

Understanding the debate about policy space: from the WTO to EU FTAs

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Abstract: Since the 1990s, a public debate has increasingly emerged about the ramifications of the advancing trade governance agenda with respect to governments’ domestic policy space to develop equitable and sustainable development. In this paper we firstly conduct a literature study to explain how one can read the scholarly debate and assessments on policy space. It is illustrated that the two camps in the public debate are replicated in scholarly analyses, with one side stressing the necessity of rules and the many exemptions still available, while the other focuses on the many de facto constraints this brings with it. In doing this, we show that the role of ideology and interpretation in scholarly debates may not be downplayed. Secondly, we show that sketching policy debates in this way also helps to understand recent debates about EU FTAs, which we illustrate with the examples of the EU-Central America Agreement and TTIP.

1 – Introduction

As the United Nations Conference on Trade and Development (UNCTAD) celebrated its 50th anniversary, it dedicated its annual *Trade and Development Report* to ‘Global governance and *policy space* for development’. The underlying concern was that the progressing trade liberalization agenda had an impact on the “(...) *freedom and ability of governments to identify and pursue the most appropriate mix of economic and social policies to achieve equitable and sustainable development in their own national contexts, but as constituent parts of an interdependent global economy.*”(UNCTAD, 2014). Various conceptualizations of ‘policy space’ in the scholarly literature (Mayer, 2009; Shadlen, 2005; Wade, 2003) focus on the following three elements: it is about (i) the *policy tools* or resources that can or cannot longer be used, to (ii) reach certain *goals*, such as equitable or sustainable development, (iii) in the *context* of an interconnected *world economy*.

Even though the issue of shrinking room to manoeuvre (amongst others through international agreements) has been around a long time (see e.g. Chang, 2006), the term itself and the debate about the (perceived) problems accompanied with it, should be situated somewhere at the beginning of this millennium. In parallel with various advancements in global trade governance, such as NAFTA (1994), completion of the Uruguay Round (1994) and the establishment of the WTO (1995), a political and scholarly debate emerged about the relationship between this agenda and domestic manoeuvring space. Indeed, in UNCTAD’s Sao Paulo Consensus (2004), it was argued that the continued interdependence of national economies in a globalized world, *combined* with the emergence of a rules-based trade regime, meant that the space for national economic policy (especially in trade, investment and industrial policy) was now increasingly embedded in international disciplines and obligations.

This relationship between international and domestic politics has always been sensitive (Gourevitch, 1978), in particular the link between international economic integration and the domestic space to conduct the most appropriate policy (Mayer, 2009). In the post-WO II period, a sustainable equilibrium in this respect was even actively pursued. The architecture of the General Agreement on Tariffs and Trade (GATT, 1947), for example, foresaw specific exemptions to the free trade regime, to craft room for countries to socially and domestically embed their economies. John Ruggie famously argued that this post-war period was characterised by ‘embedded liberalism’ (1982)¹: the construction of an international economic system designed to facilitate free trade, but with parallel provisions (such as the possibility to install quotas when one foresees problems with the balance of payments) for Member States to opt out when the excesses of the system clashed with domestic preferences or strengthened imbalances. In other words, policy space allowed for domestic support for economic openness through the protection of the vagaries of such a system (Hays, 2009; Rodrik, 1997).

¹ The concept of markets being ‘dis-embedded’ from society is originally from Karl Polanyi’s (1944) work ‘*The Great Transformation*’

Since the 80s and 90s, however, the argument that the policy space of (mainly developing) countries is shrinking (or under pressure) through various international (economic) agreements is gaining ground, driven also by academic work (Chang, 2006; Rodrik, 2007). The argument is that economic globalization, with international trade rules in particular, has put (developing) countries in a straightjacket, limiting their policy options to conduct “industrial policies” and precluding the strategies that worked for the growth superstars such as China and India (Rodrik, 2007). Directly opposed to this, is the view that the current trade governance – the WTO in particular – leaves enough room to pursue development, and that rules are benefitting countries’ adoption in a globalized world. It seems therefore that two camps have formed in the public space about the relationship between the international trade governance and domestic policy space.

Mosley (2005) shows that a similar divide can be discerned in the (closely related) debate about the link between economic globalization and the so-called ‘race to the bottom’. She argues that two explanations contribute to this divide: a lack of empirical material, and ideology. This brings us to think about two things: first, what is the empirical, scholarly, evidence related to the issue of policy space under international trade rules, and what are the main dividing lines? Secondly, if fault lines can be found in the literature, are they still applicable to more recent debates as well?

The *first goal* of this paper is therefore to shed some clarity on this debate, by focusing on *scholarly* evaluations of policy space under the WTO and the subsequent push towards bilateral agreements. We show that the viewpoints in these accounts can be conceptualized in terms of dichotomy between de jure and de facto constraints. Importantly, however, we also point towards the role that ideology and interpretation can play in these scholarly arguments. Remarkably then, the two camps distilled from the literature in this way overlap to a considerable extent with the camps discernible in the public debate. This indicates that ideology might play a prominent role in scholarly analysis as well, and points towards the necessity of more empirical research.

The *second goal* of this paper is to show that these two camps distilled from WTO analyses on policy space, can be applied to other debates related to economic globalisation/ trade liberalization, and can as such be considered a useful heuristic to situate political and scholarly evaluations of policy space. To illustrate this, we focus on the push towards bilateral agreements after the stalling of the Doha Development Round, and on two bilateral-regional EU agreements after the 2006 Global Europe trade strategy: the EU-Central America Association Agreement (EU-CA AA) and the ongoing negotiations on TTIP. As such, we include both North-South and North-North agreements.

The paper is structured as follows: in chapter 2 we present the theoretical de jure/de facto divide that separates scholarly analyses about policy space under the WTO. Chapter 3 documents the push towards bilateral agreements and how this can be understood in the same terms. Chapter 4 provides our empirical part, which shows that the same two camps discerned

in the scholarly literature are applicable to recent discussions on the new type of EU bilateral agreements (EU-CA AA, and TTIP). Chapter 5 offers some concluding thoughts.

2 – Policy space under WTO-umbrella

To see through the different debates that unfold in scholarly accounts of policy space, we focus first of all on the distinction between *de jure* sovereignty and *de facto* control of policy space (Amsden & Hikino, 2000; Mayer, 2009; Shadlen, 2005). *De jure* policy space means that a government (still) has the formal authority over certain policy tools; if the WTO (or any other agreement) limits the ability of, say, export subsidies, this constitutes a *de jure* restriction of policy space. *De facto*, however, governments may still be able to pursue their goals through other ways (Messerlin, 2006). If the policy goal can still be reached in other ways, it is then stated that *de facto* the policy space is not much restricted. The other way around, it can also be the case that *de facto* policy space is more restricted than one would expect under *de jure* restrictions, for example through political or societal pressure steering governments away from certain options (Rodrik, 2011; Wade, 2003). In any case, when talking about *de facto* policy space, authors urge us to not focus explicitly on the specific (legal) provisions.

Ideally, and in principle, this *de jure/de facto* impact is empirically measurable. In practice, however, this may be very difficult, especially for the *de facto* impact. For example, it might be hard to prove that countries systematically steer away from a certain policy option because it was ‘pressured’ to do so. On the same note, it can be difficult to show a clear causal link between membership in the WTO and a ‘race to the bottom’ in terms of social and environmental policies. Mosley (2005) acknowledges that these questions are empirically difficult, but very important in establishing causal links. She argues that we do not have systematic empirical evidence on these links yet, which leads many assessments to rely on anecdotal evidence (p. 360).

In our conceptualization, this is an important point, because a lack of empirical evidence in the *de facto* component (which is often the case) leaves room for interpretation. We argue that it is this room for interpretation that is the main dividing line between different arguments. Mosley (2005) concurs that *interpretation and ideology* play a significant role in explaining why different evaluations on the impact of several forms of economic globalization still exist. Some economists and political scientists (in the public choice tradition) might see constraints on government autonomy as favorable, steering away from policy mistakes (Krueger, 1990; Mosley, 2005). Others point to market failures to provide public goods, or the importance of matching policy tools to the specific national context (Rodrik, 2009). The more uncertainty there is (due to a lack of empirical evidence), the more room this opens up for interpretation of ‘what could be’ or ‘what should be’.

In sum, we expect that assessments of policy space by political scientists can both be analyzed in terms of the *de jure/de facto* dichotomy, but that this can be (and often is) linked to some extent with the scholar’s own interpretation (and ideological stance) towards the issue. This is certainly true when it comes to politicians and practitioners, but we argue that this is also the

case for scholars. It is important that these underlying assumptions are made explicit. We will therefore focus on both dimensions in our literature study about the impact of the WTO on national policy space.

WTO

The completion of the Uruguay Round (1994) and the establishment of the WTO (1995) contained a push to include more (trade-related) domains into trade policy negotiations (such as investment, services or intellectual property rights), a further restriction of the use of non-regulatory instruments (voluntary export restrictions or quotas), and an overarching legal dispute settlement system to enforce these provisions (Winslett, 2016; Young & Peterson, 2006). Most accounts that focus on the nexus between trade governance and policy space have therefore focused on the question: does (membership of) the WTO limit a country's domestic policy space to pursue sustainable and equitable development?

According to a first strand of authors, the WTO certainly entails a *de jure* restriction of policy space, but this is not worrisome. Countries can make mistakes, such as subsidizing an industry for the wrong reasons (e.g. corruption) or picking out the 'wrong' industry to promote (Milner, 2009). If totally free, there is always the possibility of bad, costly and destabilizing policy choices, which can be avoided by international rules, making policy more efficient (Krueger, 1990). Furthermore, international engagements are for some countries more credible than national legislation, thus increasing trade and investment confidence (Page, 2007). What is more, their involvement in international agreements can even broaden their policy space, if they were previously constrained by domestic pressure by import-competing sectors (Maggi & Rodriguez-Clare, 1998), or corruption (Pauwelyn, 2012).

Even in those instances where there is ambiguity about the benefits of restricting policy space, some scholars state *de facto* we can still speak of a significant amount of policy space. First of all, the direct impact that the WTO had on existing policy tools was for several countries not that far-reaching. Dicaprio and Gallagher (2006) state that many different forms of industrial policy that should be inconsistent with the WTO agreements, did not disappear (such as local content requirements or import controls), as these countries notified them early on, waited for someone to adjudicate it, renamed it, or applied to Special and Differentiated (S&D) treatment to keep it in place.

This S&D in general, *secondly*, provides several opportunities and measures to make the trade regime relevant for developing countries (B. Hoekman, 2005). This is "*the product of the co-ordinated political efforts of developing countries to correct the perceived inequalities of the post-war international trade system by introducing preferential treatment in their favour across the spectrum of international economic relations*" (Gibbs, 1998 in Fritz, 2005). It includes provisions such as

longer implementation times, provisions to safeguard the trade interests of developing countries or measures to increase trading opportunities² (WTO, 2016).

Next to this general exemption, thirdly, different policy windows stay open in specific agreements. The Subsidies and Countervailing Measures (SCM) Agreement, for example, still leaves enough space for developing countries to use subsidies for sustainable development (Ayala, Gallagher, & Network, 2005). Amsden & Hikino (2000) echo this, by stating that there are no legal constraints (but there may be political) that steer governments away from taking the same path as the New Industrialized Countries (NICs). Lastly, governments have many *horizontal* policy options, such as innovation, infrastructure and education that are totally unrestricted by WTO provisions (ICTSD & World Economic Forum, 2016). This relates to a belief that *vertical* industrial policy tools (subsidies, tax cuts, quotas) are rife of government failures, necessitating an avoidance of these strategies (Lerner, 2009).

A second group of authors argue both that *de jure* restrictions are not always beneficial, and that *de facto* the situation is not more lenient, but worse, leading them to evaluate the global trade governance as ultra-restrictive (Rodrik, 2007; Shadlen, 2005, UNCTAD, 2014). First of all, there are undoubtedly several damaging restrictions in WTO agreements, with the agreement on intellectual property rights (TRIPS) as the leading example (Shadlen, 2008). Especially far-reaching provisions on patent rights are claimed to have a negative impact on access to medicines (Wade, 2003; Shadlen, 2008) or the commonly used strategy of reverse-engineering (Shadlen, 2005). Secondly, the exemptions that S&D provides are not evaluated as being effective, stating that it has not helped to alleviate structural weaknesses in developing country economies (Dicaprio & Trommer, 2010; Fritz, 2005; B. M. Hoekman, Michalopoulos, & Winters, 2003). Thirdly, there is direct pressure from dominant governments (the US and the EU; Shadlen, 2005) or international organizations (IMF, World Bank, WTO) to steer away from alternatives that are still around, and to subscribe to a neoliberal growth strategy (market access, deregulation, privatization). Fourth, tools that may legally (*de jure*) be available (such as certain subsidies) may in practice not exist, given their financial cost (Mayer, 2009) or the asymmetry in types and frequency of subsidies that developing and developed countries use³ (Amsden, 2000). There is furthermore legal uncertainty around several subsidies' accordance with SCM (predominantly on renewable energy) which in itself is a *de facto* constraint on the (frequent) use of it (Howse, 2013; Rubini, 2012).

Underlying these evaluations is the indignation that the instruments and policy tools that have historically been used by now advanced economies to protect and promote creative and productive sectors, violate the prevailing rules of the World Trade Organisation (WTO) and can thus no longer be used. They imply that today's developed countries are "kicking away the ladder" that allowed them to climb to where they are now (Chang, 2002). Wade (2003)

² The Generalised System of Preferences (GSP), for example, is such a type of S&D, for example.

³ Subsidies for R&D or financial services are allowed, even though this is more important for already developed nations.

argues that including different domains under the trade umbrella of the WTO has crucially shaped the context and discourse surrounding these issues, from ‘avoiding discrimination’ towards ‘avoiding any kind of trade barrier’.

In sum, evaluations about policy space under the WTO umbrella are closely connected to the scope of the analysis, be it on de jure or de facto forms of policy space (Shadlen, 2006). This scope-like decision, however, is apparently closely connected to interpretation or ideology of the author, be they politicians or scholars. What is remarkable in this respect is that the two scholarly camps that emerge from the literature, building on the de jure/de facto dichotomy, resemble the two viewpoints promulgated in the public debate pretty well. Here too, we see a group that thinks rules are necessary, and that there are many possibilities still on the table; and a group that evaluates the WTO-environment as very restrictive. Of course, a scholar that focuses on de jure constraints (or on the many de facto problems) does not always do this primarily out of ideological considerations (in theory, many positions are possible that are unrelated to de jure/de facto dichotomy as well), but the parallels between the scholarly and public debate are such that we cannot exclude the role of underlying assumptions. In the following paragraphs and chapters, we show that these two camps can be found in debates going beyond the WTO as well.

The bilateral push

The deadlock of the Doha Developing Round has brought alternative liberalization platforms back to the front (Aggarwal & Evenett, 2013; Woolcock, 2013). Next to so-called plurilateral agreements that focus on certain subjects with a smaller amount of countries (such as the Environmental Goods Agreements or the International Technology Agreement⁴), a trend towards more bilateral or regional agreements can be witnessed since the year 2000 (see figure 1). These agreements (both by the EU and US) go deeper in certain domains covered by the WTO (WTO+), but also include domains previously not under WTO-umbrella (WTOx)⁵ (Horn, Mavroidis, & Sapir, 2010). Figure 2 shows this trend towards a deepening of the trade policy agenda.

⁴ These are all negotiated under the framework of the WTO.

⁵ Such as the Singapore issues or labour and environmental standards.

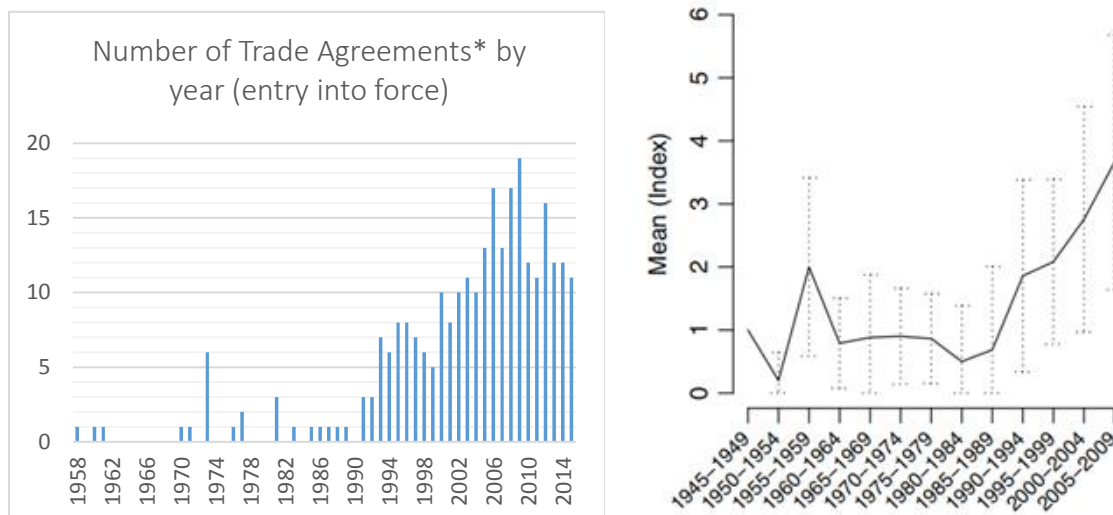


Figure 1 & 2. 1: Number of trade agreements entered into force by year. Source: WTO RTA-IS Database
2: Depth of trade agreements over time. Vertical lines are standard errors. Source: (Dür, Baccini, & Elsig, 2014)

Both this deepening and widening of the agenda has triggered renewed questions about a restriction of policy space. Particularly because this agenda contains exactly those domains that proved sensitive, or even impossible, to reach conclusions on in a multilateral setting (such as the Singapore issues: investment, competition and procurement). Horn et al. (2009) argue that the EU and US have used FTAs to spread their own regulatory systems, which was possible given the asymmetry in negotiation power in one-to-one negotiations (Winslett, 2016). By getting into these agreements, however, countries, and especially developing countries, are surrendering policy space which they have fought for fiercely on the multilateral level (UNCTAD, 2014). Given that these international treaties are very hard to get out of, several authors have dubbed this a ‘new constitutionalism’, whereby trade and investment agreements are used to ‘discipline’ neoliberal policies (Gill, 1995).

Cho and Dubash (2003) show, for example, that the investment provisions in the Multilateral Agreement on Investment (MAI, which was struck down in the late 90s) would have a significant restricting effect on policy space regarding measures around sustainable development. These provisions, however, are now commonly reappearing in bilateral investment treaties with the US and EU (Berger, 2013). In terms of intellectual property rights, secondly, NAFTA goes beyond the exemptions that were (to some) possible under the TRIPS regime (Shadlen, 2008). In terms of tariffs as well, the provisions are more stringent, given that the WTO only ‘binds’ tariffs (installing a threshold that forbids a country to go above it), while bilateral agreements speak of completely eliminating tariff lines (Shadlen, 2006). Anderson (2009) argues that EU agreements do not provide a type of S&D treatment for developing countries in FTAs.

Whatever the reasons to get into these bilateral deals (Baccini & Dür, 2012; Baldwin & Jaimovich, 2012; UNCTAD, 2014), the consensus is that these countries have negotiated with improved market access in mind, rather than preserving policy space (Wade, 2003). The

underlying concern is that trade agreements serve to lock in existing comparative advantages that countries have, limiting their ability to protect emerging infant industries, and as such stifling further diversification of their economies (Shadlen, 2005; ECDPM, 2014). This lack of industrial policy tools could lead them to use social and environmental dumping to increase competitiveness of their companies, or to attract foreign capital (De Ville, Orbie & Van den Putte, 2016).

Here too, the opposite arguments can be discerned given that several authors argue that FTAs bind their partners in a way that is beneficial for exports, leading to a higher international economic activity and ultimately raising their development levels (Hvidt Thelle et al., 2015). Woolcock (2014a) argues that the EU is very flexible and attentive to the specific needs of developing countries, leaving several exemptions, transition periods, technical assistance and aid. What is more, if there are any excesses that bilateral agreements produce, there are other elements or measures that offset these, such as provisions that help in building trade capacity and strategy (OECD, 2001). The Aid for Trade unilateral agenda of the EU for example, is contractually imposed through bilateral agreements such as the EPAs (DiCaprio & Trommer, 2010). Chapters on sustainable development as well have the goal to limit the potential negative impact of a trade agreement on social or environmental standards (Perulli, 2014).

Shadlen's (2006) main message is that, while we cannot be blind towards the restrictions that the WTO has imposed in comparison to the GATT (debates remains unsettled there), this debate becomes less outspoken when compared to the additional restrictions that bilateral deals with the US and EU are adding. Here, we showed that two views still persist, and that this older WTO-debate might still be relevant today. In the next chapter, we go deeper into two recent EU FTAs, to track these arguments and see if they resemble these two different views.

3 – A new wave of EU FTAs: same arguments?

Even though the shift towards bilateral agreements holds several pitfalls or dangers that we must be aware of, literature on the impact of deep and comprehensive EU agreements with respect to policy space are very rare. Predominantly, this is related to the recent nature of this type: most of these agreements were announced after 2006, entered into force after 2013, are still being negotiated or have to be ratified. Still, the evolutions towards more, deeper and broader trade agreements is a phenomenon particularly witnessed in the EU (Araujo, 2016; Lechner, 2016; Dür et al., 2014). It is interesting to see therefore, whether the distinction between the two camps described above is applicable in debates about policy space in these new types of EU agreements as well. To illustrate that this is indeed the case, we analyze evaluations and assessments about policy space with regard to two EU agreements, one with Central America, and one with the United States. These trade agreements were selected to have (political and scholarly) debates on both North-South and North-North agreements. For each agreement the most controversial aspects will be discussed.

EU-Central America Association Agreement

The 'Global Europe' trade strategy launched in 2006 marked the starting point of a new generation of free trade agreements through which the EU would prioritise its economic interests and competitiveness: '... economic factors must play a primary role in the choice of future FTAs.' (European Commission, 2006). Notwithstanding these ambitions to focus on emerging or more affluent economies, the EU also continued the trade negotiations with the ACP countries, which started in 2002, and would also conclude a trade agreement with Central America.

In addition to the selection of trade partners, the EU also intended to expand the scope of the trade agreements by including trade and non-trade issues that were significantly more ambitious than what was tabled or negotiable at the WTO level. The EU's quest for reciprocal market access and the elimination of non-tariff barriers in its trade relations with developing countries caused a great deal of controversy among scholars, politicians and activists.

The EU-CA AA was negotiated from October 2007 to May 2010. During the nine negotiation rounds there was only little public and scholarly attention dedicated to the agreement both in the EU and in Central America. Mainly because the EU was pursuing a trade agreement with Peru and Colombia during the same period and most efforts concerned the human rights situation in Colombia. In Central America CAFTA-DR, the trade agreement with the US in force since 2007, remain the centre of attention (Bierbrauer & De Goede, 2011).

Nevertheless, the EU aimed at securing access to the Central American market which was at least equivalent to that of the US, entailing that the concessions in the agreement would be as far-reaching (Woolcock et al., 2012). Indeed, the trade pillar of the Association Agreement is a comprehensive free trade agreement, covering over 95% of tariff lines and trade as well as, among others, border services, establishment (but not investment protection), public procurement, intellectual property rights and regulatory barriers (such as Technical Barriers to Trade and Sanitary and Phytosanitary measures).

The trade pillar of the EU-CA AA has been provisionally applied since 2013, whereas the pillars on cooperation and political dialogue are still awaiting ratification by all the EU member states⁶. Research on the consequences of the implementation of the trade pillar is rare, mainly because the process of implementation is still ongoing and it is therefore quite early to observe the impact (Honduran official, 2016). Debates on plausible effects, have been ongoing since the negotiations, even though on a small scale. The different views on the impact of the EU-CA AA on policy space illustrate the *de jure/ de facto* divide that was introduced earlier. On the one hand there have been actors confirming the *de jure* impact without perceiving this as problematic for the remaining *de facto* policy space. On the other hands, others worry that the impact of the EU-CA AA will have a significant restraining impact on the policy space of the Central American countries. These views will be clustered around three claims proponents of EU trade agreements with developing countries put forward, namely (1) bilateral are better than unilateral trade arrangements, (2) the EU has flexible and differentiated approach

⁶ At the time of writing only 17 member states have ratified the Association Agreement (General Secretariat of the Council, 2016)

towards developing countries and (3) negative impacts will be countervailed by cooperation and the chapter on 'trade and sustainable development'.

Bilateral are better than unilateral trade arrangements

Before the Association Agreement, all Central American countries were GSP beneficiaries. Karel De Gucht, the then Trade Commissioner, stated during the public hearing on the EU-CA AA in the European Parliament that '*One of the main benefits of the Agreement is that will replace that unilateral system with a stable, predictable and reciprocal framework. This means more legal certainty for companies, encouraging investment and business expansion*' (De Gucht, 2012). The risk of losing preferential access to the European market under GSP and the relief of relying on a bilateral trade agreement was also emphasized by a Costa Rican official (2015). These arguments in favour of concluding the EU-CA AA show a focus on the de jure implications of the agreement, namely safeguarding market access. Arguments of WTO-compatibility are also often used in this context.

Scholars have explained the logic for developing countries for securing market access in exchange for deeper commitments in regulatory harmonization (Shalden, 2005). Manger and Shadlen (2014) explain through the concept of 'Political Trade Dependence' that countries that depend on a large share of preferential export are more likely to seek instead of unilateral preferences trade agreements in highly asymmetrical negotiations even if development concerns are not high on the agenda. Those who focus more on the de facto impact of the bilateral agreements will highlight these consequences of regulatory concessions development policy tools (Heron, 2011). In their view, the short term benefits of trade benefits through securing market access do not add up to the sacrifices made on regulatory policy autonomy.

On a more general de facto level, there are concerns that bilateral agreements such as the EU-CA AA will reduce the policy space available for governments to define and implement policies for the promotion of sustainable development and poverty eradication according to the country's specific needs and capacities (ALOP, APRODEV, Oidhaco, CIFCA, & Grupo Sur, 2011). In addition there is also the fear that by adhering to the deep trade agendas, countries get stuck in a model they cannot pursue their own interests and limit their ability to respond to the current crisis with regulatory reforms, structural and macroeconomic and appropriate rescue programs, and that may have exposed them unnecessarily to the contagion of global economic system failures (Tolentino & Tovar, 2010).

The EU's flexible and differentiated approach

The EU's differentiated approach, including exemptions, transition periods and technical assistance, has been researched by Woolcock (2014b). Based on an analysis of recent EU FTAs, he affirms the EU's discourse claiming it differentiates its trade liberalization policy according to its trade partner. The policy towards emerging markets is more reciprocity-based, whereas Least Developed Country (LDC) would enjoy a more development-based approach. In addition, Woolcock's study suggests a differentiation between LDCs and middle income developing countries. This de jure assessment is also put forward by De Gucht, when he

assures the EU-CA AA is '*...very balanced: That is because we have negotiated it with the different levels of development of our Central American partners firmly in mind*' (2012).

Others have a less positive assessment of the so-called 'tailor-made' agreement. They look at the de facto impact on the country's policy space based on the negotiation dynamics of the EU as well as the effectiveness of the differentiated approach. Concerning the negotiations, NGOs accused the EU of not walking the talk about liberalization by acting in a rather protectionist way (Tolentino & Tovar, 2010). The EU's assertive attitude was confirmed by a Costa Rican trade official (2015). These negotiations led to a very comprehensive agreement, including commitments that were off-limits at the WTO level like the Singapore issues.

According to some, the flexible approach of the EU will not be effective to overcome the asymmetry between the levels of development of both trade partners. A Honduran official (2016) stated that even though they have 15 years to prepare their market for the arrival of a number of duty-free and quota-free products, transition periods are not sufficient to change their internal economy. That is because the necessary reforms demand more than only time and the country does not have the needed capacity. Overall, there is very little knowledge on the effects of the trade agreement, leaving room for interpretation on the de facto implications. Similarly, Heron (2011) predicts in the context of the EPA with CARIFORUM, that due to the lengthy transition periods designed to cushion the effects of liberalization, it is likely to be some time before the long-term development consequences of the agreement become clear. In the case of Central America, NGO's are warning on the impact of small farmers that will never be able to compete with EU or US producers and the risks this competition bears for their food sovereignty (Pérez, 2015).

Countervailing measures

In addition to the differentiated approach, the Association Agreement foresees several measures to ensure sustainable development. According to proponents of the de jure view, these commitments should be sufficient to compensate negative consequences the agreement might cause and thus limit the de facto constraints on sustainable development. The EU-CA AA includes, in line with the other recent EU FTAs, a chapter on 'trade and sustainable development'. Through this chapter both parties '*commit to respect, implement and enforce a series of universal standards on labour rights and the environment shared by Europe and Central America*' (De Gucht, 2012). It would also function as a safeguard against countries lowering their standards to be more competitive. In addition to these provisions in the trade pillar of the EU-CA AA, the cooperation pillar also provides financial and technical assistance under the relevant EU instruments for this purpose (Woolcock et al., 2012). The commitments to promote sustainable development through its trade agreements have also been reaffirmed in the latest EU trade strategy, 'Trade for all' (European Commission, 2015c).

Critics refute these beliefs by stating the commitments are not adequate and will therefore not prevent a constraining effect on the de facto policy space to advance sustainable development in the Central American countries. First, there is the asymmetry in enforceability of trade and non-trade issues. Trade issues are followed up closely by both parties, through several committees and legally enforceable if necessary. The chapter on trade and sustainable

development on the other hand rely on softer mechanisms. In addition, the cooperation pillar has still not entered into force, which has disappointed many Central American actors. Many voice their disillusion because they feel deceived by the EU's promise of comprehensive cooperation to accompany the trade pillar.

The different evaluations along the *de jure/ de facto* divide illustrate that the interpretation of policy space can lead to diverging conclusions. As indicated by Mosley (2005), further empirical research, informed of the potential ideological influence, is necessary. The case of Central America is an interesting and challenging case in this regard, grouping six countries marked by their own characteristics, and a strong influence of the US.

TTIP

The question of policy space in *developed* countries is under-researched, not in the least – and obviously – since specific North-North bilateral agreements are a rather recent phenomenon. Both the US and the EU have since the second part of the 2000s started to focus more on economically relevant partners, predominantly emerging economies. For the EU, this was translated into the 'Global Europe' trade strategy (2006), which indicated a shift towards countries that have a significant market potential and still upheld several barriers to export⁷.

The continuation of this strategy meant that more North-North agreements were being negotiated as well. Two agreements have already been signed, with South Korea (2010) and Canada (2014)⁸, while agreements with Japan and the US are underway. Especially the latter (and, attached to it, the concluded agreement with Canada) has triggered a lot of attention and criticism, amongst others on the basis that governments' ability to regulate in the public interest will be curtailed. The reason for focusing on TTIP is thus compelling, since it has (re-)politicized a debate about the possible consequences of free trade agreements in terms of policy space *within* Europe. In this respect it becomes interesting to assess the claims used by both advocates and critics, to see whether the same evaluations can be discerned in this context. Here, we focus on two of the most contentious aspects of the deal: regulatory cooperation and the ISDS clause.

Regulatory cooperation

Eliminating differences in regulation that contain significant costs for doing business across the Atlantic is one of the largest, and most contested, parts of TTIP. More than 80% of the (potential) benefits stem from this pillar (CEPR, 2013), but at the same time critics argue that the far-reaching character of these provisions would have detrimental effects on (future) standards and regulations (De Ville & Siles-Brugge, 2015). TTIP aims to address both the general process of regulatory policy-making (i.e. horizontal provisions) and seven sectoral chapters to deal with existing regulatory divergences in domains such as textiles, vehicles or

⁷ At the time, ASEAN, Korea, Mercosur, India, Russia and the Gulf Co-operation Council were listed as priorities.

⁸ This deal is still to be ratified by both the European Parliament and Member State parliaments, and it is unclear at the moment whether this will come into force.

pharmaceuticals. For the purpose of this paper, we only focus on the former, horizontal, provisions⁹.

The horizontal chapter contains two big parts: (i) a chapter on ‘Good Regulatory Practices’, which is meant to “promote good governance in the regulatory process, in particular transparency, predictability and accountability” (European Commission, 2016a), which involves information exchange, stakeholder consultation and impact assessments; (ii) ‘Regulatory Cooperation’ which serves to help regulators work together more efficiently on future and existing regulation, so that divergences can be avoided when possible (European Commission, 2016b). For the critics, as we shall see below, these propositions entail a direct attack on the democratic and precautionary principle in Europe (CEO, 2014) and hence risk limiting the policy space for governments to adopt regulations in the public interest. Advocates, on the other hand, claim the opposite, and point to the many benefits that this chapter will entail.

There are, firstly, those analyses or assessments that focus on the (absence of) *de jure* components of the regulatory cooperation chapters, a minimization of the risk this entails for policy space, and a generally favorable position towards Transatlantic rules that govern regulatory policy-making.

The main point here is that these policy makers and scholars¹⁰ see very few formal constraints that will limit a state’s capacity to act. The fact that this chapter is a type of ‘soft law’ (rather than enforceable provisions), which makes it by nature something without a lot of teeth (Siles-Brügge, 2016), already facilitates taking this position. Commissioner Malmström has stressed time and time again that “*no trade agreement will ever lower the levels of consumer, environmental or social and labour protection we decide on in Europe*” and that “*nothing in trade deals will limit the EU’s right to make new policies in the public interest*” (Malmström, 2016a). There were several controversial elements in the original textual proposals that have been altered in subsequent versions (such as a limiting of the scope) which limit *de jure* restrictions and make it discursively easier to state that the worst elements have been left out. It was also explicitly stated that the institutional structure “*will not have the power to adopt legal acts*” (European Commission, 2015a). To further assuage fears, the Commission has inserted several provisions relating to a general “right to regulate” clause. These state, amongst other provisions, that regulatory cooperation “*shall aim at improving, and not reduce, undermine or otherwise compromise the level of protection in public policy areas* and that the Parties are not bound by any regulatory outcome (European Commission, 2016a).

The principles and provisions in the chapter are furthermore seen as beneficial, ensuring a good regulatory environment across the Atlantic, in which regulatory divergences in the future are kept to a minimum (European Commission, 2013), possibly freeing up funds for public services or enforcement of regulation (Malmström, 2015). Several academics have sided with this view, claiming that TTIP can become some sort of ‘transatlantic policy laboratory’

⁹ For a broad evaluation of the goals and effect of TTIP, see De Ville & Siles-Brügge (2015).

¹⁰ Scholars that are referenced in the upcoming paragraphs are not automatically pro or contra, but are cited on content.

that helps in identifying the best solutions to regulatory problems (Wiener & Alemanno, 2015), and will simultaneously enhance efficiency, increase consumer safety and improve competitiveness of US and EU firms (Chase & Pelkmans, 2015).

A second view tends to go further than *de jure* restrictions, stating that *de facto* the situation is worse (whatever the provisions *de jure* are). De Ville (2016) argues in this respect that “concerns about TTIP are not only based on the letter of the proposals, but also on the normative context in which they are rooted”, urging us to consider the fact that all provisions in TTIP are part of a *trade agreement*, that has the elimination of barriers as its prime function (Siles-Brügge, 2016). There are different ways in which critics foresee that the horizontal chapters might have more (negative) effects than what the text itself prescribes, and could as such hamper, delay or abolish future regulations, that might have served public interest goals (CEO, 2014).

First, provisions on ‘transparency and consultation’ could, through the enhanced involvement of outside actors (read: business organizations), lead to the delay or abolishment of proposed regulation (De Ville & Siles-Brügge, 2015). Improving access to stakeholders (somewhere coined the “institutionalization of lobbying” (Goyens, 2015a) could worsen biases in policy-making, given the existing asymmetries in resources between interest groups (Bartl, 2015; Hanegraaff, Beyers, & Braun, 2011). *Secondly*, the envisaged ‘convergence’ on procedures to take out impact assessments (IA) is claimed to be a shift towards the US IA-model (Bartl, 2016), which systematically uses neoclassical welfare cost-benefit analyses (with the accompanied monetizing or measurement problems, see e.g. (Ackerman & Heinzerling, 2002)), and a risk-approach towards regulation (Lofstedt, 2011). This would alter the *use* of science and the burden of proof when deciding upon regulation (Bartl, 2015). Combined with the fact that new regulations should be the “least trade restrictive” as possible to reach the public policy goal, several critics think this could lead to “paralysis by analysis” (Siles-Brügge, 2016), making far-reaching regulation in the future more difficult to obtain. *Thirdly*, sociological and learning effects amongst regulators and policy officials might lead them to adopt a common approach to regulation, in an overarching trade framework, seeing their objectives in terms of minimizing the effects on trade and investment (Bartl, 2015).

ISDS

The same divide can be discerned when analyzing the controversial investor-to-state-dispute-settlement (ISDS) mechanism, where the debate has also “*become very heated, with ideological considerations mixing in with actual facts*” (Schubert & Saz-Carranza, 2016). The intention behind this clause is to protect investors in foreign countries by providing them an enforcement mechanism in case of discrimination or (in)direct expropriation. This has the form of access to an international (private) tribunal that has the power to demand financial compensation from the state. Critics have argued that far-reaching provisions in this domain would attack (or hamper the development of) regulations in the public interest, as they can be sued by investors who see these interfere with their (future) profits, and as such policy space to regulate is constrained.

On one hand there are assessments claiming that the ISDS/ICS¹¹ clause “ensures that a state can never be forced to change legislation” (Malmström, 2015). To strengthen this claim, again a “right to regulate” clause has been inserted to restore trust and legitimation in the system; the ability of investors to take a case before the tribunal has also been more precisely defined (European Commission, 2015b). Furthermore, there is always an *annulment clause* allowing states to challenge the final judgment, as a final guarantee of a state’s right to regulate (Schubert & Saz-Carranza, 2016). Besides the focus and claims that the *de jure* limitations are harmless, they stress that the system in itself is beneficial and necessary to protect investment, especially in TTIP, given that jurisdictions in the US are not properly enforcing international treaties (Malmström, 2015c)

Evaluations more critical in nature have attacked these positions in two respects. Firstly, they state that the so-called ‘harmless’ *de jure* restrictions are certainly not to be underestimated. Broude, Haftel, and Thompson (2016) show that renegotiations of bilateral investment treaties (BITs) have tended to include broader and stronger investor rights, leading to a significant decrease of policy space¹². Furthermore, legal scholars have questioned if inscribing a “right to regulate” will clarify interpretations for judges or arbitrators (Lester, 2015). Van Harten (2015) even stated that the Commission has inserted “poison pills” into the new proposal, while “pretending to protect the right to regulate, [...] leaving catches in the text that return us to the usual concerns about ISDS” (p. 5). A study by several rejectionist NGOs concluded that some of the high-profile cases in history would have an equal chance of coming to life under the newly proposed ICS system (Cingotti et al., 2016). Smaller arguments too are refuted: the annulment clause seems ineffective as only 23% of requests for annulment were granted (Schubert & Saz-Carranza, 2016) and the so-called systemic deficiency in the US legal system that would necessitate ISDS in TTIP is according to Kleinheisterkamp (2014) also absent.

Going further than challenging *de jure* claims, they state that *de facto* the situation is even worse. Most prominent here is the argument of “regulatory chill”: simply the awareness that expensive lawsuits could be invoked, could prevent governments of regulating in the public interest; a “right to regulate” on paper is, according to Goyens (2015b), not easily implemented in real life, with different pressuring actors. Also, they claim that the system is inherently biased pro-business, as only foreign investors can initiate claims (Schubert & Saz-Carranza, 2016), and that this has not withered away with the new system (Van Harten, 2015). Lastly, opponents also reject the fact that investment protection would be necessary in an agreement with the US, as both entities already have well-functioning legal systems, and including ISDS would only strengthen the ability of multinational corporations to raise legal challenges against all sorts of regulations (Jarman, 2014).

The main take-away from both these discussions is that the debate about how far the provisions (for regulatory cooperation or ISDS) would constrain a country’s policy space to act in the public interest is characterized by the same two camps witnessed in earlier chapters.

¹¹ In September 2015 the Commission proposed its updated version of the investment chapter, labelling it ICS: Investment Court System. See: European Commission (2015b).

¹² The only type of FTAs where this was not the case was between two ‘Southern’ countries.

One side stresses the benefits of rules and argues that this does not constrain policy space in any significant way; the other points to more ‘yet to see’ effects that in any way go beyond what is written in the textual agreements. The space for interpretation also opens up in cases of lack of empirical research, as with regulatory cooperation. Friedrich Merz, a former German MEP, has strikingly formulated his criticism on anti-TTIP activists, and as such shows what the debate is actually about: *“The fact that he [Thilo Bode], an activist for Foodwatch and staunch TTIP opponent] is speaking of hypothetical scenarios ... demonstrates that he can’t find anything in the texts to prove his point.”* (POLITICO, 2016). This clearly shows the focus on *de jure* provisions in the text. If critics address these claims, they cannot say they spread misinformation. Rather, a too narrow focus on the text, and as such a selected and strategic reading of TTIP might be the biggest concern.

4 – Conclusion

UNCTAD’s 2014 study, which we quoted in the beginning of this paper, refers to our overall research theme as *‘the enduring case for policy space’*. This implies that debates about the relationship between international trade governance (or economic globalization more broadly) and the domestic policy space to pursue the appropriate path of equitable and sustainable growth are still unsettled. In this paper we firstly showed that the scholarly literature itself is divided: there are authors who see trade rules as inherently good, and if there are any effects to be noticed beyond the textual agreements, they point towards the many options still on the table. Opposite to this are scholars who deem the international environment as ultra-restrictive, as they primarily focus on *de facto* effects that imply a much worse outcome than a *de jure* focus might predict. Secondly, we looked beyond debates about the WTO and showed that this dichotomy in the literature and public debates is in fact still ‘enduring’. The general bilateral push, and EU FTAs in particular, resemble the same two camps when arguments about a restriction of policy space are raised. This is true for the ‘classic’ North-South agreements, as shown for the EU-CA AA, but also for the more recent push towards North-North agreements, where concerns about the “right to regulate” are widely politicized since the TTIP negotiations.

This enduring case urges us to look at two particular explanations for the divide, that simultaneously constitute not only suggestions, but necessary requirements for further research. First of all, we have indicated that, as the two camps in the literature closely overlap with the public debate on policy space, *ideology and interpretation* might play an important role in academic debates as well. This is not a surprising statement when dealing with social science research, nor is it a condemnation of the fact that an author’s own interpretation might slip in the choice of research questions or how he/she problematizes the outcome. The fact that this might be the case, however, urges us to explicit these assumptions we make. In this way the debate would be one step closer in becoming less fogged with interpretations that are presented as real outcomes.

Secondly, and closely related to the former, is that we urgently need more systematic, comparative and long-term empirical research on the effects of economic globalization in general, and trade governance in particular, on the (perceived) constraints on policy space. Echoing Mosley’s (2005) view that we do not have this evidence yet, makes us rely on

anecdotal evidence or case studies, and clears the room for interpretation and would-be scenarios to slip in.

For several reasons, these arguments may be even more pressing due to the push for North-North agreements. *Firstly, industrial policies* for advanced economies might become more important again. Due to Europe's prolonged economic downturn, a debate is re-emerging about a new industrial policy for Europe that could reintroduce the use of – formerly key – national tools (such as subsidies or general trade protection for infant industries) (Pianta, 2014). It is therefore interesting to see how intra-European developments towards such a new policy could co-exist with commitments made in the WTO or bilateral agreements such as TTIP¹³. *Secondly*, not only is the knowledge we have on the effects of (institutionalized) regulatory cooperation limited, but the empirical evidence on the extent to which regulatory policies themselves unduly inhibit trade (and the question if trade agreements should do something about it) is unsettled (Bown & Crowley, 2016). This touches upon normative questions, which by definition are interpreted differently. *Thirdly*, there are other parts of the modern deep trade agenda that will potentially have an impact on policy space as well. The negotiations for TiSA (a plurilateral agreement on services), for example, have elicited some of the same fears: *“we [BEUC] are concerned that TiSA will restrict the ability of the EU and its member states to maintain their right to regulate in the future”* (POLITICO, 2016b). A broader evolution is taking part whereby the authority or competence of international institutions/regimes is increasingly penetrating several domains that were previously predominantly domestic jurisdiction (Woods & Narlikar, 2001; Zürn, 2004). And *lastly*, these agreements (TTIP, CETA, TiSA, TPP) are argued to be templates of 21st century trade agreements, which means whatever is negotiated here, might be replicated to a large extent in future agreements with other developing or emerging countries.

Finding a balance between preserving an open multilateral trading system, while accounting for domestic peculiarities, preferences and different development paths is not an easy exercise. If we want to move closer to a solution that works for all states alike, understanding the different viewpoints in the debate is a first step towards it.

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¹³ On TTIP, Pianta (2014) argues that the completion of this agreement would close the possibility for a European industrial policy to emerge, while minimizing the space for public action in the economy (p. 291).

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