



Conflicts of sovereignty over EU trade policy: a new constitutional settlement?

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Abstract

This paper investigates whether the politicization of a new generation of trade agreements has led to the transformation of EU trade policy. It provides a qualitative study of multilevel contention based on sources from civil society and the parliamentary archives in Belgium, Germany, and the European Union concerning the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and three subsequent agreements concluded by the EU with Japan, Vietnam, and Singapore. We argue that, far beyond mere institutional disputes, the contention surrounding CETA has epitomized two conflicting visions of sovereignty: on the one hand, a vision where national executives *qua* states share sovereignty under the auspices of the European Commission, and on the other hand, a claim to reassert popular sovereignty (and the channelling thereof by parliaments) in a multilevel fashion. We demonstrate that the strengthening of the latter vision has been limited as the empowerment of parliaments was not sustained when civil society's mobilization waned. The EU institutions have successfully curtailed the category of mixed agreements thus limiting the involvement of national and regional parliaments. CETA was a climax in the politicization of trade yet failed to bring about a new constitutional settlement that enhances the popular component of sovereignty in the EU.

Keywords Sovereignty · Trade · CETA · Politicization · Parliament · People

Introduction

European trade was never uncontentious, and there were always dissenting voices (della Porta 2007). To a large extent, EU trade policy is known as an area of intense lobbying as decision makers seek to satisfy demands stemming from key

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actors of global value chains (Young 2016). Over the past decade, though, the expression of diverging national and sectoral interests (Meunier 2007; De Bièvre and Dür 2005) has been supplanted by the expression of public dissent about the nature, purpose and objectives of trade. In other words, European trade policy has entered an era of unprecedented politicization (De Bièvre et al. 2020). Even the very rationale behind free trade—namely that far-reaching liberalization should be pursued because it generates growth and thus increases welfare—is now questioned by a number of political parties and citizens, thus upsetting a consensus which had stood for decades. The contestation of the Anti-Counterfeiting Trade Agreement (ACTA) in 2012, and the campaigns against the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada in 2015–2016 represent a climax in the contentiousness of trade policy (Rone 2020; Gheyle 2019; Oleart 2021). The increasing role of organized civil society mobilization, on the one hand, and contention surrounding the respective roles of the European, national (and regional) parliaments', on the other, have been two important developments in this regard. Part of the explanation lies with the rise of the “politics of deep integration” (Maggi and Ossa 2021; Leblond and Viju-Miljusevic 2019), which involves governments “agreeing to international rules governing domestic policies to mitigate their adverse trade effects” (Young 2017a, 453). From the late 1990s onwards, the rise of “deep trade” issues—ranging from intellectual property to health, environmental and labour standards, competition, regulatory cooperation or investment matters — has affected small- and medium-sized enterprises (SMEs), consumers and a wide range of societal preferences to a larger extent than ever before (Leblond and Viju-Miljusevic 2019). The scholarly literature has looked at the politicization of trade agreements from several normative and theoretical angles. Scholars have first analysed whether politicization represents an impediment to the exclusive competence of the EU (Hübner et al. 2017; De Ville and Siles-Brügge 2017; Young 2017a, b; De Bièvre 2018; De Ville and Gheyle 2019). While the Treaty of Rome established the common commercial policy as an exclusive competence already in 1957, nearly all 40 trade agreements signed since 1972 included political and policy components (e.g. being association agreements), which led to qualify them as “mixed” (national/EU) thus implying ratification by national parliaments (De Bièvre and Gstöhl 2018: chap. 2). It was the politicization of (deep) trade issues as seen in debates around TTIP and CETA, however, that drew unprecedented *public* attention to national parliaments' role as potential veto players at the ratification stage (Roederer-Rynning and Kalestrup 2017; Roederer-Rynning 2017; Jančić 2017, 2019; Pinz 2019). Some therefore pointed to “challenging” and “interesting” times for the EU (D'Erman 2020; Young 2017b), seeing politicization as a potentially important threat to the EU's capacity to assert itself as a unitary actor on the global stage. Others, in contrast, have argued that EU trade policy is undergoing substantive (and welcome) democratisation by combining higher visibility and stronger parliamentarism (Jančić 2017; Meissner and Schoeller 2019; Meissner 2016). This is especially the case because parliamentary activism has been backed by transnational mobilisation of citizens' groups (Oleart 2021; Caiani and Graziano 2018;



Conrad and Oleart 2020; Gheyle and De Ville 2017; Rone 2020), even tapping into party competition in certain national arenas (Rone 2018; Bollen et al. 2020). In this perspective, contestation over trade amounts to “empowering dissensus” – that is, a much-needed legitimization of the EU through agonistic politicization (Oleart 2021).

While the existing literature has come a long way explaining the forms, process, causes and consequences of trade politicization (De Bièvre et al. 2020), this paper aims at shedding some new light on the contestation of EU trade policy through a “conflicts of sovereignty” approach. In this perspective (Brack et al. 2019; Bickerton et al. in this issue), more specifically, we detect a deeper disagreement about whether and how the popular and representative *foundation* of sovereignty should be strengthened, particularly as state executives have long enjoyed the monopoly of embodying — and sharing — sovereignty in EU policy making.

Empirically, we investigate to what extent popular mobilization and parliaments (at the national, supranational and regional level) have been successful in asserting themselves vis-à-vis the executives, namely national governments and the European Commission. We look not only at CETA (which has been most widely researched so far together with TTIP) but also at subsequent trade agreements, such as the often overlooked EU-Japan Economic Partnership Agreement (JEFTA), EU-Vietnam Trade Agreement (EVFTA), and EU-Singapore free trade agreement (EUSFTA). We focus on the European Parliament as well as the federal and regional parliaments in Germany and Belgium—two EU countries where TTIP and CETA were highly politicized (Gheyle 2019). If conflicts over CETA were to have an effect over parliamentary and popular engagement with trade policy and the distribution of political competencies, Belgium and Germany as federal states with high levels of politicization of trade across all levels of governance are the two EU countries where one might expect the effect to be the strongest.

Following previous research on parliamentary activity in the field of trade (Bollen 2018; Dahl Martinsen 2019; Pinz 2019), we took as measures of parliamentary assertion the number of questions asked on each agreement as well as amendments or requests, resolutions and plenary debates. Furthermore, we explored the nexus between parliamentary assertion and broader popular mobilization by studying both primary and secondary sources on the anti-CETA civil society campaign in Belgium and Germany, two federal states of contrasting size with multiple potential veto points where contention over CETA was intense. We triangulated these different types of data to get a more comprehensive picture of the multiple dimensions and levels of sovereignty conflicts around trade in the EU. Crucially, we explored whether parliament and civil society involvement were equally high with respect to subsequent agreements such as JEFTA, EVFTA and EUSFTA.

Our analysis unfolds in three steps. In section one, we seek to explain how mobilisation over trade agreements epitomizes conflicts of sovereignty stemming from broad structural transformations in EU politics. In section two, we show how these conflicts have manifested themselves in the contentious episode over CETA. In particular, we demonstrate that citizens’ movements and parliaments tried to reclaim for themselves sovereignty to decide over trade both at the EU and at the national level. In section three, we look first at the limited political and institutional outcomes of



CETA, namely the resilience of the EU exclusive competence and waning politicization. We then explore whether subsequent trade agreements with Japan, Singapore, and Vietnam have triggered similar contention and why (not).

Beyond politicization: institutional and foundational sovereignty conflicts over trade

In line with the propositions put forward in the introduction to this special issue, we see the rise of political contention over trade as a reflection of mainly two intertwined broad transformations: EU integration and the crisis of representation. By centralizing a number of competencies at EU level, EU integration has de facto altered the political order within national states mainly by empowering executives. In their endeavours to manage functional interdependence and/or to project collective power onto the global arena, national governments have engaged in a reconfiguration of their “sovereignty practices” which they have legitimized through the idea (and discourse) of shared or pooled sovereignty (Jabko 2020). This has often implied the delegation of authority and competence to supranational bodies in the name of effectiveness. Trade policy offers a good illustration of this. The European Commission, a non-majoritarian institution little accountable to electoral politics, has long enjoyed the exclusive competence to negotiate free trade agreements in the name of all EU member states. As national governments in the Council define the Commission’s negotiation mandate, the politics of trade have been relocated into the remote and opaque arena made up of committees and working groups populated by EU and national technocrats.

This has tapped into the second broader transformation of European politics, namely the broader *crisis of representation* (and of representation through political parties, in particular). As national governments have come to enjoy greater autonomy and remoteness from the domestic arena, parliaments and parties have been left behind (albeit to various extents in different member states). The decade after the 2008 economic crisis saw a wave of contention across numerous countries with social movements demanding “real democracy now” and more meaningful popular participation in politics (Rone 2020). Long-term criticisms of democratic deficits at the EU, on the other hand, led to an attempt to mitigate them through formal empowerment of the EP with the Lisbon Treaty. To be sure, some scholars have emphasized that the EP in particular had not been a “weak parliament” before that either, because of its important role as a conditional agenda setter (Tsebelis 1995) and its strategic efforts to increase both its formal and informal powers (Héritier et al. 2019). Still, the entry into force of the Lisbon Treaty changed the game by codifying the involvement of the EP (de Putte et al. 2014), giving it the right to veto and making already existing parliamentary control legally effective. Ultimately, the empowerment of the EP, rather than appeasing, fuelled even further demands for democratization of EU policy making both at the national and the transnational level.



Against this background, the conflicts over trade policy illustrate how diverging conceptions of sovereignty *within* as well as *across* domestic polities come to fill in the political vacuum created by “shared sovereignty” (on the problem with “shared sovereignty”, see Bickerton et al., this issue). Importantly, we detect two intertwined types of sovereignty conflicts. At first sight, the contestation of CETA is essentially a story of an unstable and contested *institutional arrangements* over trade policy along the vertical axis. As the more recent agreements touch upon their own prerogatives in areas such as sensitive regulatory issues, investment or state-investors relations, national (and possibly regional) parliaments seek to normally exert control over mixed agreements. In that perspective, the decision of the Court of Justice of the European Union (CJEU) on the EU-Singapore agreement from 2017 was a ruling about a vertical, institutional conflict of competence between the EU and member states. A deeper understanding of the conflicts under examination, though, unveils tensions over the *foundational principle* underpinning sovereignty in Europe, namely the norm of popular self-rule. As argued in this issue, the weakening of popular sovereignty resulting from the practice of “shared sovereignty” in the EU has led to mobilization to reclaim a say from both civil society and parliaments at the regional and national level.

Conflicts over trade should therefore not be conceived in terms of a vertical zero-sum game between national sovereignty and EU competence with veto players coming along the way. The established literature has often regarded EU trade policy as a domain driven by a principal-agent dynamic. This has meant that the member states have continuously used increasingly both delegation to the Commission (their agent)—by consenting to enlarge the domain of EU exclusive competence—and control over the agent—through the negotiation mandate (De Bièvre and Dür. 2005). While national constitutions rule how national parliaments should exert control over the government in the realm of trade, the main locus of power in policy making has clearly lied in the bilateral principal-agent tie, i.e. the national and the EU executives. The recent politicization of trade, therefore, constitutes a backlash against established practices of shared sovereignty which have not featured a key role for citizens and their representatives. Issues surrounding market regulation by the state, transparency, and participation in decision making are raised by populist movements claiming that “people should have a say”.

In what follows, we examine the conflict over CETA and its implications for a new constitutional settlement for EU trade policy. A major difficulty lies in the fact that the empirical manifestations of popular sovereignty remain elusive and that its institutionalization is contested. Popular sovereignty is at the same incarnated by elected representatives performing *representation* in parliaments, whilst also claimed by mobilised activists whose active *participation* has been depicted as a European “democracy of stakeholders” (Aldrin and Hubbé 2016). Our analysis focuses ultimately on two empirical components of the sovereignty conflicts. The first component is the sovereignty claims themselves. By this, we mean the discursive constructions present in public debate that make claims about where final authority should lie in a political system. Sovereignty claims are often performative in nature: they seek to delegitimize certain actors or policies whilst re-legitimizing others. The second component of sovereignty conflicts is the institutional struggles



and reforms which they generate. These struggles are over the distribution of competencies and the relative autonomy of institutions in the exercise of these competencies. Conflicts of sovereignty arise when an important number of actors reclaim sovereignty by contesting the existing constitutional settlement, putting forward alternative ideas about where the ultimate authority lies in the polity.

Conflicts of sovereignty in the contestation over the CETA

Claims to transnational parliamentary and popular sovereignty

In 2016, the Belgian region of Wallonia refused to ratify CETA. This brought the long process of negotiation and ratification to a sudden halt, causing panic in Brussels. The visibility of the Walloon rebellion contributed to emphasizing a vertical reading of the conflict over CETA, featuring national (or regional) parliaments in a battle against the EU's exclusive competence embodied by the European Commission.

Yet, an important act of the CETA controversy was played also at the EP, which made use of its newly acquired powers in trade. Under the terms of the Lisbon treaty, the EP can consent to or reject trade agreements. While ACTA had already been a first episode confirming that the EP would make an active use of its powers, the CETA confirmed this trend. From 2014 to 2020, the EP used a diverse repertoire of actions relying on procedural, cognitive and normative tools to assert its role in the conflict (Roederer-Rynning 2017). Our enquiry of EP activity over the CETA shows that 163 questions on CETA were raised from 2009 to 2020 (a particularly high number compared to only 2 questions on the South Korea trade agreement, and 11 questions on the Columbia, Ecuador and Peru Trade agreement for the same period), 7 resolutions were adopted in the same period and 8 plenary debates were held (see Table 1). Most interestingly, a close examination shows that 44 out of the 163 questions on CETA (a bit more than one fourth) were on procedural issues. These included questions about the allocation of competencies and citizen participation in decision-making. We observed that the CETA did not raise serious concerns in the EP until after the end of negotiations in 2014—only 33 questions were asked on the agreement thought the whole period and 3 plenary debates were held. It was only when the major citizen-led campaigns against both TTIP and CETA gained traction that MEPs became active on the topic with 117 questions between 2014 and 2019 only, together with 5 debates (Table 1).

In line with our argument about executive dominance in practices surrounding shared sovereignty, negotiation mandate conferred to the Commission by national governments has been mainly surrounded by secrecy. There have been good arguments for this: the EU Factsheet on transparency in Trade Negotiations argued, for example, that a certain level of confidentiality is necessary to protect EU interests since revealing one's strategy from the very beginning risks harming the outcome. Furthermore, a climate of confidence, in which provisional concessions are made that might not remain in the final deal, is crucial (EC Factsheet 2013). Civil society and the European Parliament, however, were not convinced of the benefits of secrecy



Table 1 Parliamentary scrutiny of the comprehensive economic and trade partnership agreement between the European Union and Canada

Parliament	Questions(oral and written)	Amendment or request	Resolu-tion/motion adopted	Plenary debates
<i>European parliament</i>				
2009–2014	33	0*	5	3
2014–2019	117	12	2	5
2019–2020	13	0	0	0
BELGIUM				
<i>Chamber of representatives</i>				
2010–2014	1	Not available	0	0
2014–2019	100	Not available	1	2
2019–2020	0	Not available	0	0
<i>Senate</i>				
2010–2014	1	Not available	0	0
2014–2019	3	Not available	0	0
2019–2020	1	Not available	0	0
<i>Walloon parliament</i>				
2009–2014	0	Not available	0	
2014–2019	54	Not available	2	5
2019–2020	3	Not available	0	0
<i>Flemish Parliament</i>				
2009–2014	1	1	1	0
2014–2019	84	121	2	5
2019–2020	21	17	1	2
<i>Brussels region parliament</i>				
2009–2014	2	0	0	0
2014–2019	139	42	0	1
2019–2020	44	14	0	1
GERMANY				
<i>Bundestag</i>				
2009–2013	2	0	0	0
2013–2017	139	42	0	1
2017–2020	44	14	0	1
<i>Bundesrat</i> (since 2016)	0	0	1	1

and low saliency. Numerous MEPs expressed concerns with regard to transparency giving voice to a key concern expressed by NGOs mobilizing against CETA.

The European Parliament's Committee on International Trade (INTA) received the basic text of CETA only a few weeks before the conclusion of the agreement in September 2014 in Ottawa. The 2009 negotiating directives, amended in 2011 to allow talks on ISDS, were made publicly available more than a year after the draft agreement between the two parties was agreed upon (Delimatsis 2016, 12). The



main way MEPs got acquainted with the agreement before the end of negotiations in fact was through a leak by the German broadcaster ARD (ibid, 14). By fighting for their right to know more about the negotiation texts of CETA, elected representatives tried to assert themselves as agents who do far more than just rubberstamp agreements negotiated by others. In a question from August 2014, S&D MEP Marc Tarabella complained that CETA negotiations “took place behind closed doors, in keeping with established Commission practice, one which has long been criticised by ordinary members of the public and representatives of civil society”.

While the EP was institutionally empowered by the Lisbon Treaty, there are grounds to suggest that its exercise of these powers was driven by pressure from civil society. In EP questions, references to popular mobilisation and participation are numerous. For example, Europe of Nations and Freedoms MEP Dominique Martin claimed that:

EU institutions flouted the democratic process at several levels, both national and European. Civil society has legitimate concerns not only about the damage this type of free-trade agreement can do to jobs and to provisions for protecting workers, but also about the establishment of arbitration courts [...] In order to speed up the adoption of the draft agreement and favour the interests of large groups, it was simply not tabled for debate in a number of national parliaments, and certain relevant EP committees were not even consulted. This failure to consult a large number of democratically-elected MPs is a serious attack on democracy. How does the Commission intend to explain to Europe’s citizens its evident desire to short-circuit debate about the agreement?

Remarkably, this question by an MEP from the ENF group does not oppose national and supranational European sovereignty at all, contrary to what one would expect from a far-right politician. Instead, the question problematizes the way democratic process was flouted at both the national and European level, framing democracy as a primary concern and talking explicitly about European citizens. The question is similar to the one posed in October 2014 by GUE/NGL MEP Jean-Luc Mélenchon. Referring to the public consultations on ISDS, Mélenchon claimed that “the Commission ultimately disregarded the views expressed by EU citizens on this issue, despite having consulted them in the first place”.

The reference to “European citizens” and European democratic participation was put forward powerfully by the Green and left-wing civil society organizations that registered a European Citizen Initiative against TTIP in July 2014. Unlike previous mobilizations against trade agreements that were global in nature, this time civil society mobilizations opted for a European Citizen Initiative—a new European Union mechanism introduced by the Lisbon Treaty, which aimed to connect direct democracy with EU-level legislative output (Siles-Brugge and Strange 2020; Weisskircher 2020). The “Stop TTIP” initiative, an ultimate expression of a claim for popular sovereignty at the European level, was rejected by the Commission on legal grounds. The Commission argued that the negotiation mandate for TTIP and CETA was not a legal act but merely a preparatory act on behalf of the EU institutions. Therefore, the citizens’ initiative fell outside the



framework of the Commission's powers to submit proposals for legal acts of the Union (Democracy International 2014). In 2017, the CJEU decided that the Commission should not have refused to register the ECI, since the principle of democracy, which is "one of the fundamental values of the EU" and the objective behind the European citizens' initiatives, required a broader interpretation (Longo 2019, 195). Once rejected, activists repurposed the initiative as a "self-organized" ECI including also concerns about CETA. Throughout the whole period of mobilization, activists consistently focussed on the transnational aspect of opposition to first TTIP and then CETA, emphasizing their desire to protect European regulatory standards as much as nation states' regulatory capacities (Siles-Brugge and Strange 2020).

These developments have led authors such as Marc Pollack to talk about the rise of "new new sovereigntism":

[A] European variant of the American new sovereigntism, in which a growing number of critics — concentrated primarily, though not only, among the pro-European left and centre-left — has raised fundamental procedural and substantive objections to international rules and norms, which they depict as hostile to European laws and values, and against which they champion a defiant resistance (Pollack 2017).

Unlike mobilizations against austerity, that remained very much enclosed within the national level, the transnational nature of the movement against TITP and CETA has been tangible (Caiani and Grazziano 2018; Rone 2020; Siles-Brugge and Strange 2020). As with the Anti-Counterfeiting Trade Agreement (ACTA) rejected by the EP in 2012 or the contentious 2006 EU Services directive, it was the combination of national campaigns and transnational coordination and lobbying which made the movement against CETA particularly robust (Crespy and Parks 2017).

In sum, three mechanisms are at stake in the way in which popular and parliamentary sovereignty have asserted themselves at the European level against a notion of state sovereignty relying on the domination of the executives (the Council coordinating through the European Commission) over trade policy. First, the new competence to grant consent makes the EP matter—while it already had informal powers before the Lisbon Treaty (Tsebelis 1995), its new formal powers made it an obvious target of mobilization insofar as it offers a new potential veto point in the decision-making process. Second, the intense mobilization of civil society incited the EP to make use of the new institutional opportunities to assert its new competence. Third, political groups sympathetic to the grievances of NGOs were pro-active from within the EP to build critical majority capable of challenging the decisions of the Commission and member states. Whilst the EP's control powers over trade had been enhanced since 2009, the questions from MEPs on competence distribution and democratic control were concerned about the inclusion of multiple actors and interests, not just the EP. With the impetus given by the Walloon rebellion, Green, far-left, far-right, and increasingly also social-democratic MEPs endorsed the involvement of regional and national parliaments in making trade policy. Rather than an opposition between national sovereignty and EU exclusive competence, some MEPs were principally concerned with securing inclusive forms of democratic representation. Moreover,



they reclaimed for themselves a role as representatives of the mobilized civil society, groups which they saw as a manifestation of “the people”.

Popular and parliamentary activism to reassert sovereignty at the national level

Politicization of CETA in Belgium

Against the background of the dispersal of parliamentary sovereignty vertically and horizontally (Crum and Fossum 2013), national parliaments have attempted to reassert themselves. This trend is especially evident in free trade agreements. After discussing transnational mobilization in the previous section, we now turn to the mobilization from citizens and parliaments in two federal countries, namely Belgium and Germany. As Table 1 below shows, in those countries, the activity surrounding CETA has been exceptionally high. Data on activity over trade in the Belgian federal parliament confirm that while trade was a very low-salience issue for a long time, its salience in parliamentary questions increased dramatically when it comes to both TTIP and CETA (Bollen, 2018, 332). Between 2014 and 2019, 100 questions were asked on CETA in the Belgian federal parliament compared to only 1 between 2010 and 2014 (see Table 1). Similarly, high activity could be seen in the Walloon, Flemish and Brussels Region Parliaments for 2014–2019 period (ibid). Parliamentary reassertion has proven effective in unpacking deals made in Brussels and constraining representatives of the national executive to justify their choices in the public sphere.

As with the EP, popular mobilization prompted parliamentary activism at the national level. In Belgium, the 4th of May Coalition was instrumental for mobilizing against TTIP then CETA. The coalition comprised “all trade unions, all national health insurance funds, 11.11.11-CNCD, the consumers (Test-Aankoop/Test-Achat), environmental organizations (Greenpeace, Bond Beter Leefmilieu and Inter-Environnement Wallonie) and the *Liga voor Mensenrechten* (human rights organization)” (Gheyle 2019: 317). These highly diverse groups published a common paper that demanded a new negotiation mandate for transatlantic trade deals. This mandate should exclude *inter alia* ISDS, regulatory harmonization and financial deregulation. These groups made a plea for more transparency and a sustained dialogue with parliaments and civil society (ibid). In 2015, organizations that had been active in the European “Stop TTIP” initiative established a demonstration coalition called “Stop TTIP-CETA”. This was responsible for a number of highly attended protests as well as the “TTIP free zones” initiative as part of which many cities and regions declared themselves TTIP and CETA free (ibid, 323).

Certain political parties actively supported the efforts of civil society groups. In Belgium, contention over CETA was led by the francophone Socialist Party (PS), prompted by the campaign from organized civil society (including trade unions). While being in opposition at the federal level, the PS dominated in Wallonia as well as in the Brussels region (Bollen et al. 2020). Paul Magnette, Wallonia’s Minister President, and an academic specialised in European Studies,



and André Antoine, a lawyer and President of the regional parliament, were the key figures in Wallonia's political rebellion. From the outset, Walloon political leaders conceived their role in terms of voicing and channelling the grievances expressed by civil society in the streets into the Belgian and the European political system (Magnette, 2017: 35–36). In November 2014, Wallonia's parliament organized a public hearing about CETA and in September 2015. Paul Magnette invited representatives of citizens' groups opposing CETA to the *Elysette*, the headquarters of the Walloon government. On 27 April 2016, Wallonia's regional parliament adopted the following resolutions:

(a) urge the federal government to ask the Court of Justice of the European Union to check the compatibility between the CETA and EU Treaties, (b) urge the federal government to call in the Council for the qualification of CETA as a mixed agreement, (c) urge the federal government to refuse the provisional implementation of CETA, (d) not give the federal government full powers to adopt CETA, (e) asking the federal government to advocate a conflict resolution mechanism based on public jurisdictions and (f) call the federal government to commit within the EU institutions to the enshrining of a number of principles in all future free trade agreements (Parlement Wallon 2016).

The regional parliament threatened it would block CETA ratification unless these conditions were met. In October 2016, Wallonia vetoed CETA.

This veto caused a major international diplomatic incident. The government of Wallonia came under intense pressure from both the Belgian (especially Flemish (Bollen 2018)) and international media. It was widely reported that the small region of Wallonia was holding the rest of the EU hostage. Accused of cutting itself off from the rest of the EU, the Walloon leader Paul Magnette gave a famous response. In his words, “[t]o be isolated from our own population, to be isolated from our own citizens, in an era, in the beginning of the twenty-first century, when democracy is so profoundly in crisis, this would be at least as grave as being diplomatically isolated” (Bollen 2018: 335).

Nevertheless, the pressure on Wallonia proved too great. After difficult negotiations, the Council adopted a decision to sign CETA on October 28. The agreement reached required the EU and Canada issue a joint interpretative instrument with a binding status that clarified many of the problematic aspects of CETA, such as the parties' ability to regulate economic activities in the public interest. Furthermore, Belgium asked the CJEU whether the controversial investor court system was compatible with European law. Ultimately, despite its rebellion, Wallonia gave a green light to CETA. Many observers felt that the improvements that had been secured, especially with regard to regulatory issues, were no more than a symbolic victory for the Walloon parliament. Still, at least with regard to ISDS, the outcome of the CJEU court case was important since it forced the Commission to transform private investment arbitration procedures into a public court system, while at the same time making it clear that this would be part and parcel of mixed competencies. We discuss the consequences of this decision on the negotiation and conclusion of trade agreements in the last section of the paper, highlighting how mixed competencies over investment were achieved at the price of national parliaments losing power over trade agreements.



Politicization of CETA in Germany

Popular mobilization was even stronger in Germany, where a variety of different actors contributed to the politicization of first TTIP and then CETA. Beyond those actors and groups well known from the “alter-globalization” organizations such as ATTAC or CAMPACT, there were many environmental organizations and food and consumer organizations such as Foodwatch. Small- and medium-sized businesses, religious organizations and trade unions joined the resistance to TTIP and CETA (Gheyle and Rone 2020). German organizations that had been crucial for the ‘Stop TTIP’ European Citizens Initiative were also very active domestically. This led to a dramatic rise of public opposition to TTIP and CETA—a situation especially paradoxical since Germany was the main country pushing for agreements such as TTIP and CETA and was the one to gain the most from them as EU’s top exporter (ibid).

Unlike what we saw in Belgium, there was no parliamentary rebellion associated with popular mobilization in Germany, not at the federal nor at the regional level. Instead, a constitutional struggle broke out. The *Bundestag* proved very cautious in waiting for the definitive decision of the Constitutional Court. In October 2016, complaints were filed which attempted to stop the agreement altogether. What was stake was the Bundestag’s decision to empower the Federal government to approve (or reject) the agreement—and the provisional application of the provisions falling under the EU exclusive competence—in the Council. Two groups of citizens, of 125,000 and 68,000, respectively, filed the complaints. The former was made up of the consumer’s organization *Foodwatch* and the rights associations *Campact* and *Mehr Demokratie*, the latter was headed by the parliamentary group of *Die Linke*. From a legal point of view, they rooted their arguments on the articles of the German Constitution (*Grundgesetz*) referring to the democratic nature of the German state where “state authority is derived from the people” (Article 20.2) and to the role of the Bundestag in representing the sovereign people. At that time, both the Court and the Economics Minister Sigmar Gabriel who was heard by the Court argued, in contrast to the plaintiffs, from a more functional point of view. “A preliminary injunction preventing the Federal Government’s approval of the provisional application of CETA would”, they argued, “significantly interfere with the—generally broad—legislative discretion of the Federal Government in the fields of European, foreign and foreign economic policy”. In a similar manner, they continued, “this would also be true with regard to the European Union [... and] would have a negative effect on European external trade policy and the international status of the European Union in general” (BVerfG 2016). Shortly afterwards, a mere “position taking” put forward by the coalition parties (CDU/CSU and SPD) was adopted in the Bundestag. It recommended to follow the Court and to allow the Federal government to approve the provisional application of those parts of the CETA falling under EU competence.

This was not, however, the end of the story. *Die Linke* started a procedure over “disputes between supreme federal bodies” (*Organstreitverfahren*) arguing that by only adopting a “position” rather than a formal decision (resolution), the Bundestag had not fulfilled its constitutional obligation of participating in decisions over EU integration. Five years later, in 2021, the judges from Karlsruhe ruled that the Bundestag’s position was rooted in substantial deliberations. It had therefore fulfilled its



constitutional and democratic duty to guide the action of the federal government in the EU Council. The Bundestag was awaiting the Court's decision to move towards ratification, and this is expected to happen under the new legislature following the 2021 federal election in September.

From the outset, a majority of the Bundestag has declared it would wait for the German Constitutional Court to rule before making its final decision over the ratification of CETA. While CETA was not very salient in the deliberations of the Bundesrat (the upper German chamber made up of representatives from the regional parliaments), the Bundesrat saw its right as that of joint ratification of CETA along with the Bundestag. As the Greens and *die Linke*, who supported the CETA campaign, hold seats in a majority of regional parliaments, the possibility is open for a disagreement between both chambers of the German parliament.

Overlapping the government-opposition dynamics, the German case more deeply reflects the clash between two conceptions of sovereignty. One conception, claimed by CETA's opponents, is to extend the effective scrutiny powers of the Bundestag in the name of the people. The other, so far represented by the German Constitutional Court and the two coalition parties CDU/CSU and SPD, favours "shared sovereignty" at the EU level, with executives (the Federal government as well as the Commission) enjoying full discretion to decide over trade policies.

'The empire strikes back': resilience and the settling of sovereignty conflicts

The institutional outcomes of contesting CETA: symbolic victories and trade policy fragmentation

As discussed above, one of the conditions for securing the Walloon approval of CETA was for Belgium to ask the CJEU whether the investor-court system was compatible with EU law. In April 2019, the CJEU stated that the investment provisions on CETA were indeed compatible with EU law. In February 2017, the EP voted on CETA and confirmed it by 408 votes to 254, with 33 abstentions (Legislative Train Schedule). Signatories have applied the agreement but in an uneven fashion. Since it is a mixed agreement, it requires ratification by the national parliaments in all EU member states. As of July 2021, 12 EU Member States have still not ratified CETA. Since the CETA confrontation, the Belgian Socialists have been struggling to secure political commitments on trade at Belgian level. On 11 June 2020, Socialist MPs put forward in the Belgian federal parliament a "resolution over European free trade agreements with the aim of including constraining criteria with regard to human rights, social and environmental norms" (Chambre 2019). The parties forming the majority in the chamber rejected the proposition.

The reality of trade policy remains at odds with the vision of a new trade policy, as laid down in the Namur declaration: the manifesto signed by Paul Magnette and many other distinguished scholars including Thomas Piketty, Dani Rodrik, Marise Cremona, Paul Craig, and numerous other experts (EJIL, 2016). The manifesto and the "CETA drama" made many analysts hopeful that EU trade policy would become



more democratic (Kleimann and Kubek 2016). On the other hand, The Trading Together Declaration (2016) argued that developments such as the Wallonian veto are unwelcome and weaken the EU's trading position, while ignoring that national parliaments already have mechanisms of controlling what national governments do in the Council of Ministers and that the EP exercises "direct control over the Council" (ibid). Regardless of the interpretation, for many, the Walloon veto spelled "the beginning of the end of EU trade policy (der Loo and Pelkmans 2016) and meant that "the EU threw away its trade powers" (Oliver et al. 2016). Ultimately, while CETA did prove to be a "game changer" for European trade politics (Banks 2016), this did not happen in the democracy-enhancing way civil society and parliaments would have wished.

Wary of repeating the dramatic last-minute negotiations and similar public contestation, the European Commission asked the CJEU to clarify whether it alone could conclude the free trade and investment agreement with Singapore which it had been negotiating in parallel with CETA. The decision of the European Commission to make CETA a mixed agreement was a political move taken under the pressure of public contestation. Now, the Commission wanted a legally authoritative and binding answer how to treat future trade agreements. The Luxembourg court ruled in May 2017 that while large part of the agreement fell under exclusive EU competence, portfolio investment and dispute settlement between investors and states required member state consent (Morgan 2017).

In theory, the CJEU's Singapore decision could have led to a situation in which member states would ratify all major trade agreements. In practice, the European Commission started splitting major bilateral agreements into trade agreements under its exclusive competence and investment agreements requiring national parliamentary ratification. This solution speeded up the negotiation and ratification of trade agreements. All three agreements that have been signed and applied after the provisional ratification of CETA — the trade agreements with Japan, Singapore, and Vietnam — have not included the controversial plans for investor-state dispute settlement mechanisms or their later incarnation as Investor Court Systems (Conconi et al. 2020: 22). These agreements were also much less debated and contested than CETA. Their negotiation and signature passing almost unnoticed, as if the good old status quo around trade as a "quiet politics" issue (Culpepper 2011) had been restored. Unlike major EU trade agreements in the past, these new trade agreements did not need national ratification (De Bièvre and Gstöhl 2018: chap. 2), pointing to a true "revolution" in trade policy, with national parliaments no longer needing to ratify trade agreements apart from in narrowly specified cases. One might argue that it was precisely the clever decision of the European Commission to defend legally the exclusive competence of the EU in the negotiation of trade agreements that explains the dramatic decrease in politicization of subsequent agreements. Yet, the legal and institutional explanation alone does not suffice. It is true that ISDS had been a key point of contestation in the popular and parliamentary mobilization against both TTIP and CETA. Still, it was not the *only* reason why these agreements were challenged. Concerns about regulatory cooperation as well as trade-related concerns such as threats to labour, environmental and food standards had been also a key point of contestation in previous mobilizations. Civil society organizations such as



Attac Germany considered the agreement with Japan, for example, equally problematic in these trade (and not only investment-related) respects (JEFTA Stoppen 2021). Yet, JEFTA, as well as the agreements with Singapore and Vietnam, caused much less contestation than the agreement with Canada. In the next section, we argue that this is due not only to the timely and efficient legal offensive mounted by the Commission but also to the lack of popular mobilization on the issue, which had been a key factor in parliamentary involvement.

After CETA: a return to the low politicization of trade and executive domination

In this final section, we investigate the debates over the EU-Japan Economic Partnership Agreement, the EU-Vietnam Trade Agreement, and the EU-Singapore free trade agreement to assess whether the CETA controversy has had enduring effects. As far as civil society is concerned, it appears that following mobilization against TTIP and CETA, the key NGOs which had orchestrated mass street protests moved on to other issues (Rone 2020). While the organizations involved had built considerable networks across Europe and expertise in trade, their funding is more often than not project-based. This has meant that they can rarely afford to maintain an extended staff working on the same topic for long periods of time (Dür and Bièvre 2007; Drieghe et al. 2021). Furthermore, trade unions that had opposed TTIP and CETA mainly because of ISDS kept a low profile. The far-right had joined opposition to TTIP and CETA late, under the pressure from its voting base (Rone 2018). It disengaged from further critique of trade agreements, with the exception of the odd protectionist arguments about threats to agriculture or national automotive industries. Only the Greens and far-left parties belonging to the GUE/NGL group in the EP continued engaging critically with the issue of free trade. This was not sufficient to sustain a high level of politicization. In turn, the lack of civil society mobilization over subsequent agreements such as JEFTA, EVTA and EUSFTA made parliamentarians less interested in pursuing the topic (Pinz 2019).

When it comes to parliamentary questions, the decrease in interest is clear. While 163 questions were raised on CETA in the EP during the negotiations and ratification process (2009–2020), only 62 questions were raised on JEFTA (Table 2), 32 questions on EVTA (Table 3) and only 13 questions on EUSFTA (Table 4) for the same period. Furthermore, a closer look at the motions on JEFTA, for example, reveals that the content of these motions has been very different. Most motions on CETA, especially in the period 2014–2019, were highly critical of the agreement. Most motions on JEFTA were mainly about details of the agreement rather than criticizing the agreement per se. Similarly, while a fourth of questions on CETA were dominated by concerns about the distribution of competencies in relation to the agreement and the lack of transparency and democratic participation, most questions on JEFTA focussed on agricultural concerns as well as the controversial Japanese practice of whaling.

The difference in engagement at the national level was even more striking. From 2010 to 2020, there had been 100 questions on CETA in the Belgian Federal Parliament and 185 questions in the Bundestag (Table 1). This is a strikingly



Table 2 Parliamentary scrutiny of the Japan-EU Free Trade Agreement

Parliament	Questions (oral and written)	Amendment or request	Resolution/ motion adopted	Plenary debates
European parliament				
2009–2014	24	0	5	3
2014–2019	38	5	6	3
2019–2020	3	0	0	0
BELGIUM				
<i>Chamber of representatives</i>				
2010–2014	0	Not available	0	0
2014–2019	0	Not available	1	0
2019–2020	0	Not available	0	0
<i>Senate</i>				
2010–2014	0	Not available	0	0
2014–2019	0	Not available	0	0
2019–2020	0	Not available	0	0
<i>Walloon parliament</i>				
2009–2014	0	Not available	0	0
2014–2019	11	Not available	2	5
2019–2020	1	Not available	0	0
<i>Flemish parliament</i>				
2009–2014	0	0	0	0
2014–2019	4	1	1	0
2019–2020	1	0	0	0
<i>Brussels region parliament</i>				
2009–2014	0	0	0	0
2014–2019	0	0	0	0
2019–2020	0	0	1	1
GERMANY				
<i>Bundestag</i>				
2009–2013	0	0	0	0
2013–2017	10	1	0	0
2017–2020	1	5	0	1
<i>Bundesrat (since 2016)</i>	0	0	0	0

high number compared to no questions on JEFTA in the Belgian Federal Parliament and only eleven questions in the Bundestag for the same period (Table 2). The majority of questions on JEFTA (ten out of eleven) in the Bundestag came exclusively by Green and *Die Linke* MPs in the 2013–2017 legislature. Many of these questions were about transparency and the involvement of national parliaments in the adoption of the Treaty as well as of the EP. On 14 June 2018, the pending ratification of CETA and the green light for the federal government to agree to JEFTA at EU level were both discussed at a plenary session of the Bundestag.



Table 3 Parliamentary scrutiny of EU-Vietnam Trade and Investment Agreements

Parliament	Questions(oral and written)	Amendment or request	Resolution/motion adopted	Plenary debates
<i>European parliament</i>				
2009–2014	6	1	1	1
2014–2019	21	1	0	1
2019–2020	5	1	0	1
BELGIUM				
<i>Chamber of representatives</i>				
2010–2014	0	Not available	0	0
2014–2019	2	Not available	0	0
2019–2020	0	Not available	0	0
<i>Senate</i>				
2010–2014	0	Not available	0	0
2014–2019	0	Not available	0	0
2019–2020	0	Not available	0	0
<i>Walloon parliament</i>				
2009–2014	0	Not available	0	0
2014–2019	4	Not available	0	0
2019–2020	2	Not available	0	0
<i>Flemish Parliament</i>				
2009–2014	0	0	0	0
2014–2019	1	0	0	1
2019–2020	2	1	1	0
<i>Brussels region parliament</i>				
2009–2014	0	0	0	0
2014–2019	0	0	0	0
2019–2020	1	0	0	0
GERMANY				
<i>Bundestag</i>				
2009–2013	0	0	0	0
2013–2017	0	0	0	0
2017–2020	3	1	0	0
<i>Bundesrat (since 2016)</i>	0	0	0	0

Attention to EUVTA has been even lower than attention to JEFTA, with only two questions posed in the Belgian Federal Parliament and three questions in the Bundestag between 2009 and 2020 (Table 3). There had been also one motion and one plenary debate in the Flemish regional parliament in the period 2014–2020. This was an exception since both the German Bundestag and Bundesrat, as well as the Belgian Federal Parliament and other Belgian regional parliaments, completely ignored the agreement with Vietnam. Finally, the EUSFTA provoked four questions in the Belgian Federal Parliament and six in the Bundestag (Table 4). There were no



Table 4 Parliamentary scrutiny of EU-Singapore Free Trade and Agreement

Parliament	Questions(oral and written)	Amendment or request	Resolution/ motion adopted	Plenary debates
European parliament				
2009–2014	5	0	2	0
2014–2019	7	2	1	0
2019–2020	1	0	0	1
BELGIUM				
<i>Chamber of representatives</i>				
2010–2014	0	Not available	0	0
2014–2019	3	Not available	0	0
2019–2020	1	Not available	0	0
<i>Senate</i>				
2010–2014	0	Not available	0	0
2014–2019	0	Not available	0	0
2019–2020	0	Not available	0	0
<i>Walloon parliament</i>				
2009–2014	0	Not available	0	0
2014–2019	6	Not available	0	0
2019–2020	0	Not available	0	0
<i>Flemish parliament</i>				
2009–2014	0	0	0	0
2014–2019	4	0	0	0
2019–2020	0	0	1	0
<i>Brussels region parliament</i>				
2009–2014	0	0	0	0
2014–2019	1	0	0	0
2019–2020	0	0	0	0
GERMANY				
<i>Bundestag</i>				
2009–2013	0	0	0	0
2013–2017	3	0	0	0
2017–2020	3	1	0	0
<i>Bundesrat (since 2016)</i>	0	0	0	0

motions, resolutions or debates in the Belgian federal and regional parliaments, nor in the German Bundestag and Bundesrat, with the exception of a single motion by the Flemish Parliament in the 2019–2020 period (Tables 2, 3, 4).

Parliamentary activism and extensive discussions about competence had been features of the politicization of CETA. They did not continue with regard to subsequent agreements. While many observers hailed CETA as a game changer and the conflicts it generated as the beginning of a new era of democratization of trade policy, this politicization was short-lived. The splitting strategy of the Commission proved successful. Since subsequent trade deals have fallen exclusively within



the competence of the EU, they have been monitored by the EP, a move which has crowded out the debates in national parliaments. What is more, the limited politicization of subsequent trade agreements by civil society organizations also meant less pressure from the public, thus further dis-incentivizing parliaments to mobilize on the issue.

Conclusions

This paper has sought to demonstrate that recent mobilizations surrounding EU trade policy go beyond institutional conflicts about the scope of EU supranational competencies. Instead, they are the manifestation of deeper conflicts about the foundation of sovereignty in the EU political order. On the one hand, there has been a vision of sovereignty in the EU that relies on executive dominance in the sense that national governments (a) claim to embody sovereignty, (b) share it among themselves at EU level and (c) delegate their authority to the EU Commission. On the other hand, there has been a vision promoted by citizen groups and parliaments discontent with procedures consisting in little more than rubber-stamping what has been agreed by the Council and the Commission. Thus, civil society and members of both national parliaments and the EP have sought to assert themselves as the ultimate holders of sovereignty in a multilevel democratic order. For that purpose, they have sought to play an effective role as scrutinizers—and possibly veto players. Rather than opposing national parliaments to the EP, actors promoting this vision tend to conceive of it in a multilevel fashion and have been active in exploiting possibilities of networking across territorial levels of governance. The CJEU intervened in a crucial way in this conflict between two visions of sovereignty: to both prevent and circumvent politicization and parliamentary veto points, the CJEU decision on EU's free trade agreement with Singapore allowed the Commission to separate trade and investment agreements. Doing so allows to narrow down the latter category of agreements qualifying as mixed and therefore to curtail the further involvement of regional and national parliaments in EU trade policy.

If the politicization of trade reflected a mere vertical institutional struggle between national and supranational sovereignty, then after the Commission started splitting trade from investment, the EP should have continued engaging with subsequent trade agreements as much as it did with CETA in an attempt to provide full parliamentary control at the supranational level. Yet, this was not the case. Not only did national parliaments lose interest but so did, albeit to a smaller extent, the EP. The free trade agreements with Japan, Singapore, and Vietnam were swiftly negotiated and passed almost unnoticed. Facing a new institutional set-up and an absence of popular mobilization from below, *both* the EP and national parliaments lost an incentive to question “who rules?” over trade and challenge the practice of executive autonomy in that area.

CETA therefore failed to bring about a new constitutional settlement over trade, whereby peoples and their representatives would have a greater say. Furthermore, large corporations and diverse sectoral interests are keeping on weighing for a further intensification of global trade, a goal that is pursued in spite of uneven social



development levels and a deteriorating climate. The cornerstone of EU trade policy is thus bound to remain contentious—perhaps increasingly so—in the years to come.

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