariffs - fell under exclusive EU competence. This was a reaffirmation of the status quo established by Opinion 1/94. Yet in stark opposition to the AG's argumentation, to this, the Court also added services, public procurement, intellectual property, sustainable development, and competition, as well as those parts of the EUSFTA's chapters on dispute settlement between the parties and transparency that do not relate to areas of shared

competence. While the Lisbon Treaty had transferred services, and the commercial aspects of intellectual property rights to the EU level as competences, the Court was called on to specify the exact extent of these provisions in two previous post-Lisbon cases³¹. In both instances, the Court had not defined the contents of Article 207 *ad abstract* but had focused instead on identifying the nature of the agreements in question as a condition to determining how broadly Article 207 could be applied to services and the commercial aspects of intellectual property rights. As Ankersmit points out, prior to Opinion 2/15 the Court's jurisprudence suggested that:

'the more an agreement operates within the context of an international trade regime, the more likely it is that it will fall within the scope of the Common Commercial Policy' (Ankersmit 2014).

It was this interpretation that Opinion 2/15 reaffirmed when the court found that all these elements of the agreement – because they were directly linked to trade – fell within the scope of the CCP.

In relation to transport services, the Court used different legal arguments to determine competence divisions for the five modes of transport in question. Some of the transport-related provisions of the agreement – namely aircraft repair and maintenance, selling and marketing of air transport services, computer reservation system services – were ruled to be business services rather than auxiliary services in the area of transport. As such, the Court ruled that these fell under exclusive EU competence. Regarding rail and road transport services, the Court accepted the Commission's argumentation as related to Article 3(2) TFEU ruling that the EUSFTA could come to affect common rules already in place here. While the Court could not establish this link in relation to internal waterways transport services, it ruled that the commitments within the EUSFTA were extremely limited and could be disregarded when considering competence.

In relation to portfolio investment, the Court rejected the Commission's arguments relating to Article 63 TFEU, pointing out that the EUSFTA cannot affect primary EU law according to the meaning of Article 3(2). The Court also established that the conclusion of an international agreement on portfolio investment was not provided for in a legislative act. However, the Court did find that the conclusion of international agreements that facilitate

³¹ *Daiichi Sankyo* (Case C-414/11) and *Conditional Access Services* (Case C-137/12, Commission v. Council)

the movement of capital and payments between the EU and third parties could be ‘deemed necessary’ in line with Article 216(1) TFEU in the context of an FTA in order to achieve the free movement of capital as laid down in Article 63 TFEU. In other words, the Court argued that so far as an FTA granted market access for third-country investments these investments should be afforded the right of free movement within the EU. To achieve this, provisions on portfolio investment were warranted in the EUSFTA. This meant that portfolio investment was found to be a shared competence, as opposed to an EU only or Member State exclusive competence, as the Commission and Member States had argued respectively.

In relation to ISDS the Court ruled that since this form of dispute resolution removed the dispute from the national court system, leaving no room for Member States to oppose ISDS claims made under the EUSFTA by investors, these provisions could not be considered purely ancillary EU competences under the ERTA doctrine with the Court finding ISDS to be a shared competence between Member States and the EU.

By placing portfolio investment and ISDS into one bucket, the Court facilitated the separation of these investment-related chapters from the rest of the agreement. In practice, this led to the Commission moving towards an EU exclusive FTA model excluding investment competences that were never wholeheartedly surrendered by Member States, and that had caused so much political backlash within the EU and humiliation for the EU globally.

4. Interpreting the ruling

If one interprets Opinion 2/15 strictly in relation to the EUSFTA the ruling suggests that agreements that include provisions on portfolio investment and investor-state arbitration clauses (regardless of whether this is ISDS or ICS) qualify as mixed agreements. Hence, the EU’s post-Lisbon agenda modeled off NAFTA, where investment arbitration is merged into FTAs can only lead to mixed agreements.

In this vein, the expectation that merging investment provisions into FTAs will simplify a complicated system (Villata Puig and Al-Haddab 2011:294) proved to be misguided. If the EU were to pursue only mixed agreements, that would almost certainly lead to an unprecedented level of uncertainty quite possibly debilitating the EU from taking part in international trade governance or concluding any meaningful bilateral agreements in the

future. Of course, by corollary, the ruling also meant that Member States' decision on how to ratify CETA – as a mixed agreement – was, legally justified.

However, if one takes a broader view in interpreting the ruling, the picture is somewhat more nuanced. The Court's ruling is generally thought to be reflective of the political debate surrounding CETA. As one national agent taking part in the proceedings put it, the Court was:

'clearly acting as a political and less as a legal actor, moderating the debate. To which it is of course not blind'. (National Agent 1 2017)

Considering how the Court had in the past supported the gradual expansion of the Union's trade competencies while being mindful of the red lines of Member States, Opinion 2/15 can be interpreted as an eloquent answer to the question of how to deal with public contestation rather than a penitence leading to the debilitation of the EU's trade agenda. On the one hand, the Court acknowledged the integrity of the liberal consensus agenda by granting the EU competences in all substantive areas that emerged following the creation of the WTO – at least to the extent that they are included in FTAs (see the example of transport services provision). On the other hand, the ruling implicitly acknowledges that investment competences were not a part of this consensus³². By doing so the ruling also indirectly addresses the unceremonious circumstances surrounding the transfer of investment competences to the EU level in the first place.

In reaffirming the liberal consensus and separating investment from it, the Opinion presented the EU trade élite with two options on how to proceed. EU trade policy could either continue pursuing the goal of merging investment arbitration into new generation FTAs and model all future agreements off the CETA model or exclude investment arbitration and portfolio investment provisions in favor of an, even more, Europeanized and streamlined trade policy.

³² As we have discussed here and in Chapter V, including investment clauses in FTAs is not a specific WTO agenda item and it arguably does not form part of the EU's liberal consensus something that seems clear given that: there are no international standardized norms for investment arbitration and that Member States were reluctant to give-up investment competences to the EU level.

Considering the traumatic CETA ratification process, the choice seemed clear. While the ECJ had created a situation where it did not predetermine the politics of the CCP – it did not force EU-only ratification over mixed ratification – it nevertheless made the option of pursuing EU-only ratification that much easier and attractive. In this sense, the Court's ruling was not openly political, but it was likely based on an assumption as to how trade decision-makers would respond. As one former Member State Foreign Minister put it:

'2/15's message to the Union is: okay, go out into the world! Do trade! Do it all! You should not be slaves to the Walloon Parliament.' (Minister2 2017)

Shortly after the ruling, an internal document was circulated within the Commission which laid out a new architecture for separating the mixed competence element of trade agreements from the EU-only elements (Montanaro and Paulini 2018). In fact, the Commission applied this approach in the case of the EUSFTA and the EU-Vietnam FTA as well. The CETA agreement was, however, left untouched seeing how the Council had already opted for a mixed ratification procedure.

Since then, it has become quite apparent that Member States have gone one step further choosing not only to separate investment but abandon it from the EU's FTA agenda, at least with respect to other functioning democracies. A decision that has been made easier by the EU's recent negotiating partners who have all shared a preference for excluding investor arbitration clauses from their agreements. The EU-Japan agreement was concluded without portfolio investment or arbitration provisions while the EU-Australia and EU-New Zealand agreements are being negotiated without these provisions.

In choosing this route, the trade in-group made the decision to not expand the liberal consensus to include investment arbitration. Moreover, the demise of the NAFTA agreement under the Trump Administration only to be replaced by the USMCA agreement – which does *not* contain an investment arbitration clause – signals the decline of the NAFTA Chapter 11 model more generally. Instead, the decision to streamline EU trade policy through reaffirming the liberal consensus was convenient for several reasons. It allowed the EU to continue pursuing the WTO agenda in an efficient manner, without risking a situation where anti-trade NGOs from any one Member State (or region) could effectively capture and hold trade policy hostage. It also allowed Member States to take-back ownership – at least in part – of competence that had been transferred away from them unwittingly. Lastly, the ejection of

ISDS also allowed for the ever so elusive de-escalation of the politicization of trade as it was the flagship policy instrument fueling the public backlash against trade.

Where the post-Lisbon system had failed to provide trade policy with an effective toolkit for reconciling decision-makers' view of trade legitimacy with the challenge posed by public contestation, Opinion 2/15 allowed the same trade élite to announce it's understanding of trade legitimacy as the winner without predetermining the outcome. In the equation created by this ruling, the Commission has gained credibility as a negotiator acting on behalf of Member States while the European Parliament's role as a sufficiently legitimate forum to oversee trade has also been confirmed as the practice of national parliamentary ratification has failed to become a norm for future agreements.

This means that while the EP had failed to deliver on the promise of the European Convention with CETA, it was nonetheless reaffirmed as the sole source of parliamentary legitimacy for trade agreements. While this might well seem like a paradox it speaks to the broader point that addressing the public contestation of trade policy that unfolded around TTIP and CETA was not about opening-up a substantial and open-ended debate to ultimately redefine the aims of the EU's trade agenda. Rather it was about neutralizing a challenge to the in-group's understanding of what constituted good and legitimate trade policy.

Somewhat unexpectedly, this exercise in process-tracing has revealed, the 'hiccup' around investment competences led to an actual and meaningful change in the direction of EU trade policy, albeit without a meaningful policy debate about the desirability of merging investment arbitration into FTAs. The fact that Member States pushed back against the NAFTA model, even though they had subscribed to it some years earlier had to do with a latent recognition of what the treaty change actually implied in relation to their BITs as opposed to a changed policy preference to stop using investor arbitration with other developed economies. As is quite evident from the fact that the 3000+ ISDS mechanisms that EU Member States are party to continue to be in force. Conveniently, dropping investment arbitration from the scope of the CCP also helped de-escalate the public contestation of trade. In the end, the Opinion created clearer lines and clearer institutional responsibilities for all three institutions leading the in-group to expect that they could now pursue the liberal trade agenda with less political pushback. Or as one INTA member of parliament put it;

'the split helps manage political difficulties. Trade agreements will be easier to conclude. This way we will be able to avoid difficult political debates' (EP9 2017).

In the subsequent and final chapter, I highlight some of the characteristics of the new trade architecture that has emerged in the aftermath of Opinion 2/15. Despite circle-fencing, the core of the CCP this new architecture leaves in place the novel standards of transparency and throughput legitimacy introduced as a response to the contestation of TTIP and CETA. Early indications of what this means for the policy preferences of EU trade suggest that the logic of economic rationality continues to dominate elite thinking despite the appearance of several novel agenda items on the trade agenda.

| | Evidence |
|----------------|---|
| [Step3] | <p>(HC/LU) EP involvement helped transparency but was insufficient to provide CETA with adequate level of legitimacy (interview data)</p> <p>(HC/LU) Failure to deescalate CETA's contestation following the introduction of the ICS system was frustrating for TPC members in the Council and Commission officials who felt they had done a lot to accommodate the public's demands (interview data)</p> <p>(HC/LU) CETA's failure would have been traumatic for EU trade policy, CETA declared 'gold standard' agreement (interview data + media perception)</p> <p>(LC/LU) Turning to national parliaments objectively lengthens ratification making outcome less certain.</p> <p>(LC/HU) expectation that national parliaments will act as rubber stamps during ratification but will provide for a greater 'sense of involvement' (interview data).</p> <p>(HC/LU) Commission opposes mixed ratification (Juncker comments)</p> <p>(HC/LU) Investment competence transfer to EU level was conflictual, Member States opposed expansive interpretation of Article 207 on FDI (interview data + secondary literature)</p> <p>(LC/LU) Decision on CETA ratification was taken at time when EUSFTA case on competence divisions was ongoing.</p> <p>(HC/LU) ECJ is attentive of political will of Member States especially in issues of constitutional importance (secondary literature)</p> |
| [Step4] | <p>(HC/LU) Opinion 2/15 is rendered by a Full Court, in opposition to Advocate General's opinion.</p> <p>(HC/LU) Opinion 2/15 is considered to be of constitutional importance by Commission, EP, TPC (interview data)</p> <p>(HC/HU) Opinion 2/15 provides new interpretation of EU law, empowering EU in requisite areas to pursue comprehensive trade deals with EU only ratification.</p> <p>(HC/HU) By finding investment arbitration to be mixed Opinion 2/15 settles dispute on arbitration related aspect of FDI competences and disincentivizes pursuit of FTA agreements containing investment arbitration clause (interview data)</p> <p>(HC/HU) In aftermath of ruling Commission announces intention of separating mixed and EU-only parts of FTAs into separate agreements.</p> |

Chapter VII: An inclusive-executive trade regime: the liberal consensus continues unbroken

The ECJ's intervention created a new framework for EU trade policy. A system which in principle should be better equipped to keep the pipelines of decision making from becoming clogged-up with broad-ranging ideological debates about capitalism, globalization or poverty. In theory, the choice to pursue EU only competence agreements means that the trade technicians of the Commission and Member States no longer need concern themselves with the knock-on effects of protests against trade or investment arbitration. It is enough to convince a majority of European Parliamentarians of the benefits of agreements for them to be legitimized. In practice, the post-CETA system is more nuanced than this.

In this chapter, I take-stock of some of the most important changes that have taken place in the aftermath of the court ruling and touch on the overall direction of the public debate around trade agreements in support of the final step of the Causal Mechanism. To recall, the claim being made here is that while the ECJ's intervention did lead to the emergence of a new ruleset for trade it did not change the fundamental nature of the policy agenda. Yet, given the sustained public interest in trade as a result of the CETA experience decision-makers are faced with a continuous struggle to balance the desire of maintaining their policy agenda with the need to be more inclusive. This results in an interesting dichotomy. I argue that just because FTAs now have chapters on gender or sustainable development this does not mean that they are based on a different logic as before. While the decision-making process is more inclusive and open to widening the scope of the trade policy debate the CCP remains an executive (élite) driven policy.

1. More inclusive cuts both ways

To recall, the ECJ's ruling did not oblige policy-makers to abandon mixed agreements. It left them at a crossroads. The ruling clearly incentivized the pursuit of EU-only agreements by making it the path of least resistance. However, it also left the door open to pursuing mixed agreements through including investment arbitration which would have arguably been a way to ensure the

broad-ranging involvement of national parliaments in the decision-making process. Yet this is not what happened in the post-CETA period.

Creating a strong and broad-ranging EU level investment policy was not supported by the trade élite as evidenced by Member States pushback on ISDS and BITs. While the Court's ruling might have flustered some Member States if for nothing else because they were formally losing powers to the Commission, looking at recently finished and ongoing negotiations, it is clear that EU-only agreements are the accepted norm today with mixed agreements resulting out of historical path dependencies for agreements under negotiation prior to the ruling. While it might well be possible to change these agreements from mixed to non-mixed based on 'facultative mixity' the heated political debate around the Mercosur agreement, for instance, means that any such attempt would be seen as circumventing public debate. Nevertheless, as discussed in Chapter IV, few parliaments practice strong principal-agent control over their governments in trade affairs and the ratification of trade agreements by national parliaments is largely seen to be an exercise in rubberstamping by Member States.

Beyond this shift towards EU-only competence agreements, the most apparent change to the character of EU trade comes through its increased inclusiveness which has seen the Commission ramp-up its engagement with civil society stakeholders that have previously been sidelined. Business and industry organizations have been lobbying EU trade policy well before the Lisbon Treaty. In fact, finding a compromise between the interests of the export and import sectors was the primary dynamic driving trade agreements even before the creation of the WTO as we know from Pascal Lamy. However, NGOs have traditionally been sidelined from having much influence over trade despite having been active around it at least since the creation of the WTO (Dür and De Bièvre 2007).

As discussed in Chapter III, trade traditionally fell into the area of low politics even after the creation of the WTO. While NGOs had targeted both Member State governments and the EU level to influence policy preferences, failing to mobilize a broad base of voters in national elections limited their leverage (Ibid). In other words, trade was contested, perhaps even loudly contested by some parts of the public (think Seattle Riots), but it was not politicized insofar as

anti-globalists failed to gain sustained public resonance. As seen in Chapter IV this changed at the latest with the TTIP and CETA agreements where NGOs played a major role in amplifying the public contestation against the liberal agenda in a sustained and more organized fashion. While the contestation of trade might not be as loud or as public as it was during the CETA negotiations it is still there as evidenced by the continuing European debates on issues such as food standards or the ecological footprint of trade. In fact, several interviewees were of the opinion that trade policy was unlikely to revert to the pre-CETA state of relative public obscurity (EPRS2 2017; Epst.Co1 2017; TPC5 2016; TPC7 2017).

Perhaps the best indication that the trade élite understands this shift is that today's trade policy has been expanded with new institutional layers that provide additional fora for previously side-lined NGOs to express and even amplify their opinions. However, this is not to say that the old pathways of influence have become corroded. In fact, alongside strengthened opportunities for NGOs, business and industry also continue to function as constituent building blocks of EU trade policy (see *Figure 19*).

1.1 Widened scope of debate – the expert group on trade agreements

Beyond the large number of ad-hoc NGOs that ballooned – especially in Germany – to oppose TTIP and CETA, several other sector-specific organizations with longer track-records of advocacy recognized the importance of taking positions on trade. In the post-CETA period, a number of these NGOs are more 'insiders' than before. Working to shape EU trade policy along very specific interests, groups representing consumers' rights, public health goals, animal rights, labor rights or environmental sustainability are better resourced and more exposed to decision-makers and the public than before. They take part in regular civil society dialogues and many times enjoy operational funding from the Commission to present their views about trade.

Most importantly, by setting up the 'Expert Group on EU Trade Agreements' (EGTA) in 2017 the Commission has created a formalized platform for a select group of NGOs to feed into the policy debate on trade. EU trade policy has for some while used the tool of 'structured civil society dialogues' to seek feedback from civil society – a format open to a broad range of stakeholders. The EGTA, however, was created with the specific purpose of making decision

making more input legitimate. A clear and direct acknowledgment that the unprecedented contestation of trade expressed through the CETA episode was indeed about legitimacy.

Expert groups have been used by the Commission since the 1980s to seek specific ‘technical expertise’ on a broad range of issues from waste management to environmental sustainability or aviation safety. However, DG Trade has had one of the lowest number of expert groups out of all the Commission DG’s and bodies having established only 7 prior to the Lisbon Treaty, as opposed to the 58 established by DG Agri, the 68 established by DG Environment or the 97 established by DG Enterprise and Industry (Julia Metz 2014:290). DG Trade currently has 10 expert groups. Whereas the majority of these – similarly to expert groups of other DGs – involves the gathering of actual technical expertise and function as an additional forum for gauging the preferences of Member States on very specific and often highly technical issues the more general EGTA was established with a distinctly political flavor. Something that shows just by reading through *Table 11*. The composition of DG Trade’s expert groups is also telling in this regard. Whereas groups established before the EGTA are composed of Member State authorities – ultimately representing Member States’ interests in a principal-agent capacity – the EGTA is composed of broadly understood civil society.

| Informal and Formal Expert Groups of DG Trade (2019 - March) | | |
|---|-----------------------------------|---------------------|
| Name (est.) | Membership | Type |
| Generalised Scheme of Preferences (2012) | (Member State) Public Authorities | Informal, permanent |
| Preparatory Meetings for WTO SPS Committee (2011) | (Member State) Public Authorities | Informal, permanent |
| Responsible sourcing of tin, tantalum, tungsten and gold (2014) | (Member State) Public Authorities | Informal, permanent |
| Screening of FDI into the EU (2017) | (Member State) Public Authorities | Formal, permanent |

| | | |
|---|-----------------------------------|---------------------|
| Steel (2008) | (Member State) Public Authorities | Informal, temporary |
| Système Intégré de Gestion de Licence (SIGL) (2005) | (Member State) Public Authorities | Informal, temporary |
| Trade and Investment Relations with China (2011) | (Member State) Public Authorities | Informal, temporary |
| Trade and Sustainable Development (2014) | (Member State) Public Authorities | Informal, permanent |
| Trade Economist Network (2014) | Member State Officials | Informal, permanent |
| Expert Group on Trade Agreements (2017) | NGOs, Trade Unions, Business | Formal, temporary |

Table 11 DG Trade Expert Groups

The EGTA operates on a formal and temporary basis meaning that it has been set up by a Commission decision that involves the College of Commissioners as opposed to informal groups which are created by a Commission department such as a unit – arguably lending it a higher degree of importance. The EGTA’s task is listed in the Commission Register of Expert Groups as the following: ‘Assist the Commission in relation to the implementation of existing Union legislation, programmes and policies’ (European Commission 2017d). In the Commission decision creating the group and in the call for applications for members the EGTA’s tasks are enumerated as follows:

‘providing technical expertise and practical experience relevant to negotiations in bilateral, plurilateral and multilateral trade agreements;

shedding light on the different perspectives the stakeholders they represent may take on certain issues, by engaging in open and constructive exchanges with other members of the group;

providing input related to the overall implementation of trade agreements;

[sic!] providing feedback on the perception and public debate on trade agreements across EU Member States and issues that may require particular attention on the basis of their contacts with their respective European networks.’(European Commission, 2017b:1 emphasis added)

In other words, the group has the clearly stated objective best expressed in the final point of providing a platform to increase both the input and throughput legitimacy of trade policy as the Commission envisages its members serving as a conduit to transmit information to and convey information from the broader public to the Commission.

The group can be composed of between 20 and 30 organizations which are selected by way of an open call. The first batch of members were selected in late 2017 with the first meeting taking place in January of 2018. The mandate of the group's members lasts until the end of 2019. Taking a broadly defined understanding of civil society, membership in the EGTA is not limited to NGOs. It also includes trade unions and business umbrella groups. The first batch was composed of 11 NGOs, 4 union groups and 12 industry organizations represented in the EGTA.

The information received by the members of the EGTA from the Commission includes exchange of views with DG trade officials, briefings on the state of play of negotiations and sharing the Commission's thinking of what negotiating outcomes it sees as desirable. As set out by in Article 12 of the Commission decision establishing the group, the information shared with the EGTA may include confidential information as well (European Commission 2017c). This information, subsequently, feeds into the policy materials produced by members of the EGTA to advocate for specific changes to the approach adopted by the Commission. While NGOs, industry groups and unions can all use these meetings to express their own points of view to the Commission, the EGTA has no formal power to influence the negotiating process or the policy directions of EU trade.

As a result, the most tangible output from this group comes from the policy materials of NGOs. Those sitting on the EGTA have mostly adopted a similar approach; arguing that trade agreements need to include separate single-issue chapters on public health / animal welfare / consumer-rights / gender / small and medium-sized enterprises, etc. The idea being that the effects of trade on these aspects of social life have not been sufficiently considered to date.

1.2 Continuing close relationship with industry

European industry is in an even more privileged position than NGOs. A state of affairs that is reflective of the very nature of trade policy. As is, the point of trade as understood under the paradigm of the liberal consensus is to facilitate the flow of goods, services, and investments. In practice, this is done after weighing-up the (economic, strategic and political) costs and benefits of doing so. As a result, offensive and defensive interests adopted by a sovereign operating in the WTO system are based on tradeoffs. Tradeoffs between growing the proverbial pie that is free trade and protecting national champions. Or as (Goldstein 1988) points out in relation to US trade policy post-WTO: ‘Laissez-faire, intervention against foreign producers, and intervention to redistribute social goods all coexist as legitimate state policies.’ (ibid.:181).

Much to economists’ frustrations, this logic of balancing economic considerations with political ones has been a hallmark of the post-WTO period (Rodrik 1995) albeit, as discussed in Chapter III this has nevertheless resulted in the internalization of the idea that trade policy is legitimate when it works to deliver aggregate gains (Baldwin 1989). It follows that in order to find the ‘sweet spot’ between protecting politically sensitive or strategically important segments of one market while sacrificing access in exchange for boosting competitive exports, trade negotiators need to cultivate close relations with industry to understand their supply interests and concerns. Furthermore, to ensure the system of aggregate gains is maintained between trading partners, a rules-based approach to trade recognizes the importance of maintaining an array of trade defense instruments to balance market distortions such as dumping.

While in the US context, industry has a storied history of lobbying trade policy from the bottom-up (through Congress) this has not traditionally been the case in the EU where the Commission has had to nudge industry to be more active in organizing itself and lobbying for its interests (Gerlach 2006; Woll 2011). In studying the effects of the institutionalization of WTO litigation (Shaffer 2006) points out that in order to make the best use of multilateral rules to defend its own trade interests (assumed to be synonymous with domestic industry interests) trade policy executives need to be aware of things such as market access barriers to trade. Something that they can only do through cultivating close working relationships with businesses.

In discussing the role of the Market Access Unit within DG Trade and comparing it to the office of the USTR during the tenure of Trade Commissioner Leon Brittan between 1993 and 1999 Shaffer notes:

'While the USTR responded to onslaughts of private sector lobbying reinforced by Congressional phone calls and committee grillings, DG Trade had to contact firms to contact it. DG Trade hired consultants to provide detailed sectoral reports on trade barriers, hosted well-publicized informational fora on trade policy which it urged business executives to attend, distributed glossy brochures and otherwise solicited European businesses to work with it on trade matters' (ibid:838).

The drive to develop and maintain close working relationships with industry has only gotten stronger since then, an assertion that is well supported in the literature. As Poletti, De Bievre and Hanegraff (2016) write:

'The EU Directorate-General for Trade adjusted to the WTO DSM [dispute settlement mechanism] through the creation of three institutional components: the Market Access Unit, the Trade Barriers Regulation Unit, and the WTO Division. All three new administrative units were explicitly organized to ease access for special interests, enhance capacity to act on their behalf, and generate an influx of information to fuel offensive market access investigations by the EU and file WTO complaints, as well as react to other WTO members challenging the EU in WTO dispute settlement.' (:203-204)

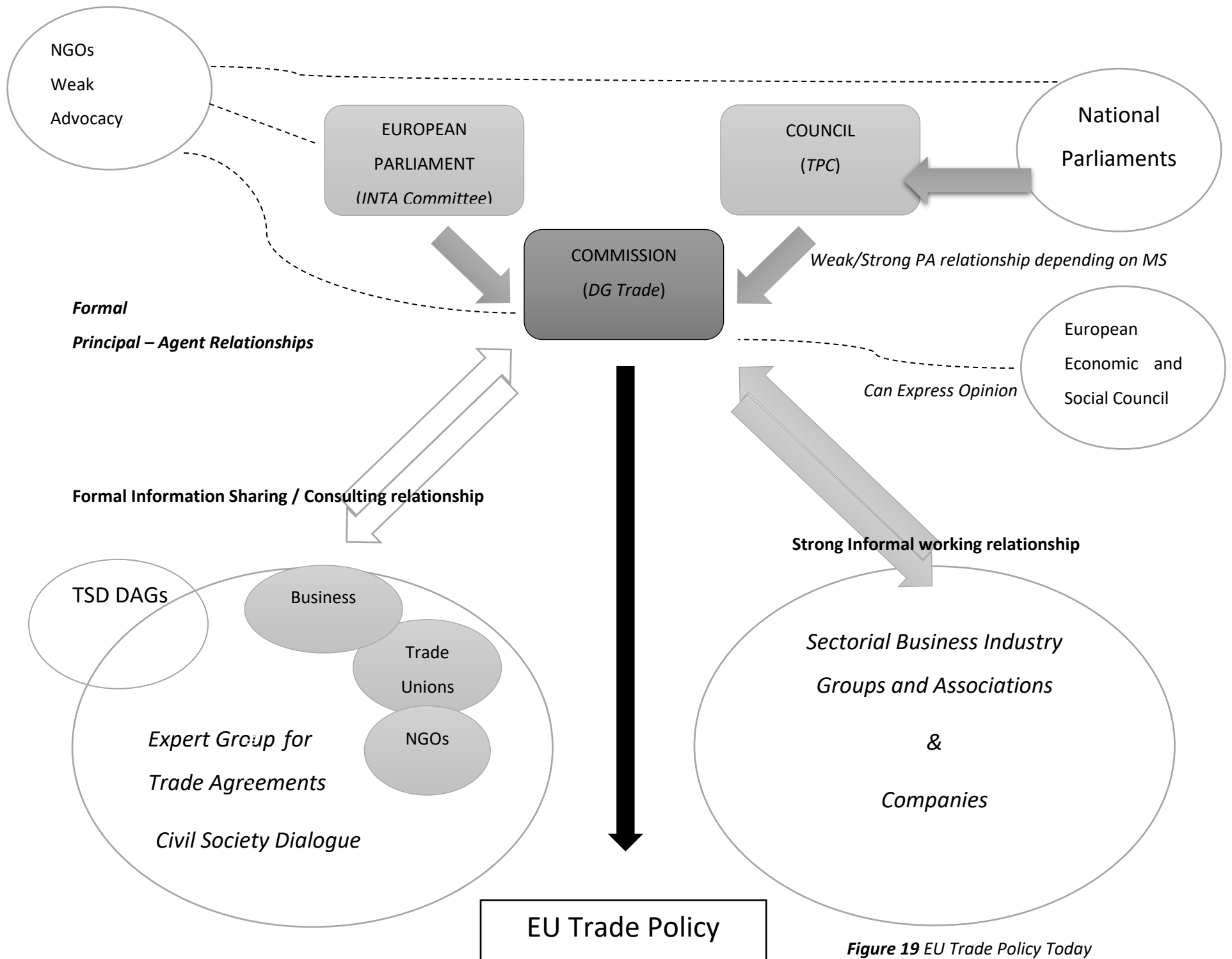
The relationships that DG Trade has built with industry through the three new units referred to in the above quote has resulted in a shift towards aggressive European interest representation focused not only on sectors but also to a large degree on specific products. A shift that for Poletti, De Bievre and Hanegraff raises the concern that narrowly defined special interests hold undue influence over DG Trade. Interests that are often presented by the Commission as pan-European interests in order to leverage the EU's negotiating position vis-à-vis third countries and also would be dissenting Member States (Woll, 2011).

In this vein, it is not alien for European trade policy to protect the interest of European national champions at the multilateral level – as does the United States. In fact, the EU has brought the second most dispute settlement cases to the WTO behind the United States. The Airbus – Boeing subsidy issue is one good example of how the Commission has internalized the interests of the European aviation industry seeing these to be synonymous with a pan-European interest:

‘European companies must be able to compete on fair and equal terms. The recent WTO ruling on U.S. subsidies for Boeing is important in this respect. We must continue to defend a level-playing field for our industry’. (European Commission 2019a)

These trends underscore that determining which industry interests are to be given preference over others is not a transparent process. Yet the point is that there is nothing to suggest that the close working relationships with industry cultivated by the Commission over the past 15 or so years is not still there. Beyond continuing to work closely with DG Trade on trade defense, industry associations sit alongside NGOs in the EGTA and just like them, they also elaborate position papers³³ on a broad range of trade issues. Taken together with the EU’s continuing and prolific use of the WTO dispute resolution system and the pursuit of wins for European industry in bilateral negotiations all strengthen the argument that EU trade decision-makers continue to see trade policy first and foremost as an economic public good. Figure 19 provides an overview of which interest groups feed into the formulation of EU trade policy decisions and how these interact with the different EU institutions.

³³ Which can be more comprehensive than the position papers of NGOs sitting on the EGTA. BUSINESSEUROPE’s 2019 policy recommendations for the incoming Commission are a good example of this, especially when compared with other recent papers produced by NGOs (Businesseurope 2019).



2. The continuing perseverance of the liberal consensus

So far, we have established that today civil society undeniably has more access, resources, outlets, and opportunities to question and voice alternative arguments to the liberal consensus. While it can be argued – perhaps convincingly – that debating questions about the relationship between gender and trade or labor rights and trade contribute to making policy outcomes more input legitimate, throughout the remainder of this chapter I argue that the liberal consensus remains intact and continues to function based on the output legitimate paradigm despite the increased access of NGOs.

Firstly, it must be observed, that it would be difficult to argue that trade liberalization is no longer the primary guiding principle behind FTAs. Beyond cutting remaining tariffs and securing new market access recently concluded and currently negotiated bilateral agreements include binding provisions on; services liberalization, investment facilitation (without investment arbitration), opening-up public procurement markets, the mutual recognition of sanitary and phytosanitary standards (i.e.: how each party makes food), limiting the scope of government subsidies, intellectual property rights protections (extending to pharmaceuticals) and establishing mechanisms for regulatory cooperation between the parties. In other words, these agreements deliver bilaterally on the proverbial liberal consensus that was envisaged at the WTO level. If anything, EU trade policy has been more effective at delivering on this agenda than the WTO which had been stalled since the failure of the Doha Round which became evident at least by 2015 (Financial Times 2015). The WTO dispute settlement mechanisms' blockage under the Trump administration only compounded this problem.

To argue that EU trade policy's objectives are moving away from the liberal consensus as a result of the contestation of trade one would have to point to new EU offensive and/or defensive interests that are not based on the logic of Pareto-improving economic gains. Interests that the EU pursues to the same extent that it pursues geographical indications for agricultural products or the elimination of industrial tariffs. The obvious argument to make here to support such a claim would be to point to how the EU now refers to provisions on combatting climate change and ensuring high levels of labor standards in its bilateral agreements. These are arguably

the two flagship innovations touted by the Commission when it argues that its trade policy is now based on more altruistic values. As a 2017 Commission non-paper puts it:

Sustainability is therefore one of the key objectives of EU trade policy, and the Commission is committed to including Trade and Sustainable Development (TSD) chapters in free trade agreement (FTA) negotiations as part of our value-based trade agenda. (European Commission 2017b:1)

While it could be argued that issues such as gender and trade or indigenous rights and trade are equally important to many Europeans, the need to combat climate change is clearly an issue that has broad-ranging political traction – 74% of Europeans see it as important (Special Eurobarometer 459 2017). The 2019 EP elections resulted in what has been characterized as nothing short of a ‘green wave’. Over the past years, the issue has increasingly become publicly contested as concerns over climate change have gained public resonance through viral videos, Hollywood policy entrepreneurs and other activists such as Greta Thunberg. In this context, the EU’s apparent commitment to make combatting climate change a constituent element of the EU’s trade agenda is arguably input legitimizing.

The issue of labor standards across the globe has also gained prominence over the past decade. Similarly, to the issue of climate change, lower labor protections in developing countries are often seen to be connected to the capitalist model of global production and consumption. A model where the EU arguably has a moral responsibility to effect change – to eliminate child labor and poor working conditions.

Together, the need to take climate action and protect workers’ rights have been bundled into what the Commission has termed ‘Trade and Sustainable Development’ (TSD) Chapters in FTAs. Such chapters can be found in the EU-Korea FTA, CETA and all subsequently negotiated bilateral agreements. The level of consistency with which the Commission includes TSD chapters in its agreements is telling in and of itself. In fact, the EU has even created a formalized framework³⁴ for civil society organizations from both sides of a bilateral agreement to take-part in the active monitoring of how effectively these TSD Chapters are implemented. Other

³⁴ Which entails the creation of Domestic Advisory Groups composed of civil society organizations (DAGs) in both countries party to an FTA – see Figure 19.

progressive issues are either only present in single agreements – such as gender and indigenous rights in the EU-Chile FTA – or are not afforded separate chapters at all.

Through these TSD chapters, the EU expects to drive concessions from its negotiating partners on adherence to the Paris Climate Agreement along with the ratification of the International Labour Organisation's Core Conventions. In fact, the Commission has committed several times to not concluding any agreements with partners that cannot meet the EU's expectations on TSD. Indeed, the debate on whether to make adherence to the Paris Agreement an 'essential clause' in future agreements -meaning that non-adherence would allow either party to terminate the application of the agreement – is something that continues to linger on the policy agenda today.

Yet the ease with which the EU set aside its commitment to effective climate action in the face of an impending trade war with the US is a good illustration of how the continued perseverance of the liberal consensus continues to be the core driving principle of EU trade.

2.1 EU-US trade relations

Negotiations on TTIP ended without an outcome in 2016 after President Trump took office. Subsequently, the trade relationship quickly deteriorated as the US administration adopted a zero-sum approach to interpreting trade policy. Under Trump's trade paradigm the long-standing trade deficit the US ran with the EU became an issue of contentment to be remedied. Despite economic orthodoxy which does not equate a trade deficit with 'losing' to or being 'ripped-off' by a trading partner (Weinstein 2018). Trump's approach to trade has been widely interpreted by mainstream economists as a threat to the rules-based trading order created through the Uruguay Round which established trade as a public good for the benefit of all countries.

In line with the 'America First' approach to international relations Germany's steel, aluminum and car export surpluses to the US became a major fixation for President Trump, who in 2017 repeatedly sought to negotiate a bilateral deal with Chancellor Merkel to rebalance the trade relationship. Germany, of course, is not able to negotiate trade independently from the Commission a point that President Trump struggled to understand (Sheth 2017). Unwilling to

reopen TTIP negotiations, President Trump sought to rebalance the trade deficit between the US and the EU (and between other countries seen to be ‘ripping-off’ the US) through imposing tariffs. In 2018, the first volley of these tariffs came into effect with the US imposing a 25% tariff on steel and a 10% tariff on aluminum for all imports entering the US. These tariffs affected Germany most, which until then exported around 4% of all US imports in both categories (Reuters 2018; Workman 2019). While initially exempting Mexico and Canada (Horsley 2018), these tariffs were later expanded to the US’s NAFTA partners as well (Long 2018) with permanent exceptions being granted only to Australia, Argentina, Brazil, and South Korea.

Trump’s tariffs were seen by Commissioner Malmström as a ‘*bad day for world trade*’ and as clearly protectionist as opposed to something having to do with national security (European Commission 2018a). The *Bundesverband der Deutschen Industrie* – the largest German industry organization was quick to point out that the tariffs were an affront to the ‘liberal values’ that the transatlantic trade relationship was based on calling for a return to multilateralism (Howald 2018). The tariffs imposed affected €6.4bn worth of EU exports and prompted the EU to: adopt countermeasure tariffs on US goods worth €2.6bn, launch WTO dispute settlement proceedings claiming that the tariffs were illegal, and launch an anti-dumping investigation with a view towards activating safeguard measures to protect EU steel and aluminum markets from the possible fallout Trump’s tariffs could have on third-country exports to the EU (European Commission 2018b). In response, the Trump administration threatened to ‘tariff the hell out of’ the EU industry by imposing tariffs on EU car exports (Von Der Burchard 2019a). In short, in the span of two years, the transatlantic trade relationship went from negotiating the most ambitious trade agreement in history to an escalating trade war which seriously endangered some of the fundamental principles set out in the WTO – the institutional guardian of the liberal consensus.

Trump’s tariffs were put in place through invoking the little-used ‘Trade Expansion Act’ of 1962 which empowers the President to impose tariffs on imports threatening US national security. For the US President to be able to impose tariffs under this act, the US Secretary of Commerce must conduct an investigation determining whether or not the products in question pose a threat to US national security – this is called a ‘Section 232 Investigation’. The Secretary’s

report is subsequently passed to the president who can then agree or disagree with its findings and decide on imposing tariffs. No congressional approval is needed either way (Bureau of Industry and Security n.a.).

The Trump administration launched the Section 232 investigation into EU car imports in late May of 2018 (Euractiv 2018). Amidst the deteriorating trade relationship, President Juncker and Commissioner Malmström actively sought to reverse course and deescalate tensions prior to the publication of the Section 232 Report on cars which was due in February of 2019. The first step was taken by President Juncker who met with President Trump at the White House in July of 2018 promising to increase European purchases of US soybeans in an effort to give President Trump a political win amidst escalating trade tensions between the US and China that were causing serious economic distress³⁵ to US soybean exporters (Valero 2018). In exchange, President Trump showed openness to deescalating tensions, promising to pause plans on imposing new tariffs on cars. In order to rebalance the trade relationship the two presidents also agreed to launch bilateral negotiation to eliminate ‘tariffs on all non-auto industrial goods [and] increase cooperation on energy purchases’ (European Commission 2018c:n.a.). In addition, President Trump showed a willingness to ‘work together [with the EU] to reform the World Trade Organization’ (Ibid) amidst the WTO’s escalating institutional crisis caused by the US’s blockage of the appointment system of new judges to the WTO’s appellate body for dispute settlement. In the aftermath of the July meeting talks intensified on concluding some sort of trade agreement on the ashes of TTIP, albeit the exact scope of this agreement was not specified.

Parallel to this apparent *détente* the policy debate on climate change had reached trade policy within the EU. France’s President Macron had triggered a debate around the issue starting with the publication of the Government’s CETA Action Plan in 2017 which called on the EU to ‘make compliance with the Paris Agreement an essential clause for all future EU trade

³⁵ The United States is the largest soybean producer in the world. China is the world’s largest soybean importer. In response to US tariffs on Chinese exports in 2017 China implemented a 25% tariff on US soybeans in June of 2018. This meant that China effectively stopped buying US soybeans in 2018. The Chinese decision caused serious economic distress to a number of US farmers who in anticipation of growing their exports to China as a result of severe drought in Argentina – another major soybean exporter – overplanted the previous year.

agreements (...) to ensure that trade agreements are fully consistent with European policies that contribute to sustainable development.’ (Gouvernement Française 2017:n.a.). In other words, Macron sought to make compliance with the Paris Agreement a hard law element of future EU FTAs. A move that was clearly aimed at the United States, which by that time had made clear its intentions to withdraw from the Paris Agreement. Macron’s proposal failed to pick-up broad-ranging support from Member States. Nevertheless, Commissioner Malmström did pledge – on Twitter – to not conclude FTAs without including a reference to the Paris Climate Agreement (Keating 2018).

This left EU trade policy at a crossroads. On the one hand, Trade Commissioner Malmström had made a commitment to mainstreaming climate action into its trade policy – i.e. to act as a norm entrepreneur. On the other hand, however, the EU was faced with the further escalation of trade tensions with the US. The specter of an all-out trade war was clearly something decision-makers and industry wanted to avoid. Seeing how the United States is one of only two countries in the world not committed to abiding by the Paris Climate Agreement, making an exception in relation to the US was seen by NGOs as being synonymous with annulling the credibility of Malmström’s commitment.

Nevertheless, bilateral discussions on negotiating a trade agreement intensified between the EU and the US after the July meeting between Juncker and Trump. However, the parties struggled to see eye to eye on the scope of the trade agreement to be negotiated (Lawder 2019). The EU wanted to exclude agricultural goods from the scope of the agreement – food production standards and safety issues were one of the sticking points of the public contestation of TTIP – while the US insisted on including agriculture – to alleviate pressure on the US farming community triggered by Chinese retaliation to Trump’s tariffs on China. Despite Commissioner Malmström repeating on several occasions that the EU would not negotiate on agriculture, in January of 2019 United States Trade Representative (USTR) Leighteizer published the US’s negotiating objectives which sought to ‘Secure comprehensive market access for U.S. agricultural goods in the EU’ (USTR 2019:1). The EU, in turn, published its draft negotiating mandate which did not include agriculture (European Commission 2019b). Importantly the pre-negotiation

discussions did not extend to addressing the Paris Agreement. As such, it was rather unsurprising that the draft mandate published by the Commission did not contain a reference to it.

To address the paradox situation caused by the omission of a reference to the Paris Agreement, Commissioner Malmström backtracked on her previous commitment arguing that since a trade agreement with the US would have a narrow scope – limited mostly to industrial goods and conformity assessment in her reading – it would not qualify as a *bona fides* FTA, hence the Commission would not be violating its commitment in relation to the Paris Agreement:

‘On the Paris agreement, that is not really a law, but it is an understanding that we seek trade agreements only with countries that are in the Paris agreement. Now, all countries in the world are, for the moment, in the Paris agreement, except Nicaragua, and the United States has announced that it is leaving, but it has not left yet. That is also one reason why it would be very difficult for us to have a comprehensive trade agreement. But what’s on the table is not a full free trade agreement—it is a limited one—and that’s why member states at some stage, including France, said that this is something we could live with for the moment.’ (Johnson 2019:n.a.)

Malmström’s argument met criticism from members of the EGTA after she made it clear to the group over the course of February of 2019 – after the publication of the draft mandate – that the prospective agreement would also include fish and fish products under the pretext of ‘industrial’ goods. Something that was widely seen to be necessary to make the agreement compliant with Article 24 of the GATT which stipulates that preferential free trade agreement must cover ‘substantially all trade’ – a provision that while not precisely defined, has been interpreted by the EU to mean 90%+ of tariff lines (Ghislain 2019).

In the meantime, the Secretary of Commerce had concluded the 232 report on car imports giving President Trump 90 days to publish it and take a policy decision on whether to impose new tariffs. Under pressure, Member States sought to cut through pushback because of the Paris Agreement and have the negotiating mandate approved quickly to lock Trump in negotiations and avoid new tariffs (Rios 2019). Not only on cars but also on EU agricultural products which Trump threatened to tariff as the result of escalating subsidy disputes between the EU and the US on Boeing and Airbus (Ibid). However, as might be expected adopting the mandate did not go smoothly as the EP’s plenary failed to pass a resolution on the talks, only just narrowly avoiding passing a resolution recommending rejection of the Commission’s proposed mandate as MEPs

opposed the idea of negotiating with the US under the threat of further tariffs (Von Der Burchard 2019b).

More importantly, however, France proved to be adamant about not endorsing the mandate because of the United States' withdrawal from the Paris Climate Agreement. As pressure from the US side grew to start negotiations, the Council took the unprecedented step of putting the negotiating mandate up for a vote and adopting it with France voting against, and Belgium abstaining (Schreuer 2019). While adopting the mandate, and indeed, approving a trade agreement is a QMV competence trade policy is no different from other policy domains in the Council insofar as voting rarely happens. To secure a sense of ownership and commitment from Member States, important policy decisions are generally based on unanimity (Novak 2010).

While the EU's efforts to engage President Trump in negotiations just for the sake of doing so and avoiding new tariffs have led observers to call these talks the 'Great trans-Atlantic trade charade' (Von Der Burchard and Behsudi 2019) the takeaway from this example seems straightforward. Decision-makers increasingly prove willing to acknowledge the importance of addressing climate change in trade agreements – a flagship policy item of trade-contesting NGOs. One which arguably has the most public resonance as it is most aligned with the zeitgeist of our time. However, the actions they are willing to take to pursue a meaningful policy agenda to address climate change is limited when this conflicts with the public goods that the liberal consensus produces – i.e.: maintaining a rules-based trading order and/or growing the web of free trade agreements or simply avoiding economic harm.

Even if we acknowledge that France continues to be perhaps the single most protectionist Member State, and we factor in that France's rejection of the mandate was influenced by the upcoming EP elections, Commissioner Malmström's ham-handed narrative on why an agreement which qualifies as a preferential trade agreement under Article 24 of the GATT is not, in fact, a comprehensive free trade agreement epitomizes how the liberal consensus has become circle fenced from public contestation.

Whether it be to actually negotiate an agreement or merely avert a trade war which results in escalating tariffs, the way in which EU trade policy handled the breakdown of the trade

relationship with its closest political ally shows the level of value attributed to rules-based free trade as a public good. When push came to shove hedging against economic fallout proved to be more important than demonstrating a strong commitment to the newly declared value proposition of EU trade.

3. Conclusions

Gaining and maintaining market access, removing barriers to trade, creating common rules for the real economy, protecting national champions and avoiding protectionism. These continue to be the primary themes underlying EU trade policy today. In other words, EU trade policy has not transcended its base motivations which are still firmly rooted in an economic rather than a norm entrepreneurial logic.

That said, it is also undeniable that in the wake of the ECJ's 2/17 ruling the scope of the debate within the EU has been widened to include non-traditional interest groups with specific non-economic agendas. These changes have been layered on top of the previous structure of civil society interest aggregation which amounted to close cooperation between the trade executive and EU industry. While the fundamental nature of EU trade has not changed, the EGTA does offer several potential benefits for EU trade policy, which have been well understood by Commissioner Malmström who has consistently played-up the EU's values-based approach to trade.

The resurgence of protectionist trade policies may very well strengthen the case for policy-makers to emphasize the importance of common values when they make the public case for a trade agreement. Showcasing a shared commitment to high levels of protections for animal welfare, to combatting climate change and thinking about ways to make the distribution of wealth created by free trade agreements more equal can all be good tools to engender more support for trade. However, it seems equally evident that regardless of the ebbs and flows of protectionism the primary interest of EU trade policy will continue to focus on providing the best possible economic outcomes for European industry while securing the buy-in of Member States.

The conflict between France and the other EU Member States in relation to the Paris Agreement underscored that there is a qualified majority that shares this view on trade. While it

is true that resorting to actual voting in the Council has been unprecedented in the trade space until now, the above elaborated US example demonstrates just how important economic considerations continue to be when push comes to shove. While it has become somewhat more challenging to maintain the liberal consensus amidst heightened public attention, this paradigm is still very much the only one in town.

Some observations on process-tracing

Given the relative novelty of process-tracing as a methodology for conducting in-case (one N) research in the social sciences it seems appropriate to make some observations about how I have used process-tracing and how this methodology's practical application could be further improved before moving to draw conclusions about the substance of the research. As established in Chapter II, the methodological literature is still developing as different views of process-tracing persist. Without wanting to contribute to these theoretical debates, I make two brief observations relating to the practical aspects of the methodology in hopes that they might be of use to future researchers interested in using process-tracing.

First and foremost, the claim that interview data cannot (always) readily be quantified in the same way as it can be with quantitative methodologies seems to hold ground. Having conducted N44 loosely structured interviews with the trade policy élite the different levels of knowledge, engagement and actual interest in the subject matter shines through. As a result, some interviews were significantly more revealing than others in establishing the dominant view within a given institution (the Commission, the EP, different Member State governments, etc.). While this does not seem to be problematic in and of itself, more thinking seems to be called for to establish thresholds or criteria for claiming robustness when it comes to relying on these interviews. In addition, the question of how to deal with less robust, although enriching information that provides further context should also be discussed at more length.

To deal with these issues, throughout this dissertation I have tried to stick to two basic principles: saturation and the lowest common denominator. Saturation meant that I would only consider any given claim to be substantiated once the interview responses became well saturated. The principle of the lowest common denominator, in turn, meant that I would make my strongest claims at the highest level of abstraction permitted by the interview responses while using any additional explanations or observations relating to these claims to add context. For example, in looking to establish that Member States' turn towards national parliaments to ratify CETA was a direct result of the EP's inability to quell politicization, I asked this question

from all the TPC deputies I interviewed (N7). All of them confirmed the fundamental point (saturation), although, given the additional space for elaboration provided by the semi-structured format, they emphasized different aspects of why this was the case which is doubtless reflective of their different personal and subjective experiences. While these, given their subjective nature were not substantiated to the same degree as the fundamental claim, they nevertheless are valuable in adding context and do not pose a consistency issue as such context is usually complimentary and very rarely contradictory given the fact that the claim being made at the lowest common denominator remains undisputed.

Secondly, the iterative nature of the research process itself means that the application of process-tracing implies a set of individual judgment calls as to how much the researcher shares with his or her reader. I have taken an approach which while not always making evident all the stages of my thought process of how I came to formulate any given expectation nevertheless provides the underlying reasoning and makes explicit the evidence upon which I base my resulting claims – these are provided at the end of each applicable chapter in the form of tables where evidence is weighted based on uniqueness and certainty. While I am confident in my judgments, it is worth noting that there is ample space for the methodology to develop in this regard in order to establish universal standards for how much of the research process needs to be shared and consensual definitions and modes for establishing uniqueness and certainty.

Lastly, with the above observations as caveats, one of the most beneficial aspects of process-tracing, in my view is the reliance on the causal mechanism as a centerpiece of the research process. The causal mechanism is both a reflection of the central claim of research and a product of the research process itself, given the interdependent nature of claim and evidence. The relatively easily falsifiable hypotheses which come together to form the causal mechanism result out of an iterative process of back and forth between theory and empirical evidence, ultimately granting the researcher more analytical leverage. While approaches differ as to how one communicates this process – some process-tracing makes explicit reference to discredited mechanisms – the fact remains that the Bayesian logic underpinning this methodology allows for this sort of evolutionary research. Again, creating common guidelines around what this should mean in practice would be a necessity for raising the quality of process-tracing overall.

Conclusions

Taking stock of the findings of the dissertation it can be said with some confidence that the politicization of trade has had a rather profound effect on some if not all aspects of the CCP. Perhaps the most obvious and least surprising institutional change is the solidification of the position of the European Parliament as a co-principal of the Commission. As a byproduct of this process, the transparency of the CCP has also increased by virtue of having a better-informed EP. Although it remains to be seen how the EP will use its privileged position to facilitate political debates that have been absent from trade policy in the past. The shift towards more transparency has also been bolstered by the increased transparency the Commission now practices in relation to negotiating documents. Changes in the way the EU approaches investment policy are also noteworthy, as the Court's decision to renationalize investor-state dispute settlement competences were clearly influenced by politicization as was the shift away from the classical ISDS model towards the Investment Court model.

However, despite these changes, the policy core of the CCP has proven to be rather resilient in the face of politicization. The disconnect between the Parliament's and protesters' preferences on investment arbitration amidst the CETA episode goes some way towards demonstrating this point and dispelling the notion that empowering the EP necessarily leads to a more output legitimate policy. Member States' commitment to push through and save CETA from failure without turning back the clock on the EU's trade agenda also supports this observation. As does the fact that the EU has continued to conclude deep and comprehensive FTAs with other partners since. The objective of anti-trade protesters – of not concluding comprehensive FTAs – has, unsurprisingly, continued to be incompatible with the preferences of the trade élite.

In fact, the changes that have taken place in the CCP's design have made for a more streamlined policy which is less prone to public criticisms and is better suited to deliver on the liberal consensus policy agenda. I proceed to make three observations as to why this is the case, which in turn will provide a more comprehensive answer to the research question posed in the introduction.

Firstly, the politicization of the CCP put the trade élite in a situation where they were forced to contemplate how best to appease those contesting their shared agenda and views on legitimacy. Something they had never had to do before. Given the élite's overall dedication to pursuing bilateral free trade agreements at a time when new WTO agreements seemed increasingly unlikely, policy-makers adopted a problem-solving approach to dealing with the political backlash. This meant that simply muddling through or maintaining policy continuity was not an option as a failure to respond, in earnest, to public concerns would have surely fueled rather than extinguished politicization. The challenge, as we have seen was determining what qualified as an earnest response that would be accepted as such by the public.

Whereas in the past, the veil of public disinterest surrounding trade allowed the CCP to function under a *modus operandi* of incremental changes based on power struggles between Member States and between Member States and the Commission, politicization radically changed the scope conditions for policymaking strengthening the dichotomy of 'them' versus 'us', which I have tried to capture by pointing to the different strands of legitimacy held by protesters and the élite. Perhaps the most important reason for why protesters simply couldn't be ignored, is to be found in European public discourse about the EU, which for better or for worse has operated for some time under the unrelenting assumption that the EU needs to be made more democratic and legitimate. The EU is arguably fulfilling its original purpose of delivering public goods to Europeans based on the idea of subsidiarity (such as peace, free movement, and economies of scale, etc.) in a way that balances national interests with technocratic expertise and parliamentary oversight. Nevertheless, the disposition of European political leadership over the past decades has been to accept the argument that more needs to be done to democratize all aspects of integration. Even if this impetus is rarely filled with meaning.

While the growing public interest in trade might well have been apparent already at the time of the European Convention, when Parliamentarians argued for their own empowerment, the real catharsis moment that brought to the forefront the need to address the public came about when trade policy instruments that had long been considered technical and plain boring were suddenly identified by anti-trade NGO groups – and through them by the general public opinion,

as tools to promote exploitation, corporate sovereignty, and capitalist greed. While reconciling anti-capitalist value patterns and views on legitimacy with the policy justifications that guided the development of the trade policy is arguably an insurmountable task the EU trade élite had to try and do just that in order to save the CCP from inoperability. This resulted in a slew of changes that were not always well planned or reasoned, but rather followed a path of convenience.

Looking back at the way in which the public discourse surrounding this process of politicization unfolded, it is equally important to recognize how the low quality of the public debate might have prejudiced this process. The CETA agreement was envisioned by its opponents as a would-be Trojan horse for the United States to ultimately impose its standards on Europeans. Anti-CETA narratives were largely based on hysteria, misinformation, myths and unjustified fears ignoring fundamental elements of FTAs (such as rules of origin or parties' right to regulate). While the fact remains that the trade élite as a whole did not do enough to counter these narratives despite their commitment to these agreements (as we have seen in Chapters V and VI) it is also important to appreciate that it would have been difficult to present convincing counter-arguments based on facts that would have penetrated through the emotionally charged narrative presented by the Stop-TTIP/CETA NGO campaigns. In turn, this indicates a worrying deficiency when it comes to the capacity of the EU as a policymaking community to speak-up for what are supposed to be welfare enhancing public goods. It also indicates a worrying shift when it comes to the quality of the public debate as well.

If we take the view that European integration should not move in the direction of more federalism at least so long as there is no societal push to supersede the nation-state and that instead, the EU should focus on delivering welfare-enhancing public goods as efficiently as possible then we should also have an expectation of policy-makers that they be able to reason for and justify the benefits brought about by these public goods. Something that is reasonable to expect of politicians, elected government representatives and parliamentarians as well. In the post-CETA FTA model based on EU-only competence agreements, the role of the EP in this process will become even more pronounced as much of the burden of elevating the public discourse shifts to the chambers of parliament. As we move away from the acute politicization of trade to more sustained public attention and polarization, with the potential to boil-over to

politicization easier than before, close attention will have to be paid to how the EP fulfills this newfound duty.

At this point, it is also, however, worth pointing out that the empowerment of the EP since the Maastricht Treaty has often come with decision-making moving behind closed doors. The increasingly pervasive practice of fast-tracking legislation by sidestepping the ordinary legislative procedure for the sake of gaining some perceived efficiency gain, or for the facilitation of grand coalition bargaining might tempt the zeal of the EP in future trade agreements to carry this responsibility forward. Especially if the level of public attention to trade were to subside – something that seems likely given the saturation of the EU FTA landscape and the planned move away from negotiations towards better implementation under the von der Leyen Commission. As such, the continuing heightened public interest in trade will likely be a necessary scope condition for maintaining a healthy level of transparency. Monitoring how and along which interests the parliament tries to excerpt influence on the Commission during negotiations, when and which debates are moved behind closed doors are all tasks that civil society at large should focus on going forward. In this sense, civil society has a continuing task to maintain public awareness to trade. The challenge will be grounding future public debates in facts.

Secondly, and closely linked to the above point, is the observation that this changed modus operandi of continuous change did not fundamentally alter the policy vision of the trade élite, which remained remarkably consistent over the examined period. Pareto-improving outcomes, as opposed to import substitution or isolation and a preference for not overburdening trade agreements with heavy-handed environmental, labor, human rights, gender, etc. instruments only loosely related to trade have been the hallmarks of the EU's FTA agenda. Unrelentingly. The one obvious shift in policy preferences is the defenestration of investment protection provisions from the EU's FTA agenda.

As I have observed in Chapter V, the question of whether ISDS provisions should be fused with FTAs was one that was unsettled amongst the élite even when the EU embarked upon the CETA and TTIP negotiations. While the pursuit of the Liberal Consensus agenda on behalf of the EU does still entail debates over policy, these are facilitated by trade-offs that result in mutually

acceptable outcomes to all. This was never the case with ISDS or BITs more generally, which were introduced to the EU's FTA agenda by way of the Commission's agency. A move that was fiercely opposed by several Member States once its broader implications for investment policy became apparent. While at the start of my dissertation (see Figure 1) I posited that in response to politicization the elite would likely only enact token like changes to policy substance, in light of the conclusions made in Chapter V it seems more correct to say that in the case of CETA and TTIP, the changes to trade policy were indeed more substantive than mere token changes, however, they strengthened the original Liberal Consensus agenda as opposed to subtracting from it.

The point then is that the largest substantive change in policy to come out of the response to politicization was, in fact, the elimination of an instrument that was never a part of the Liberal Consensus. Rather, it was a proxy for an inter-institutional power struggle which eventually required the intervention of the ECJ. Not only did the trade agenda remain unchanged, CETA and the EU-Japan Economic Partnership Agreement brought about never seen successes for comprehensive new generation FTAs as these agreements have delivered on liberalization across the board.

Thirdly, it logically follows from the above observations that the desire or need to respond to the public, coupled with the resilience of the core policy agenda will have resulted in other institutional changes aiming to reconcile the disparate value patterns of the elite with those of the public. Seeing how beyond criticizing the legitimacy of the policy agenda anti-trade campaigners raised the issue of transparency related to the process aspects of trade decision making, the trade elite responded by increasing transparency and democratic oversight. This, in turn, resulted in two things. Firstly, it created a pathway for the EP to consolidate its newfound role as an input legitimizing actor in decision-making as it could call on the same arguments that MEPs used to empower the EP at the Constitutional Convention. Namely that it, as a directly elected body could channel public preferences into the policy process most effectively. Yet, and this goes back to the above point, as we have seen in chapters V and VI this consolidation has also meant that the EP has essentially become a part of the trade elite.

It follows that the empowerment of the EP ultimately strengthened the élite's capacity to circle-fence the liberal policy agenda by relying on the Parliament to fulfill its oversight function without seriously threatening the outcome on CETA. Giving way on modifying ISDS (to ICS) contributed to the 'domestication' or cooption of the EP as this politically heated issue provided a good opportunity for political grandstanding on behalf of MEPs at relatively little risk. This point is further evidenced by the EP's gradual falling-out with the protesting public, which culminated in the EP's adoption of CETA. In addition, the decision to increase transparency has meant that the Commission, as the trade policy executive has taken it upon itself to implement significant changes to how it approaches accessibility to information to the public and civil society beyond granting the EP new powers.

While one can only hope that steps like publishing the negotiating mandate of agreements (which were previously classified) and publishing negotiating text proposals that the EU presents to its partners will gradually improve the quality of the public debate around trade going forward, the de-escalation of the politicization of trade following the decision to expel ISDS from the realm of FTAs has left naysayers to trade in somewhat of a vacuum. While select civil society actors – NGOs, Union groups, and business organization – have more opportunities to share their views on trade through pathways such as the trade expert group or the civil society dialogue, the debate seems to have evolved to a point where the fundamental premise of the liberal trade paradigm is not as contested as it was during the politicization of CETA. As long as the focus of the conversation around how to change trade continues to center on how best to diffuse European norms on sustainability or gender rights to other trading partners and not on anachronistic debates around capitalism or globalization the CCP's policy paradigm is unlikely to change. This implies the continuing perseverance of the CCP as an institution based on economic logic. Following lengthy political debates around CETA in the French National Assembly President Macron, who had previously been openly critical about the agreement justified the need to ratify CETA with the following statement:

I am not naïve, but I would like everyone to look at the situation in which we are at the moment. What will be the result of this race in ten years? The closure of all our borders? If we decide to refuse everything based on principle, like this trade agreement, then we will be isolating ourselves. Well

this [ratification] is the road that we have chosen for ourselves. (Emmanuel Macron sur le CETA: “Si nous décidons de tout refuser par principe, nous nous isolons nous-mêmes” 2019)

This acknowledgment of the need to head economic rationality in a world interwoven by global supply chains and interdependencies is, in my view, a par excellence expression of the fundamental logic that continues to justify the CCP in its current form.

To sum up my observations so far and answer the research question posed at the outset of the dissertation – does politicization of EU trade policy trigger EU institutions to pursue changes in policy goals, institutional arrangements and modes of operation? – we can say the following. It seems clear that while the politicization of trade has indeed had a pronounced effect on how the CCP functions as well as on the policy goals that it pursues. The resulting outcome is a leaner and more focused trade agenda that has reinforced the fundamental premise of the Liberal Consensus after what has been a near decade long transitional period of pathfinding.

This is arguably a good thing as the core drivers of the CCP are better protected from the protracted public debates which subjected the question of trade to daily political grandstanding (as was the case with the Wallonia episode) and arguments based on fake news. There will likely be a continuing heightened sense of public awareness to trade which is also a welcome development as there is a legitimate need to have broad-ranging debates about how trade policy can and should feed into achieving other foreign or domestic policy goals like diffusing European norms and standards or contributing to tackling climate change. The fact is that the post-CETA institutional design of the EU’s trade architecture is better suited to facilitate these debates, in an intelligent and factual way, while maintaining focus on delivering economic gains to Europeans through trade. In addition, as the WTO’s institutional crisis is set to escalate over the short to medium term, there is clearly space for the EU to show leadership and vision to maintain the idea of rules-based free trade and potentially reinvigorate multilateralism.

In terms of what the take-away from the institutional transformation of the CCP is for other EU policies or integration more broadly, it seems apparent that so long as the heightened public awareness to issues of EU integration remains the default and not the exception, we can expect politicization to reach all aspects of how the EU works, what its goals are and why these are

justified. While disparate visions of integration between different European societies persist, European leaders regardless of political family must be better prepared and more willing to defend the public goods that all Europeans enjoy as a result of the EU to their domestic audiences. Raising the quality of public discourse by taking the EU closer to its citizens will be a necessary scope condition for these efforts to be effective. In core areas of integration where there is broad unity amongst élites as to the legitimacy of EU action or a specific policy, the obvious challenge will be finding the correct balances between better communicating the rationality that underlies what are élite driven (output legitimate) vision of policy and making sure that there is sufficient flexibility in these to accommodate public demands.

Balancing the newly found and forceful public interest in tackling climate change with more traditional objectives such as spurring economic growth and tidy balance sheets or following a model of rules-based trade will be a good test in this regard. Especially as the European Green Deal includes plans for ramping-up public spending into green infrastructure or introducing a carbon border adjustment mechanism on the EU's trading partners, both objectives driven by public demand yet both objectives that have the potential to conflict with existing EU policy. Answering uncomfortable questions that conflict with the economic consequentiality logic should increasingly be expected. Why is the EU negotiating with a partner that has not committed to upholding the Paris Climate Agreement? Does a trade agreement between Mercosur and the EU contribute to the deforestation of the Amazon? Is it ecologically justifiable to ship meat from Australia and New Zealand to the EU? Instead of shying away from opening these debates, the élite should embrace them and present convincing arguments while accommodating the public as much as possible, with a view to discrediting non-factual, anachronistic anti-capitalistic and anti-globalization arguments based on fearmongering. Afterall, if the point of European trade policy is to deliver economic benefits to Europeans, the public should be able to better understand what these are and how they will benefit from trade.

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