

The Legitimacy of ‘EU-only’ Preferential Trade Agreements

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Abstract: The 2001 Laeken Council Declaration committed the European Community to constitutional reform to enhance the legitimacy of EU governance through “more democracy, transparency, and efficiency”. The 2009 Treaty of Lisbon responded to the Laeken Declaration with extensive reforms in decision-making, scope of EU exclusive competence, and external policy objectives and principles. This chapter reviews law, practice, and quality of institutional change in Common Commercial Policy (CCP) treaty-making after Lisbon against the objectives set out by the Laeken Council, focusing on de jure legitimacy, output legitimacy, and input legitimacy. Putting an end to the tradition of ‘mixed’ agreements in favor of ‘EU-only’ economic treaty governance approximates the achievement of the Laeken Council objectives and renders EU external economic treaty-making more efficient and representative. Legitimacy would benefit further from reinforced engagement of national parliaments.

Keywords: EU External Relations, Common Commercial Policy, deep integration, Preferential Trade Agreements, input legitimacy

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I. Introduction

This paper examines three dimensions of legitimacy of the negotiation, signature, and conclusion of broader EU external economic treaties – i.e. preferential trade agreements (PTA) - since the entry into force of the Lisbon Treaty in 2009 in comparison to pre-Lisbon law and practice. These three dimensions are the *de jure* legitimacy, output legitimacy, and input legitimacy of EU PTA governance. The focal point of this enquiry is whether the Lisbon Treaty reform of EU Common Commercial Policy (CCP) has resulted in the achievement of the reform objectives set out by the 2001 Laeken Council¹, notably the European Council’s pledge to enhance the legitimacy of EU governance through “more democracy, transparency, and efficiency”.² For the purposes of this paper, the term governance is employed as a synonym for the process of negotiating, signing, and concluding EU PTAs.

Any assessment of the Lisbon reform of the CCP that is mindful of the Laeken objective of enhanced legitimacy can arguably not be limited to the positive analysis of black letter law but should account for the constitutional reality and practice that followed formal reform. Most importantly, in order to discern potential effects on political representation, transparency, and efficiency of the decision-making process any such an assessment needs to examine whether primary law reform restructures the market for access to public decision-making.

Constitutional reform may reallocate institutional access points for political participation of stakeholders. If so, constitutional reform *a priori* alters the relative cost of political participation for a given set of diffuse or special interests that act upon the political institutions mandated with CCP governance. Formally institutionalized incentives guide interest group activity towards legitimate channels of influence. The variable efficiency of private interest organization³ as well the

¹ European Council (2001): *Presidency Conclusions, European Council Meeting in Laeken*, 14-15 December 2001.

² Already in 2011, Markus Krajewski noted that “the results of the EU reform process reached by the Lisbon Treaty, must be primarily assessed according to whether they have contributed towards an improvement in the transparency, efficiency and democratic legitimation of the Union. These aims which were set down by the European Council in the Laeken Declaration are the “raison être” of the Lisbon Treaty.” Krajewski, Markus (2013): ‘New Functions and New Powers for the European Parliament: Assessing the Changes of the Common Commercial Policy from the Perspective of Democratic Legitimacy’, in Herrmann, Christoph & Marc Bungenberg (eds): *Common Commercial Policy after Lisbon*, Springer. p67-68

³ Olson, Mancur (1965): *The Logic of Collective Action – Public Goods and the Theory of Groups*, Harvard University Press.

structural characteristics of public decision-making bodies⁴ – i.e. of the mandated political institutions – determine the quality of interest aggregation and the effectiveness of interest groups to skew the substance of policy in their favor.⁵ Constitutional reform and practice by the mandated political institutions thereby determine the likelihood for diffuse (majoritarian) interest biases in decision-making or the success of attempts to ‘capture’ the public policy agenda on behalf of special (minoritarian) interests.⁶ Alternative institutional choices and the design of the institutional architecture implicate choices over process transparency, representation of stakeholders, policy objectives, and the likelihood of their accomplishment.⁷

This paper argues that the Lisbon reform of CCP governance has triggered a process of institutional change that may now – 10 years after the entry into force of the reform - generate what Joseph Weiler calls a new ‘legal-political equilibrium’.⁸ At the time of writing, it is now evident that the new post-Lisbon legal-political equilibrium of CCP political transactions in the area of broader external economic treaty-making has fundamentally shifted to a *modus operandi* that arguably minimizes transaction costs of CCP governance; alters the institutionalized sources of democratic legitimacy; and enhances democratic representation at the same time. It is the change of constitutional practice from a mixed to a non-mixed (‘EU-only’) mode of signing and concluding broader EU external economic agreements, which creates this new balance. It is argued here that the achievement of the three Laeken objectives, which underpin the Lisbon reform, is further approximated in this new legal-political equilibrium.

As noted above, legitimation of post-Lisbon CCP governance can be conceptualized along the lines of three different dimensions of legitimacy, notably *de jure* legitimacy, output legitimacy, and input legitimacy. The formal reform of

⁴ Rubin, Edward L. (1996): ‘The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions’, 109 (6) *Harvard Law Review*. p1428

⁵ As Hauser notes: “Indeed, the very structure of a political institution influences the nature of interest representation.” Hauser, Henry (2011): ‘European Union Lobbying Post-Lisbon: An Economic Analysis’, 29 *Berkeley Journal of International Law* 680. p694

⁶ Komesar, Neil K. (1994): *Imperfect Alternatives – Choosing Institutions in Law, Economics, and Public Policy*, University of Chicago Press, p81. Similarly, Olson discusses ‘latent’ and ‘dormant’ low-stake majorities that can be activated – say through high-profile misinformation campaigns - by high-stake special interest groups - to the disadvantage of the former and the advantage of the latter. Olson (1965): op. cit.

⁷ Olson (1965): op. cit. Komesar (1994): p54. Stigler, George (1971): ‘The Theory of Economic Regulation’, 2(1) *Bell Journal of Economics and Management Science* 2(1), pp3-21.

⁸ Weiler, Joseph H.H. (1991): ‘The Transformation of Europe’, 100(8) *The Yale Law Journal*, Symposium: International Law. p2429

vertical (substantive) and horizontal (procedural) competences as a result of the Lisbon Treaty of 2009 and the legal clarity advanced through CJEU adjudication fall into the realm of the first – *de jure* - dimension to this end.⁹ Beyond formal reform and legal certainty of policy-making, it is the powerful demand for the successful implementation of the EU’s PTA agenda as well as enhanced democratic representation and transparency at the EU level through the empowerment of the European Parliament, which have enabled and incentivized the ‘transformation’ of EU PTA governance to a new equilibrium.

The paper is structured as follows. Section II examines the conditions for *de jure* legitimation of EU-only PTA governance and gives an overview of the formal reform and litigation of EU exclusive competence for Common Commercial Policy. Turning to output legitimacy, Section III contextualizes the debate over institutional effectiveness and efficiency of EU external treaty governance by reference to George Tsebelis ‘veto-player’ analysis and provides evidence for adverse effects of comparatively high numbers of veto points on both quality and quantity of EU PTA output. Section IV complements the forgoing analysis by presenting the latest evidence of changing EU institutional practice, notably the split of EU PTAs along the lines of EU exclusive and shared external competences and the shift to an EU-only mode of EU PTA governance. Section V discusses the input legitimation of EU-only external economic treaty governance and, to that end, examines the scope of changes in democratic representation and transparency of EU decision-making as afforded through the empowerment of the European Parliament and the subordination of national political institutions to the EU level. Section VI concludes the paper.

II. *De jure* legitimation of EU external economic treaty-making

De jure legitimacy of external economic treaty-making denotes the scope of lawful treaty-making governance by the political institutions and actors mandated by EU primary law. The compliance of respective institutions and actors with the EU primary law provisions and relevant jurisprudence shall be – for the purposes of this paper – characterized as *de jure* legitimate.

⁹ Most importantly: Case C-414/11, *Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon*, EU:C:2013:520 (2013). Case C-137/12, *Commission v. Council (Conditional Access Convention)*, EU:C:2013:675 (2013). Opinion 2/15, *The FTA with Singapore*, ECLI:EU:C:2017:376 (2017). *Opinion 3/15, The Marrakesh Treaty* EU:C:2017:114 (2017).

To begin with, the choice of the *de jure* legitimate external treaty-making procedure (EU-only *or* mixed) is a function of the delineation and scope of external treaty-making competences in EU primary law and the content of the respective treaty. The significance of the question over the existence and nature of EU external competence, in other words, derives from its link to the procedural modalities of treaty-making in the EU: if the content of a treaty falls within the scope of EU exclusive competence entirely, the conclusion of the treaty by the EU alone is a legal requirement (mandatory ‘EU-only’ agreement). In contrast, where a treaty includes (just) a single provision that falls within the scope of exclusive competences of the Member States, the EU *must* conclude the treaty jointly with the Member States in their own right (*mandatory ‘mixed’ agreement*). If, however, parts of the treaty fall under EU exclusive competence, whereas other parts of the treaty fall under competences shared with the Member States, it is left to the political discretion of the EU institutions to involve the Member States as parties in their own right or conclude the treaty alone (*facultative mixity*). In other words, Member States in the Council may insist on their participation in their own right through ‘mixed’ treaty-making.¹⁰

The Lisbon Treaty reform of EU primary law broadened the scope of EU exclusive competence for Common Commercial Policy and hence altered the conditions for the *de jure* legitimation of EU-only external economic treaty-making. The CJEU, moreover, clarified the precise delineation of EU external competence with regard to European Union’s new generation of PTAs in Opinion 2/15 of May 16, 2017. Given the significance of the Lisbon reform of exclusive EU economic treaty-

¹⁰ In his submission in the Opinion 3/15 proceedings, Advocate General Wahl recalled that “the choice between a mixed agreement or an EU-only agreement, when the subject matter of the agreement falls within an area of shared competence (or of parallel competence), is generally a matter for the discretion of the EU legislature. That decision, as it is predominantly political in nature, may be subject to only limited judicial review.” (Opinion 3/15: Opinion of the Advocate General Wahl, para 119, 120) Such discretion, however, is subject to procedural rules laid down in Article 218 TFEU: The Commission may propose the signing and conclusion of an external agreement as ‘EU-only’. Member States represented in the Council can then decide to authorize the signature and conclude the treaty as an EU-only agreement by qualified majority voting (QMV) if TFEU-based unanimity requirements do not apply. Alternatively, the Council may adopt a unanimous decision to amend the Commission proposal for an ‘EU-only’ agreement and mandate the independent ratification by each and every Member State - in addition to the Council decision on treaty signature and conclusion (Article 293(1) TFEU). The Court’s wording in Opinion 2/15 (paras 244, 292) cast doubts over the prevalence of the theory of ‘facultative mixity’. See, for instance: Ankersmit, Laurens (2017) *Opinion 2/15 and the Future of Mixity and ISDS*, European Law Blog. The Court, however, reaffirmed the political discretion of the Council to adopt facultative ‘EU-only’ / ‘mixed’ agreements in C-600-14, *Germany v. Council* (ECLI:EU:C:2017:935), para 68.

making competence and the Court's precise delineation of that very competence in Opinion 2/15, I discuss both briefly below.

A. Exclusive Competence for Common Commercial Policy after Lisbon

Under the Treaty of Rome of 1957, initially, the CCP only extended to basic border measures for trade in goods.¹¹ Consecutive reforms of the primary law provisions through the treaties of Amsterdam¹², Nice¹³, and Lisbon¹⁴ have widened the scope of the CCP to cover a broader realm of policy areas and instruments that affect external trade in goods and services as well as foreign direct investment at the border and beyond.

The latest EU primary law reform - the Lisbon Treaty of 2009 - considerably consolidated and simplified the provisions of the CCP. Most notably, the reform treaty added 'services', 'commercial aspects of intellectual property' and 'foreign direct investment' to the text of the first paragraph of former Article 133 EC Treaty, now Article 207 (1) TFEU. Article 207 (1) TFEU reads as follows:

“The common commercial policy shall be based on uniform principles, particularly with regard to *changes in tariff rates*, the conclusion of tariff and trade agreements *relating to trade in goods and services*, and the *commercial aspects of intellectual property, foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of *dumping or subsidies*. The common commercial policy shall be

¹¹The original version of CCP Article 113(1) of the 1957 Treaty Establishing the European Community reads: “The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.”

¹²For a contextualization of Amsterdam Treaty amendments in ECJ jurisprudence and treaty negotiation see: Cremona, Marise (2001): *EC External Commercial Policy after Amsterdam: Authority and Interpretation within Interconnected Legal Orders*, in: Weiler, JHHW (ed): ‘The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade?’

¹³For a comprehensive discussion of the Nice treaty amendments, see Herrmann, Christoph (2002): ‘Common Commercial Policy after Nice: Sisyphus would have done a Better Job’, 39 *Common Market Law Review*, 7-29.

¹⁴Krajewski, Markus (2012): ‘The Reform of the Common Commercial Policy’, in: Biondi, Andrea, Piet Eeckhout, and Stefanie Ripley (eds): *EU Law after Lisbon*, Cambridge University Press.

conducted *in the context of the principles and objectives of the Union's external action.* [emphasis added]”

The arguably most significant expansion of EU exclusive competence occurred in the area of foreign direct investment (FDI). The addition of FDI in Article 207(1) TFEU, however, raised a number of legal questions with regard to the scope of Union competence in this policy area as well as over the future substance of EU foreign direct investment policy. Immediate challenges associated with the transfer of competence were, however, resolved through the adoption of a regulation establishing a transitional arrangement for bilateral investment agreements (BIT).¹⁵ Yet, the exact scope of the Union’s new exclusive external competence for FDI was only clarified by Opinion 2/15 in May 2017, as discussed further below.

The Commission had negotiated services and trade-related intellectual property rights (IPRs) – i.e. the two other areas that are now part of the scope of EU exclusive competence – since the coming into force of the 1997 Treaty of Amsterdam on the basis of Article 133(5) EC Treaty. The clarification and consolidation of EU exclusive competence in these areas, by means of their inclusion in the first paragraph of Article 207 TFEU nevertheless have important ramifications for Member States’ involvement in the decision-making procedure. First, Member States’ governments can no longer invoke the right to unanimous decision-making in the Council on the basis of their coverage in legislation or external agreements. Secondly, the signature and conclusion of agreements covering only services- and trade-related IPRs and other EU exclusive competences requires the ‘EU-only’ *modus operandi*, which subordinates Member States’ political institutions to the EU level of governance. Member States, in their own right, are then precluded from participation other than through their representation in the Council.

Article 207(4)(3) TFEU retains exceptions that apply to certain services sectors, which are regarded as politically sensitive, i.e. cultural and audiovisual

¹⁵*Regulation of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries* (L 351/40). In order to guarantee legal certainty, the regulation grandfathered existing Member State BITs by authorizing Member States to leave national agreements in force, while obliging Member States to bring these treaties into conformity with the regulation where necessary. The regulation also authorizes member states, subject to Commission approval, to negotiate individual BITs and envisages the formulation of a comprehensive EU investment policy at a later stage.

¹⁵Cremona, Marise (2001): p6

services as well as social, health and education services. Compared to Article 133 EC Treaty, however, Article 207(4) TFEU has removed such services from the field of shared competences and added them to the scope EU exclusive competence under Article 207 TFEU. Article 207(5) TFEU, however, provides for the last bastion of services sectors that fall in the scope of shared external EU competence. The ‘field of transport services’ remains subject to shared EU competence in accordance with Article 4(g) TFEU if Union competence is not otherwise rendered exclusive by implication via Article 3(2) TFEU.

Article 207 TFEU, in sum, is the latest result of 60 years of formal institutional change in Common Commercial Policy. As predicted by the Court in Opinion 1/78¹⁶ and retrospectively observed by Richard Baldwin¹⁷, the changing nature and increasing complexity of international trade and investment patterns in the past decades has generated a demand for a constitutional framework that adapted the powers of the Community (and Union) institutions to engage in the regulation of its external economic environment. The profit and net welfare enhancing potential of commercial opportunities inherent to international trade, as well as the evolving complementary international legal institutions that have facilitated and regulated international commercial transactions catalyzed the demand for reform of primary legal provisions governing the CCP.

The otherwise rare exclusive nature of EU competence for the CCP as well as the vagueness of its provisions with respect to its material scope and purpose(s), has, however, provided strong incentives for political and judicial conflict over the

¹⁶In Opinion 1/78, the Court opted for a markedly dynamic interpretation of the scope of the CCP. More than two decades after the entry into force of the Treaty of Rome, the Court held that “it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of more elaborate means devised with a view to furthering the development of international trade. It is therefore not possible to lay down, for Article 113 of the EEC Treaty, an interpretation the effect of which would be to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanisms such as appear in the agreement envisaged. A ‘commercial policy’ understood in that sense would be destined to become nugatory in the course of time.” Opinion 1/78, *International Agreement on Natural Rubber*, ECLI:EU:C:1979:224, (1979). para 44

¹⁷In 2011, Baldwin noted that “[in the 20th century], trade mostly meant selling goods made in a factory in one nation to a customer in another. Simple trade needed simple rules. (...) Today’s trade is radically more complex. The ICT revolution fostered an internationalization of supply chains, and this in turn created the ‘trade-investment-services nexus’ at the heart of so much of today’s international commerce.” Baldwin, Richard (2011): ‘21st Century Regionalism: Filling the gap between 21st century trade and 20th century trade rules’, World Trade Organization. p3

operation of the CCP.¹⁸ It is in this context that the interplay between policy demand generated by international economic and legal institutions, the inter-institutional political process at Community and Union level, primary law reform, and CJEU litigation has created a dynamic of constructive tension. It is this interplay that has catalysed as well as constrained incremental progress towards an expansion of the scope within which EU unity in external commercial policy remains an *a priori* possibility. It is this interplay, moreover, that has set incentives for the EU's political institutions to seek greater legal clarity over the precise delineation of exclusive competence for external economic treaty-making through litigation – as, most recently, done in Opinion 2/15.

B. Opinion 2/15: Litigating EU Exclusive Competence for External Economic Governance

Whether the content of the ‘new generation’ of broader external economic agreements matches or exceeds the scope of the CCP and implied EU exclusive competence for treaty-making is the very question that stood at the centre of the Opinion 2/15 proceedings. It was of particular concern here whether the Union's exclusive treaty-making competences extend to the entirety of the EU-Singapore FTA (EUSFTA), which makes for a blueprint for the latest generation of EU trade and investment agreements. In its questions submitted to the Court, the European Commission asked:

“Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? 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?”¹⁹

In her submission to the Court in the Opinion 2/15 proceedings, Advocate General Sharpston argued that several parts and components of the EUSFTA fall under EU

¹⁸Cremona, Marise (2001): p6

¹⁹Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU (Opinion 2/15) (2015/C 363/22), November 3, 2015.

shared competence – including certain transport services²⁰, portfolio investment²¹, labour rights and environmental protection obligations²² - whereas the termination of member states' BITs, in her view, fall within the scope of exclusive competence of the Member States.²³

The Court's opinion, however, markedly differed from the legal view of the AG and broadly confirmed the tectonic shifts of competence that the Lisbon Treaty brought about in the area of Common Commercial Policy and EU external economic governance – with one notable exception.²⁴ At the most general level, the Court held that EUSFTA components governing trade in goods, services, commercial aspects of intellectual property, government procurement, competition policy, FDI admission and protection, transport services, e-commerce, and sustainable development provisions related to trade fall under EU exclusive external competence, whereas portfolio investment and the contentious investor-to-state dispute settlement (ISDS) mechanism are subject to shared external competence.²⁵ It follows that the Union can conclude treaties, which include wide-ranging substantive 'areas' covered by exclusive external competence without the participation of the Member States in their own right – with the exception of portfolio investment and ISDS.

Compared to the legal view of the AG, the Court advanced a wider application of the 'immediate and direct effects on trade' criterion, which it had developed in its earlier jurisprudence in an effort to add precision to the exact material scope of Common Commercial Policy.²⁶ By the same token, the Court's reasoning embeds the CCP into the context of EU external action objectives and thus gives full effect to the

²⁰Opinion of Advocate General Sharpston delivered on 21 December 2016, Opinion 2/15, The FTA with Singapore: para 268

²¹ibid: para 370

²²ibid.: para 502

²³The AG opined that "the European Union has no competence to agree to Article 9.10(1) of the EUSFTA", which provides that existing EU Member States' bilateral investment treaties with Singapore "cease to have effect and shall be replaced and superseded" by the EUSFTA. Opinion of AG Sharpston. para 396

²⁴For a first analysis of Opinion 2/15 see: Kleimann, David and Gesa Kübek (2017): *The Singapore Opinion or the End of Mixity as we know it*, Verfassungsblog (23 May 2017)

²⁵By inference, in conclusion, Opinion 2/15, The FTA with Singapore, ECLI:EU:C:2017:376 (2017): para 305

²⁶"[A] European Union act falls within the common commercial policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade." Case C-414/ 11 (*Daiichi Sankyo v DEMO*) para 51; C-411/06 (*Commission vs Parliament and Council*) para 71; C-347/03 (*Regione autonoma Friuli-Venezia Giulia and ERSA*) para 75

Lisbon reform of Article 207(1) TFEU in this regard.²⁷ The combination of these two contingencies led the Court to the rather historical conclusion that the EUSFTA provisions on labor rights and environmental protection fall within the scope of EU exclusive competence attributed to the CCP.²⁸

The Court, moreover, cast a wider web for ‘incidental’ treaty content than the AG. Incidental treaty components or provisions, according to the Court’s jurisprudence, are subordinated to the agreement’s predominant purpose (i.e. commerce within the meaning of the CCP Article 207 TFEU) if they are ‘extremely limited in scope’ and thus do not have the potential to affect the allocation of competences.²⁹ In application of a more generous understanding of what is ‘extremely limited in scope’, the Court dismissed the AG’s findings that ‘moral rights’³⁰ and ‘inland waterway transport’³¹ could make for autonomous EUSFTA components. The Court hence did not require reference to legal bases for which the Union shares competence with the member states.³² The Court, compared to the AG, also advanced a more permissive interpretation of implied exclusive powers with respect to its ERTA case law³³, which resulted in a broader shelter for EUSFTA transport services commitments.³⁴

In agreement with AG Sharpston’s finding on portfolio investment, the Court’s ruling dismissed the arguments of the Commission in favor of implied ERTA exclusivity on the basis of a primary law provision, notably Article 63(1) TFEU. In doing so, the Court set an important boundary for the ERTA doctrine: triggering Article 3(2)(3) TFEU requires the existence of internal EU legislation. Primary law provisions cannot be altered or affected by external EU agreements.³⁵ Yet, the Court found that the EU and the Member States share the power to conclude non-direct investment agreements on the basis of Article 216 (1) TFEU.³⁶

²⁷The (added) final sentence of Article 207(1) TFEU reads: “The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action.”

²⁸Opinion 2/15: paras 147, 157

²⁹For instance, Case C-377/12 (*Commission vs. Council*) para 34

³⁰Opinion of AG Sharpston: para 456

³¹*ibid.*: paras 244-246

³²Opinion 2/15: paras 129; 216-217

³³C-22/70 (*Commission vs Council*) para 17

³⁴Opinion 2/15: para 192

³⁵*ibid.*: para 235

³⁶*ibid.*: para 239

In a finding that has markedly changed the direction of the Union’s policy in pursuit of external investment protection, the Court ruled that the EUSFTA’s ISDS mechanism falls within the scope of a competence shared between the EU and the Member States and thus objected to AG Sharpston’s reasoning. The AG had considered that the investor-state dispute settlement mechanism is accessory to the substantive investment protection obligations of the EUSFTA. According to the Court, however, a regime that removes disputes from the jurisdiction of domestic courts may not be regarded as ancillary (or: accessory) to such substantive obligations. Consequently, it “cannot be established without the Member States’ consent”.³⁷ It remains a mystery, however, why the Court did not endeavor to ground this finding on an appropriate – or any - legal basis. As it stands, it remains entirely unclear which TFEU provision the Court deems to confer a shared competence for the establishment of an ISDS regime.

In sum, the Court provided a much awaited clarification of the delineation of EU exclusive competence for the negotiation, signing, and conclusion of both narrow and broader external economic treaties. As a result, it shall be noted that the entire content of the EUSFTA – with the exception of ISDS and portfolio investment – falls within the scope of exclusive external competence and, if limited to that scope, allows for EU-only signature and conclusion.

Having examined the scope for the *de jure* legitimacy of EU-only external economic treaty-making with respect to the realm of vertical competence, I now turn to a discussion of output legitimation of such treaty-making practice.

III. Output Legitimation of EU-only External Economic Treaty-Making

Drawing from Fritz Scharpf’s famous conceptual distinction between input and output legitimacy of public decision-making, the legitimacy of political decision-making increases if it is effective in increasing the welfare for the people governed by the respective policy.³⁸ One condition for such output legitimation of policy is, to be sure, the capacity of a given institutional framework to produce policy outcomes at all. A second factor is its capacity to minimize rent-seeking opportunities for special interest advocacy, which, if successful, reduces economic welfare. The degree of output legitimacy, third, is also contingent on the efficiency of decision-making as societal

³⁷ibid.: para 292

³⁸Scharpf, Fritz (1999): “Governing in Europe: Effective and Democratic?” Oxford University Press.

welfare benefits that would stem from a new policy are reduced commensurate to delays in policy implementation. Overall, the analytical benchmark for economic integration policies is whether an institutional framework is effective in delivering outcomes that maximize economic welfare, notwithstanding equality of distribution.³⁹

Demonstrating the significance of institutional choice for international economic integration, various scholars have applied George Tsebelis' veto player model to compare the effectiveness of entire institutional architectures across countries.⁴⁰ This effort resulted in a comparative assessment of the performance of national institutional frameworks governing external economic integration with respect to the likelihood for deeper external economic integration,⁴¹ the likelihood of a state to sign preferential trade agreements (PTA),⁴² and the likelihood to reduce tariff and non-tariff barriers.⁴³ The findings consistently demonstrate that domestic demand for enhanced economic integration is significantly less successful in shaping policy outcomes commensurate to the increasing number of veto-players involved in the decision-making process. A series of empirical tests based on an analysis of PTA membership from 1950 to 1999 demonstrate that an increase in the number of domestic veto players can cut the probability of forming a PTA by as much as 50 per cent.⁴⁴

Following the logic of these results, the allocation of a veto right to the EP in respect of CCP agreements with third countries through the 2009 Lisbon Treaty reform would thus be expected to decrease the relative institutional effectiveness of the Commission and the Council in the CCP treaty-making process. However, the extension of qualified majority voting (QMV) in the Council to external services trade, intellectual property rights, and foreign direct investment following the Lisbon

³⁹With regard to external economic integration, unequal internal distributional effects of economic welfare gains derived therefrom frequently require domestic social policies that generate benefits for the society as a whole.

⁴⁰Tsebelis, George (1995): "Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism", 25(3) *British Journal of Political Science*, pp289-325. p313

⁴¹Mansfield, Edward D., Helen V. Milner, and Jon C. Pevehouse (2008): pp67-96. Mansfield, Edward D., Helen V. Milner, and Jon C. Pevehouse (2008): 'Democracy, Veto Players and the Depth of Regional Integration', 31(1) *The World Economy*, pp67-96.

⁴²Mansfield, Edward D., Helen V. Milner, and Jon C. Pevehouse (2007): 'Vetoing Co-operation: The Impact of Veto Players on Preferential Trading Agreements', *British Journal of Political Science* 37, pp403-432.

⁴³O'Reilly, Robert (2005): 'Veto Points, Veto Players, and International Trade Policy', 38(6) *Comparative Political Studies*, pp652-675.

⁴⁴ Mansfield, Milner & Pevehouse (2007): op. cit. p432

reform of 2009 would *a priori* result in increasing institutional effectiveness of the Commission and the EP vis-à-vis the Council, and increasing effectiveness of the institutional framework overall.

The benefits of QMV Council decisions on signature and conclusion, however, only extend insofar as external economic treaties are limited to substance covered by EU exclusive external competence. In practice, broader EU external economic agreements - i.e. EU PTAs - always included provisions falling under shared or Member States' exclusive competence until very recently, which allowed Member States to insist on their participation in their own right and to opt for the mixed modus of treaty-making. The veto-rights held by 27 Member State governments and their national (and even regional) parliaments in the *modus operandi* applicable to the signing and conclusion of 'mixed' external economic agreements dramatically decrease the effectiveness and efficiency of the overall institutional architecture in the process of CCP governance if compared to a scenario of 'EU-only' ('non-mixed') signature and conclusion of said agreements. At the same time, they increase the likelihood of successful 'capture' of veto-points by efficiently organized special interest advocacy, which has the potential to decrease the efficiency of the policy at stake.

It is a well-documented fact that the European and international political economy continues to aggregate a powerful demand for the success of the EU's trade and investment policy agenda,⁴⁵ the substance of which is reflected in the 2006 Global Europe strategy⁴⁶ and its more recent updates of 2010⁴⁷ and 2015.⁴⁸ Highly effective special interest advocacy has, on the other hand, demonstrated its capacity to capture veto-points in the 'mixed' mode of external economic governance and to increase political transaction costs associated with the signing and conclusion of EU

⁴⁵Dür presents empirical evidence on the coincidence between societal demands and the EU's position in trade negotiations, which is explained through "first rate access to decision-makers on trade policy issues". Dür, Andreas (2008): 'Bringing Economic Interests Back into the Study of EU Trade Policy-Making', 10(1) *The British Journal of Politics & International Relations*. pp 27-45. Moreover, Dür et al. show that both business and citizen groups enjoy considerable influence in EU legislative politics. Dür, Andreas, Patrick Bernhagen and David Marshall (2013): 'Interest Group Success in the European Union: When (and Why) Does Business Lose?' 48(8) *Comparative Political Studies*, pp 951-983.

⁴⁶European Commission (2006): *Global Europe, Competing in the World – A Contribution to the EU's Growth and Jobs Strategy*.

⁴⁷European Commission (2010): *Trade, Growth, and World Affairs – Trade Policy as a Key Component of the EU 2020 Strategy*.

⁴⁸European Commission (2015): *Trade for All – Toward a more responsible trade and investment policy*.

external economic agreements to nearly prohibitive levels. A requirement for unanimity in the Council as well as Member State ratification of EU external agreements hence pose a credible threat to the success of the Union's external economic agenda, despite broad general Member State support.

Two examples of post Lisbon practice serve as an illustration of the consequences of unanimous voting requirements in the mixed mode of signing and concluding EU PTAs. The episodes referred to here describe the dynamics inherent to the procedure of authorizing the signature of two of the most advanced and economically most significant trade and investment agreements negotiated in the post-Lisbon era.

The signature of the EU – Korea FTA in September 2010, first, was jeopardized by the Italian government, which threatened to veto the Council decision to authorize the signing of the agreement if the agreement's provisional application was not postponed for another year. The Italian government's position at the time was heavily guided by Italy's troubled small-car maker Fiat, which sought protection from Korean car exports to Europe. As the signing of the treaty by the President of the Council had been planned to take place on October 5, 2010, at the ASEAN summit in Brussels - the Commission and the Council Presidency found themselves under strong time pressure to forge a compromise. Eventually, the provisional application of the EU-Korea FTA was delayed by six months and commenced on July 1, 2011 as a result of the Italian intervention.⁴⁹

Similar to the Italian opposition to the EU-Korea FTA, the veto threat of the regional Belgian government of Wallonia in the more recent episode over the signing of the EU – Canada Comprehensive Economic Trade and Trade Agreement (CETA) in October 2016 further increased awareness of the negative repercussions of mixed agreement governance. The episode raised serious concerns over the prospects of the overall post-Lisbon PTA agenda, the credibility of EU negotiators vis-à-vis foreign governments, and highlighted issues of democratic representation in context of the unanimity requirement where a regional constituency of 3.5 million EU citizens could block a policy supported by the governments of all other Member States.⁵⁰

⁴⁹Kleimann, David (2011): 'Taking Stock: EU Common Commercial Policy in the Lisbon Era', 66(2) *Aussenwirtschaft*, pp211-57. pp243-44

⁵⁰Kleimann, David and Gesa Kübek (2018): 'The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU - The Case of CETA and Opinion 2/15', 45 *Legal issues of Economic Integration* (2018) 13-45.

As argued elsewhere in greater detail, the scenario of Member State parliamentary rejection of a mixed agreement – such as CETA – continues to confront the Union’s political institutions with significant legal and political challenges. At the same time, it has sharply increased incentives towards the adoption of a new EU-only design of EU external economic agreements.⁵¹

The two examples underscore the significance of institutional choice and institutional change in EU external economic governance for the pursuit of legitimate public goods, which affect the development path of the European political, social, and economic community in the decades to come.

It is arguable, therefore, that the most recent Council practice, which acquiesces to Commission proposals for ‘EU-only’ negotiation, signature, and conclusion of broader external economic agreements further approximates the achievement of ‘enhanced legitimacy’ in terms of ‘output’ through more effective and efficient governance and more efficient policies.

IV. The New EU Economic Treaty Architecture

By providing legal certainty over the treaty-making competences of the Union under the post-Lisbon primary legal framework, the conclusions of the Court in Opinion 2/15 authoritatively delineated the *de jure* legitimacy of EU external action in the area of trade and investment. Seen in context of past political and judicial battles over external competence and post-Lisbon episodes of ‘vetocracy’, the Court’s decision set the stage for a seminal shift in the practice of multilevel governance of EU external economic treaty-making.⁵²

For the former EU Commissioner for External Trade Cecilia Malmström “it’s not about winning or losing in Court. It’s about clarification. What is mixed? What is not mixed? And then we can design our trade agreements accordingly.”⁵³ Malmström, in other words, saw an opportunity in the Court’s delineation of exclusive external economic competence – an opportunity to depart from the practice of ‘mixed’ signing and conclusion of EU trade and investment agreements.

⁵¹ibid.: pp22-24; Cf. van der Loo, Guillaume and Wessel, Ramses (2017): *The non-ratification of mixed agreements: Legal consequences and solutions*, 54 CMLR (2017) 735–770.

⁵²Kleimann and Kübek (2018): op. cit.

⁵³Financial Times (4 December 2016): *Brussels Close to Trade Deal with Japan*.

To reiterate: EU-only - or non-mixed - negotiation, signature, and conclusion of PTAs significantly expedites the entry into force of respective agreements; renders provisional application obsolete; further elevates the role of the European Parliament vis-à-vis national parliaments; limits Member State participation to qualified majority voting in the Council; significantly reduces the number of veto-players involved in CCP governance; hence significantly limits the access points for special interest advocacy; and reduces prospects of non-ratification of EU external agreements that only cover EU exclusive competences.

In September 2017, to that very end, the European Commission proposed directives for FTA negotiations with New Zealand and Australia that are limited to substance covered by EU exclusive competence.⁵⁴ The negotiation directives were adopted by the Council shortly after.⁵⁵ If negotiated as such by the Commission, the agreements will *require* ‘EU-only’ signature and conclusion.

By the same token, the Commission proposed to split – for the purposes of treaty signature and conclusion - already negotiated agreements with Singapore and Viet Nam into components covered by EU exclusive and shared competence respectively in order to secure an expedited entry-into-force of treaty parts other than portfolio investment and investment protection and enforcement disciplines.⁵⁶ The Japan-EU Economic Partnership Agreement (JEEPA), moreover, does not cover policy areas subject to shared or exclusive Member State competences and thus *required* EU-only signature and conclusion in any case. As the first ‘EU-only’ PTA in the history of the European Union, JEEPA entered into force in on February 1, 2019 – only seven months after its signature by the parties and two months after the European Parliament had given its consent.⁵⁷

⁵⁴European Commission (2017a): *Recommendation for a Council Decision authorising the opening of negotiations for a Free Trade Agreement with New Zealand* (COM(2017) 469 final). European Commission (2017b): *Recommendation for a Council Decision authorising the opening of negotiations for a Free Trade Agreement with Australia* (COM(2017) 472 final).

⁵⁵Council of the European Union (2018a): *Negotiating directives for a Free Trade Agreement with New Zealand*, Brussels, 8 May 2018. Council of the European Union (2018b): *Negotiating directives for a Free Trade Agreement with Australia*, 8 May 2018.

⁵⁶Council Decision (EU) 2018/1599 of 15 October 2018 on the signing of the Free Trade Agreement between the European Union and Singapore. Council Decision (EU) 2018/1676 of 15 October 2018 on the signing of the Investment Protection Agreement between the European Union and Singapore. Council Decision (EU) 2019/1121 of 25 June 2019 on the signing, on behalf of the European Union, of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam.

⁵⁷Council Decision (EU) 2018/0091 of 12 December 2018 on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership.

Forshadowing this seminal shift in EU treaty-making practice, the Council, in its conclusions of May 22, 2018, took note of the fact that “the Commission intends to recommend draft negotiating directives for FTAs covering exclusive EU competence on the one hand and separate mixed investment agreements on the other, with a view to strengthening the EU's position as a negotiating partner.”⁵⁸ Taking pains to emphasize “that it is for the Council to decide, on a case-by-case basis, on the splitting of trade agreements” the Council reluctantly agreed to the new approach proposed by the Commission in the aftermath of Opinion 2/15 and the ‘CETA drama’. At the same time, the Council determined that, “*depending on their content*, association agreements should be mixed. The ones that are currently being negotiated, such as with Mexico, Mercosur and Chile, will remain mixed agreements” [emphasis added].⁵⁹

The Council conclusions also mirror ubiquitous (input) legitimacy concerns. The Council notes that “for FTAs falling entirely within the EU's competence, which are approved at EU level and do not require ratification by Member States, the roles of the Council and the European Parliament ensure legitimacy and inclusiveness of the adoption process.”⁶⁰ At the same time, the conclusions emphasize that “Member States should (...) continue to involve their parliaments and interested stakeholders appropriately, in line with their respective national procedures. More generally, the Council reiterates the importance it attaches to addressing citizens' concerns and expectations and recognizes the need to keep citizens continuously informed of the progress and contents of trade agreements under negotiation, thereby strengthening the legitimacy and inclusiveness of EU trade policy.”⁶¹

⁵⁸*Council Conclusions of May 22, 2018, on the negotiation and conclusion of EU trade agreements.* para 3

⁵⁹*ibid.* It should be noted at this point that Association Agreements are subject to a Council unanimity requirement codified in Article 218(8) TFEU in any case. Notwithstanding this unanimity requirement, AA's are by no means mandatory mixed agreements. For instance, the Council had signed and concluded three facultative ‘EU-only’ AAs, notably with Kosovo and Cyprus. The signing and conclusion of Association Agreements as mixed agreements is, in other words, subject to ‘facultative mixity’, as they currently cover treaty content falling into the realm of both EU exclusive and shared competence.

⁶⁰*ibid.* para 7

⁶¹*ibid.* para 8

V. Input Legitimation of EU-only Preferential Trade Agreements

The likely most contentious of all legitimacy debates surrounding the exercise of EU treaty-making competences concerns input legitimation, i.e. the responsiveness to citizens' concerns as a result of the political participation by the people governed.⁶² While a measurement of 'responsiveness' is elusive in context of the limited scope of this paper, the following considerations may help to evaluate the degree to which EU-only economic treaty governance increases or decreases input legitimation. The crucial question in regard of the shift from mixed to EU-only PTA governance is whether the given alteration of institutionalized sources of democratic legitimation can enhance democratic representation at the same time.

For starters, it is worth recalling that prior to the entry into force of the Lisbon Treaty in 2009, the European Parliament had little or no role in external economic governance. In many respects, the Council's Article 133 Committee (now: Trade Policy Committee) epitomized the 'black box' character of the pre-Lisbon era trade policy governance process, which was characterized by a lack of parliamentary control, accountability, and transparency. The pre-Lisbon institutional framework left the exercise of EU exclusive external competence for Common Commercial Policy "largely in the purview of the generally free-trade oriented career officials in the Commission, with only attenuated connections to voters, constituencies or political concerns, and the economic affairs ministries of Member States through their collective participation in the Council."⁶³

While the 'technocratic' European Commission traditionally found itself wary of the politicisation of EU trade policy through the involvement European Parliament, it nevertheless advocated – under the leadership of former EU External Trade Commissioner Pascal Lamy – for the empowerment of the EP in CCP matters via primary law reform as early as 2004.⁶⁴ Indeed, it was the Commissioner who suggested that "legitimacy is absolutely crucial to a successful EU trade policy. For example, it is scarcely credible that in 2004, nearly fifty years after the Treaty of

⁶²Scharpf, Fritz (1999): op. cit.

⁶³Hillman, Jennifer and David Kleimann (2010): *Trading Places: The New Dynamics of EU Trade Policy under the Treaty of Lisbon*, GMF Economic Policy Paper, German Marshall Fund, Washington, D.C., October 2010.

⁶⁴Rosen, Guri (2016): *A match made in heaven? Explaining Patterns of cooperation between the Commission and the European Parliament*, Journal of European Integration.

Rome, that the European Parliament still has no formal involvement in EU trade policy.”⁶⁵

The empowerment of the European Parliament is thus among the most significant CCP reform that the Lisbon Treaty has brought about precisely because it put an end to the blatant lack of democratic (or input) legitimation of external economic governance. First, Parliament gained decision-making powers in two main areas, notably co-decision powers applying to CCP domestic framework legislation. Secondly, it received the right to consent to or reject trade and investment agreements following the authorization of their signature and before conclusion by the Council. Article 218(6) TFEU *per se* requires EU parliamentary consent to all external agreements “to which either the ordinary legislative procedure, or the special legislative procedure applies”. This, in line with Article 207 (2) TFEU, applies to all CCP agreements.

Moreover, the Lisbon Treaty amendments equipped the EP with formal rights that practically enable the EP to control the negotiation process and to condition the conclusion of EU trade and investment agreement on its consent. Most importantly, the TFEU provisions confer significant information rights onto the EP. Article 207(3) TFEU requires that the Commission “shall report regularly to special [Council TPC] committee and the European Parliament on the progress of negotiations”. Moreover, Article 218(10) TFEU provides that “the European Parliament shall be immediately and fully informed at all stages of the procedure” applying to the negotiation and conclusion of agreements with third states and international organizations as laid down in Article 218 TFEU.⁶⁶

Nevertheless, the TFEU falls short of granting Parliament a formal role in the decision on the mandate or in setting out objectives of trade negotiations more generally, nor does it provide for parliamentary participation in negotiations. The Commission, through proposal by virtue of Article 218(3) TFEU, and the Council, by adopting decisions on negotiation directives by virtue of Article 218(2) TFEU, formally retain this prerogative. The EP’s right to be informed, furthermore, - even if

⁶⁵Lamy, Pascal (2004): *Trade Policy in the Prodi Commission – an Assessment*, speech, 19 November 2004.

⁶⁶The European Commission and the EP have detailed the substance of the EP’s information rights under Article 207 and 218 TFEU in the *Framework Agreement on relations between the European Parliament and the European Commission* (2 November 2010) (L 304/74, 2/11/2010).

fully, immediately, and at all stages - does not match the Council Trade Policy Committee's prerogative "to assist the Commission in" the task of negotiating trade agreements in consultation with the Commission, which is codified Article 207(3) TFEU. Finally, the EP has no formal role in the signature and provisional application of external economic agreements. Article 218(5) TFEU, in this respect, mandates that "[t]he Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force." The Council, in other words, does retain the exclusive formal right to direct the Commission's conduct of negotiations, additional to the Council's exclusive role in amending and adopting proposed negotiation directives as well as proposed decisions on the authorization of the signature and provisional application of external economic agreements.

In practice, however, the European Parliament has compensated for the lack of its formal role in decision-making on the adoption of negotiation directives, on provisional application of treaties, and its passive formal role during negotiations. Parliament has done so by leveraging existing procedural rights and setting out its substantive and procedural demands through its various channels of communication. Parliament, assisted by its specialized Committee for International Trade (INTA), has various means to voice political preferences and set out preconditions for assenting to CCP agreements early on during negotiations. These include the use of non-binding parliamentary resolutions, hearings, opinions, exchanges with Commission officials in the course of regular Commission reports to the INTA committee on progress in negotiations, as well as written questions to the Commission.

The EP has, in fact, on many occasions, called "on the Commission (...) to take due account of Parliament's preconditions for giving its consent to the

conclusion of trade agreements.”⁶⁷ EP resolutions on negotiations of PTAs with the United States⁶⁸ and Japan⁶⁹ have set significant precedents in this regard.

Against this background, parliamentary information rights vis-à-vis the Commission have an important political value: constitutionally guaranteed full and immediate information on the procedure applying to the proposal and adoption of decisions on negotiation directives and the adoption of agreements, as well as regular Commission reports on progress in negotiations enable Parliament to leverage its consent rights in order to influence the content of negotiation directives, the direction of bilateral and multilateral trade negotiations, and hence the substance of the final agreements.

Furthermore, Parliament shares a bicameral function in the process of adopting legislation necessary for the implementation of CCP agreements. Parliamentary powers to block the framework legislation necessary to implement provisions of a trade accord adds additional procedural leverage for it to demand involvement in the political deliberation process that applies to the scope, objectives, and directions of the negotiation of external economic agreements.

In light of these multiple levers – through the EP’s formal role in adopting implementing legislation and its right to veto the conclusion of CCP agreements, EP substantive and even procedural demands can hardly be ignored when the Commission and the Council determine negotiating objectives and EU positions in negotiations with third countries.

Another tangible outcome of the empowerment of the EP is enhanced transparency and public deliberation of EU external economic governance. The EP has effectuated this change not only by creating a public platform for deliberation but

⁶⁷European Parliament Resolution of 18 May 2010 on the EU Policy Coherence for Development and the "Official Development Assistance plus" concept. In the same vein, in its Resolution of 7 May 2009 on the Parliament's new role and responsibilities in implementing the Treaty of Lisbon (2008/2063(INI)) Parliament “[w]elcomes the fact that Parliament's consent will be required for a wide range of international agreements signed by the Union; underlines its intention to request the Council, where appropriate, not to open negotiations on international agreements until Parliament has stated its position, and to allow Parliament, on the basis of a report from the committee responsible, to adopt at any stage in the negotiations recommendations which are to be taken into account before the conclusion of negotiations”.

⁶⁸European Parliament resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America (2013/2558(RSP); European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI));

⁶⁹European Parliament resolution of 13 June 2012 on EU trade negotiations with Japan (B7-0297/2012). European Parliament resolution of 25 October 2012 on EU trade negotiations with Japan (2012/2711(RSP)).

has also – albeit indirectly – forced the Commission to seek legitimacy of its policy proposals through an enhanced practice of public consultations, exponentially increasing efforts to explain complex policy instruments to a broader public, and a dramatic increase of public access to trade negotiation documents. In this way, the emergence of the European Parliament has – overall - directly and indirectly resulted in enhanced transparency of CCP governance through the political institutions of the EU.

As an illustration, in the period of December 2009 until November 2013, the Directorate General for External Trade of the European Commission provided 155 informal technical briefings to members and staff of the INTA committee and EP political groups on a diversity of CCP dossiers and presented over 50 times in INTA Committee sessions and monitoring group meetings.⁷⁰ Moreover, in response to the EP's ubiquitous calls for negotiation transparency, the European Commission's 'Trade for All' communication of 2015 enhanced the previously highly restricted access to negotiation documents to unknown levels.⁷¹

It is, in sum, difficult to argue with the general assessment that the Lisbon Treaty reform has institutionalized and vastly increased input legitimation of the exercise of EU exclusive competences for external trade and investment. The question remains, however, whether the most recent design of EU PTAs has factually diminished democratic representation by reducing their scope to content falling within the realm of exclusive external EU competence. The resulting subordination of Member State political institutions to decision-making by EU institutions could lead to the impression that EU-only PTAs suffer from a net loss of input legitimation.

A look back at scholars' expectations for post-Lisbon external economic governance facilitates an evaluation of the effect of the shift from mixed to non-mixed PTA negotiation, signature, and conclusion as regards the issue of input legitimation. In 2011, Krajewski anticipated that the "broadening of the scope of the common

⁷⁰Internal documentation obtained from DG TRADE – to be disclosed upon request.

⁷¹European Commission (2015): *Trade for All – Toward a more responsible trade and investment policy*. In the communication, the Commission notes that: "[t]ransparency should apply at all stages of the negotiating cycle from the setting of objectives to the negotiations themselves and during the post-negotiation phase. On top of existing measures, the Commission will: at launch, invite the Council to disclose all FTA negotiating directives immediately after their adoption; during negotiations, extend TTIP practices of publishing EU texts online for all trade and investment negotiations and make it clear to all new partners that negotiations will have to follow a transparent approach; and after finalising negotiations, publish the text of the agreement immediately, as it stands, without waiting for the legal revision to be completed."

commercial policy by the Lisbon Treaty will lead to a disempowerment of the national parliaments.” He further notes that the ”loss of competencies in the Member States leads to a removal of the active participation of the parliaments of the member states. This loss is not just of a formal nature, but instead leads in practice to lesser parliamentary control over multilateral commercial agreements.”⁷²

Woolcock, on the other hand, observed that “in practice few Member State parliaments have exercised effective scrutiny of EU trade policy” prior to the entry-into-force of the Lisbon Treaty.⁷³ Adding to the lack of political participation prior to 2009, Krajewski considered that “the rejection of an international treaty can practically be ruled out” because, in parliamentary systems of government, the ruling government is frequently backed by voting majorities in parliament.⁷⁴ By distinction, the functioning of the EP as a check and balance to the Council and the Commission, rather than approval of government in a parliamentary democracy, rendered the EP more autonomous from the decision-making of the executive branch and more comparable to the US Congress than EU Member State parliaments.⁷⁵

In contrast to some of these early expectations, Member State parliaments have since then markedly enhanced scrutiny of CCP negotiation dossiers commensurate to the perceived political value of respective negotiations and agreements as well as intensifying public concern. Jancic, for instance, observes that “[t]he developments in EU trade policy have provoked a remarkable reaction in national parliaments. (...) Specifically, TTIP negotiations have been discussed by no fewer than 32 parliamentary chambers” most of which engaged in substantive scrutiny.⁷⁶

Moreover, as noted further above, it is only in the post Lisbon era that Member States’ ‘vetocracy’ in the mixed mode of treaty-making⁷⁷ has become a credible threat to the Union’s trade and investment policy agenda. This fact serves, by itself, as another indicator for enhanced political participation of Member State

⁷²Krajewski (2013): pp 81-82

⁷³Woolcock, Stephen (2008): ‘The potential impact of the Lisbon Treaty on European Union External Trade Policy’, SIEPS European Policy Analysis 8-2008. p5

⁷⁴Krajewski (2013): p69

⁷⁵Ibid.

⁷⁶Jancic, Davor (2017): ‘TTIP and legislative-executive relations in EU trade policy’, 40(1) *West European Politics*. p209

⁷⁷ Mayer, Franz (2016): ‘European Vetocracy? How to overcome the CETA problem?’ *Verfassungsblog* (24 October 2016)

legislatures compared to the pre-Lisbon era. Political participation of the European legislatures has in fact dramatically increased at both the EU and Member State level.

But does the limitation of the political influence of individual Member State parliaments to the voting behaviour of ‘their’ government in the Council diminish input legitimation of PTAs as compared to the mixed mode of PTA ratification? An affirmative answer to this question necessarily accepts the notion that, in extremis, democratic representation through the European Parliament and the legislatures of 26 Member States only provides sufficient input legitimation to EU external economic treaty-making if, and only if, the legislature of the 27th Member State – potentially representing a constituency as small as the population of Malta – concurs with the vote of parliamentary chambers representing 450 million EU citizens. This notion, however, seems to contradict ideas of both proportionate democratic representation in decision-making as well as output legitimation of the given institutional framework. The shift to a qualified majority voting in the Council - which requires at least four Member States that represent at least 35 percent of the EU population in order to block a Council decision - and the elevation of an increasingly effective and veto-armed European Parliament in the EU-only modus of treaty governance, appear to mend issues of both output and input legitimation discussed here.

VI. Conclusions

The Council’s acquiescence to the Commission proposal for a new economic treaty architecture for Preferential Trade Agreements with third countries has fundamentally changed the *modus operandi* for Member State political participation in multilevel external economic governance of the European Union. ‘EU-only’ external economic governance further channels the aggregation of policy demand and political transactions towards the EU triangular institutional framework epitomized by the Commission, the (qualified majority-voting) Council, and the European Parliament. It strips national political institutions of their veto-rights and yet incentivizes national legislatures to employ the rights of participation guaranteed under national constitutions to influence the voting behaviour of ‘their’ governments in the Council throughout - and not only at the very end - of the negotiation process. The seminal shift from a mixed to EU-only mode of EU PTA governance further elevates the responsibilities of the European Parliament - in comparison to its previous marginalization in a multi-dozen veto-player setting - and allows for it to effectively

fulfil its treaty-prescribed role as a check-and-balance of the Commission and the Council.

This paper has advanced a comparative analysis of *de jure*, output, and input legitimacy of PTA governance in the mixed versus EU-only mode of economic treaty-making. Against the backdrop of the Laeken Council legitimacy benchmarks, this analysis has demonstrated that the ‘best-imperfect institutional alternative’ to mixed EU external economic governance stems from the EU-only mode of negotiating, signing, and concluding of preferential trade agreements, which fully employs the available EU constitutional space for more representative, transparent, and efficient public decision-making.

The Council’s preference for mixed signature and ratification of Association Agreements with Mercosur, Chile, and Mexico retains a last bastion of Member State participation - in their own right – in EU PTA governance. By inference, the Council seems to prefer that the Laeken legitimacy standard does not apply these external action instruments. This circumstance, however, appears to be both politically arbitrary and anachronistic. The Council has, in the past, used its discretion for ‘facultative mixity’ to allow for the EU-only signature and conclusion of Association Agreements with Ukraine, Cyprus, and Kosovo. While it is *de jure* legitimate to do so, it does – in the Lisbon era - enhance output and input legitimacy at the same time. The AA treaty instrument as means to forge stronger political and economic ties with third countries, however, may soon be outdated: the more recent EU treaty design has seen a split of traditional AA content into political partnership agreements, on the one hand, and deep and comprehensive trade agreements, on the other. Adding a third separate – investment protection – agreement to this formula may thus make for the future approach to the design of broader EU external action instruments in line with the spirit of the Laeken Council declaration of 2001.

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