MASTER THESIS

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„EU Mixed Agreements: Intergovernmentalist Bargains or Supranationalism in Disguise?“

An Institutional Assessment of the Legal & Political Implications of EU Mixed Agreements in the 'Post-Lisbon' Era

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Abstract

EU mixed agreements – hence, agreements that are concluded by the Union, third parties as well as the member states as independent parties – have been increasingly scrutinised, and arguably politicised, in recent years. This phenomenon is thus a prime example of the inherent tension between forces of intergovernmentalism, ensuring the sovereign powers of member states, and forces of supranationalism, aspiring increasing power delegation to the Union as the core.

It is the aim of this thesis to determine which of the two main theoretical approaches to EU integration can better capture the institutional power play during the negotiations and conclusion of mixed agreements: neofunctionalism (as theoretical basis for supranationalism) or intergovernmentalism. The Council and national parliaments will thereby represent the intergovernmental side while the Commission and European Parliament represent the neofunctional side. Studying the implications of mixed agreements from an institutional perspective addresses a gap in the academic literature, especially by considering EU theories of integration. It is herein argued that the degree of politicisation of an agreement, rather than its substantive terms, is decisive for shaping the power balance between institutions and for determining the respective explanatory power of the two EU integration theories. Accordingly, intergovernmental actors should be more engaged, with their impact being more successful, in the case of heavily politicised agreements and provisions.

Two substantively similar case studies are hence selected to test this hypothesis: the well-known and disputed CETA between the EU and Canada as well as the less publicised and non-controversial EU-Singapore FTA (which, according to the latest Commission proposal, may even be split into an 'EU-only' and a 'mixed' part). After examining the general legal provisions and the official role of institutions with regards to mixed agreements, it is studied how these rules and competence matters are applied in political reality by comparing the two case studies. Using the methodological approach of comparative process tracing, this thesis analyses the behaviour and interactions of the studied institutions during the CETA and EUSFTA negotiations.

In this work, it is found that the increased politicisation of certain mixed agreements has indeed led to the greater involvement of intergovernmental institutions in negotiations and has restricted the Commission's autonomous bargaining power. Negotiations on CETA have illustrated that intergovernmental positions will prevail if this is in the interest of institutions. In turn, intergovernmental institutions have been less interested in the EUSFTA and its negotiations have thus been largely shaped by neofunctionalist thinking.

Kurzfassung

Gemischte Abkommen der EU, bei denen sowohl die Union, Drittparteien als auch Mitgliedstaaten als Vertragspartner beteiligt sind, werden zunehmend politisiert. Sie veranschaulichen die Spannungen zwischen Kern und Peripherie und folglich könnten beide großen europäischen Integrationstheorien, der Neofunktionalismus und der Intergouvernementalismus, als Erklärung herangezogen werden.

Ziel dieser Masterarbeit ist es, Machtspiele zwischen EU- und nationalen Institutionen während den Verhandlungen und dem Abschluss von gemischten Abkommen zu analysieren und letztendlich festzustellen, welcher der oben genannten Integrationstheorien diese Vorgänge mehr entsprechen. Der Ministerrat und die nationalen Parlamente repräsentieren dabei die intergouvernmentale Seite, während die Kommission und das EU-Parlament als Verfechter des Neofunktionalismus gelten. Dafür werden zwei inhaltlich vergleichbare Abkommen mit unterschiedlichem Bekanntheitsgrad als Fallstudien herangezogen: Das äußerst kontroverse CETA-Abkommen und das nahezu unbekannte EUSFTA-Abkommen, das laut kürzlichem Kommissionsvorschlag nun sogar in einen gemischten und „EU-only“ Teil aufgeteilt werden soll.

Der Vergleich dieser Abkommen bestätigt die Annahme, dass der Grad der Politisierung, und nicht etwa die Substanz von Abkommen, der entscheidende Faktor für das interinstitutionelle Zusammenspiel ist und, dass intergouvernementale Institutionen bei politisierten Abkommen sowohl interessierter als auch einflussreicher sind. CETA-Verhandlungen waren demzufolge vor allem von Intergouvernmentalismus geprägt, während EUSFTA-Verhandlungen mehr Spielraum für neofunktionale Ideen ließen.

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1. Introduction

There has long been a reluctance by EU member states to give up powers related to their foreign policy. This assertion is supported by Lehne who finds 'the European Union's (EU's) foreign policy remains weak and underdeveloped compared to its other projects' and one key constraining factor is the member states' insistence to 'run their own national policy in parallel' (Lehne 2017).

The strong involvement of member states in foreign policy issues has affected the conclusion of agreements with third states, even with regards to the economic realm where the Union has vast internal competences. The emergence of mixed agreements – that is, international agreements to which the Union, one or more third states as well as member states are independent parties – thus illustrates a compromise between the intergovernmental member state interest to 'preserve their external competences' and the supranational, i.e. the 'EU's collective interest to ensure coherent and effective pursuit of its external relations' objectives' (Limantas 2014: 6-7).

This clash of interests concerning mixed agreements will be the subject of discussion in this thesis. After analysing the legal basis of mixed agreements, it will be examined whether, and in what ways, the actual roles of the EU institutions involved in the negotiation and conclusion of mixed agreements diverge from these legal stipulations. Secondly, these observations of institutional behaviour will be used to analyse to what extent the theories of intergovernmentalism and neofunctionalism capture decision-making processes on mixed agreements. That is, it will be examined whether the phenomenon of EU mixed agreements is an example of member states clinging onto powers (intergovernmentalism) or rather of competence delegation to the core (neofunctionalism).

Two trade agreements are thereby used as case studies: The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada as well as the EU-Singapore Free Trade Agreement (EUSFTA). Up until very recently, both were thought to be concluded as mixed agreements but the Commission proposed in April 2018 to split up the EUSFTA into an EU-only free trade agreement (FTA) and a 'mixed' investment protection agreement (EUSFTA 2018). Though similar in scope, the two case studies arguably differ substantially in their level of politicisation. This is significant because politicisation is assumed to not only lead to controversies between member states but also to affect the inter-institutional power game. According to De Wilde et al., 'the proposition

that European governance has become politicised is accepted widely in the recent literature and supported by an increasing wealth of empirical evidence' (2015: 12). Similarly, Gheyle argues EU mixed agreements have been politicised frequently and, in the course of CETA and the failed Transatlantic Trade and Investment Partnership (TTIP) negotiations in particular, there has been much public scrutiny concerning the power distribution between EU institutions and member states (Gheyle 2016: 2). Following from this, it will herein be examined in what ways the degree of politicisation of a specific agreement affects the interplay of institutions and how the two main theoretical approaches to European integration can account for their respective roles.

In this thesis, the EUSFTA is still analysed as one agreement and it will be broadly treated as mixed agreement despite the most recent Commission proposal in April 2018 to split it into an 'EU-only' FTA and a 'mixed' investment protection agreement. It is argued that this is reasonable given that institutions treated the EUSFTA as one agreement until the very end of negotiations and that the Council has not yet approved this proposed change. It will, however, be made reference to this new Commission proposal when appropriate.

1.1. Relevance of the Topic

It is important to study mixed agreements, especially from an institutional perspective, since there appear to be many misrepresentations in mass media and a gap in the academic literature. The legal terminology and procedure with respect to mixed agreements has often been scarcely explained or even misportrayed. For instance, when the Commission initially insisted to conclude CETA as an EU-only agreement because it found all provisions fell within exclusive Union competences, it was blamed for being undemocratic and hiding problematic provisions simply because it was following legal prescriptions (APA 2016). The Walloon opposition to CETA by its regional government and parliament has furthermore illustrated that the public discourse on these issues is often prone to misinformation or misleading simplification of legal concepts and political realities (Van der Loo & Pelkmans 2016: 2).

Furthermore, the implications of EU international agreements may be of utmost importance for Brexit negotiators given that a post-Brexit EU-UK trade deal is being pursued. Wolfstädter et al. assume the future relationship will be characterised by a 'Canada plus' agreement, hence a deeper variant of CETA (2018: 12). Consequently, if FTAs are

deemed to require 'mixity' – which implies the ratification of member states as independent parties -, national or regional parliaments get a de facto veto power and a post-Brexit deal between the two parties could fail as a result of opposition in just one region or member state (Brunsden 2016). A grasp of the concept and impact of mixed agreements is moreover needed to understand the issues that the UK will face regarding the EU agreements that have applied to the UK so far: that is, upon withdrawal, the UK will no longer be bound by EU-only agreements and by the often poorly demarcated EU-only parts of mixed agreements (Van der Loo & Pelkmans 2016).

Hence, in times when some of the most ambitious international agreements are being negotiated by the EU while European citizens are split on FTAs such as TTIP (Standard Eurobarometer 85 Spring 2016: 34), it is crucial to learn more about the legal and political repercussions as well as competence distribution between member states and the Union with regards to mixed agreements. European and national institutions, pursuing either intergovernmental or supranational objectives, are at the forefront when it comes to negotiating and concluding these agreements. They are thus presumed to be key actors in this interrelationship. So far, the academic literature on mixed agreements has been mostly confined to legal issues and has paid little attention to the important institutional component and to EU integration theories as explanatory approaches. This thesis will attempt to fill this gap in the academic literature and address the implications of EU mixed agreements in light of integration theories while specifically focusing on its effects on institutions.

1.2. Research Questions

In this thesis, it will be attempted to disentangle the impacts of mixed agreements on the institutions that are involved in the procedure of negotiating and concluding them. The theories of intergovernmentalism and neofunctionalism will herein be used as theoretical underpinnings. These two grand EU integration theories are selected because of their opposing views on the role of specific institutions and on the competence distribution between the Union and the member states. For the purpose of this thesis, the broader theory of neofunctionalism will be equated with the concept of supranationalism – that is, supranational behaviour will be regarded as synonymous with the neofunctional theoretical approach. Oates similarly finds 'neofunctionalism represents the earliest effort to come to

terms with the phenomenon of supranationalism in world politics' and thus also uses neofunctionalism to account for supranational decision-making (2013: 17).

Following this framework, the Council and national parliaments will be representing the intergovernmental side while the Commission and the European Parliament (EP) will represent the supranational side. Two interlinked research questions are proposed for this thesis. The first question will be more descriptive in nature while the second one is more analytical:

Research Question I (RQ1): *How do EU mixed agreements affect the institutional power balance in the post-Lisbon era?*

Research Question II (RQ2): *To what extent do the theories of neofunctionalism and intergovernmentalism, respectively, capture the role of institutions when concluding mixed agreements?*

In order to answer the first research question, the different roles of the four studied institutions regarding mixed agreements will be analysed both from a legal perspective (Chapter 4) as well as in practice, by drawing on the two case studies (Chapter 5). The second question will subsequently attempt to determine to what extent these observations of the various institutions reflect the theoretical 'predictions' of intergovernmentalism and neofunctionalism, respectively (Chapter 6).

At first glance, by adding member states as parties – and essentially as veto players – to external agreements, intergovernmental institutions are supposed to be winning the power struggle against supranational actors. However, it is herein presumed that the legal and particularly the practical, political consequences of mixed agreements may not be as clear-cut.

1.3. Roadmap

The groundwork for analysis in this thesis will be laid in the next chapter (Chapter 2) on the conceptual framework, which will bring together the two grand theories of European integration (intergovernmentalism and neofunctionalism) and prior academic work on mixed agreements. Based on the conceptual framework, three hypotheses will be presented. It will subsequently be important to spell out the applied research method and to

justify the selection of two case studies: CETA and the EUSFTA (Chapter 3). Thereafter, the evolution and legal basis of mixed agreements will be examined (Chapter 4) before delving into the case studies and analysing the institutional interplay in practice (Chapter 5). Findings of this analysis will then be interpreted with respect to intergovernmentalism and neofunctionalism in the ensuing chapter (Chapter 6). This section will discuss to what extent institutions have 'behaved' according to intergovernmental or neofunctional thinking and will attempt to verify the soundness of the proposed hypotheses. Lastly, the conclusion (Chapter 7) will summarise the main findings of this thesis and will give some impetus for future research.

2. Conceptual Framework

This thesis examines the impact of mixed agreements on the institutional power dynamics by drawing on the main tenets of intergovernmentalism and neofunctionalism. It will therefore be necessary to analyse both of these theories as well as the existing literature on mixed agreements (and the role of institutions in this regard). The original contribution of this thesis will subsequently be to combine these two, previously separated, strands of research and to analyse how, on an institutional level, the procedures of negotiating and concluding mixed agreements are captured by these theories.

In this chapter, the two integration theories will first be presented before delving into the prior scholarly debate on mixed agreements and the role of institutions during negotiations. Lastly, the academic debate on the phenomenon of politicisation, especially with regards to mixed agreements, will be briefly alluded to since this factor is presumed to explain variation between the two case studies.

2.1. Theories of European Integration: Neofunctionalism vs. Intergovernmentalism

2.1.1. Justification for Theory Selection

As Moga stresses, neofunctionalism and intergovernmentalism are both 'macro-level theories of international relations' and, as such, they have attempted to 'describe, clarify and predict the European integration as a process' (2009: 796). While there are many different theories of European integration, Verdun finds these can be placed on a spectrum and it is possible to cluster them into two groups: neofunctionalist and intergovernmentalist theories (2002: 10). She argues later variants of these approaches have still shared the same assumptions on the role of the state versus other actors as well as whether there was automaticity and path-dependence in the process or not (Verdun 2002: 13). The neofunctionalist family is convinced of automaticity due to functional spillovers whereas the intergovernmentalist family highlights the role of the member state governments instead (Verdun 2002: 14-5). Falkner confirms that these two approaches are on the 'opposing ends of an ideal-typical continuum' (2011: 7).

Figure 1: Spectrum of Integration Theories

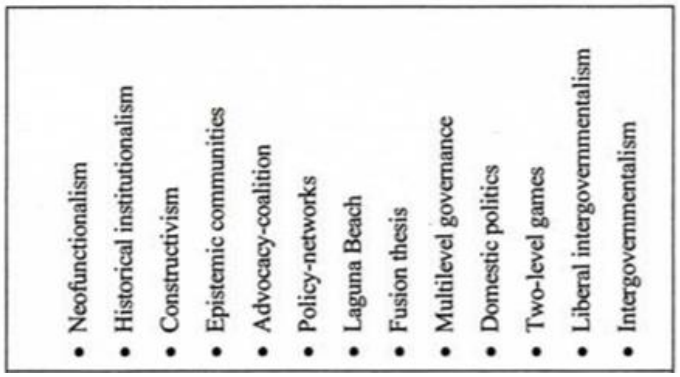

Figure 1 illustrates this spectrum of integration theories – showing theories that emphasise the role of member state governments and bargaining on the right side of the spectrum.

Figure 1: Spectrum of Integration Theories, Source: Verdun 2002: 13

Apart from this, earlier studies have already used these two theoretical approaches to evaluate decision-making procedures at the European level. Tsebelis and Garret famously compared the Commission, EP, and CJEU – as the three supranational institutions – with the intergovernmental Council (2001: 358). Using the principal-agent approach, they argue member states have 'efficiency incentives to delegate authority' but this might allow supranational institutions to exert influence over policies (Tsebelis & Garret 2001: 363). Van Oudenaren similarly concludes the 'EU is a hybrid of supranational and intergovernmental integration' (2005: 8). Moga argues intergovernmentalism is discernible 'in vital moments such as those preceding important agreements' whereas neofunctionalism has remained more relevant with regards to 'more bureaucratic, administrative decisions' (2009: 802).

While EU decision-making and integration can therefore be explained by both theories, it will be attempted in this thesis to trace the respective tendencies during the negotiation and conclusion of mixed agreements.

2.1.2. Neofunctionalism

At the outset of European integration in the 1950s, neofunctionalism was the first theory analysing this new regional cooperation in Europe (Jensen 2013: 60). This approach was embraced by many scholars during the 'golden ages' of European integration in the 1950s and 1960s but was considered less useful during the ensuing times of crises (Wallace et al. 2015: 14). With his book *The Uniting of Europe*, Ernst Haas was the first to spell out the tenets of neofunctionalism, which was based on Mitrany's functionalism (Moga 2009:

797). Haas rejected the anarchic, state-centric world view of Realists and instead assumed that, through gradual integration, supranational actors would become the prime entities (Pollack 2012: 9). To state it in his own words, 'political integration is the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states' (Haas 1958: 16).

The main explanatory factor for this integration was thought to be the concept of spillovers. Creating a supranational authority would change 'expectations and behaviour of social actors' leading to spillover effects since there is a functional demand for supranational policy-making in neighbouring policy areas (Sandholtz & Stone Sweet 2012: 20-1). Apart from this functional spillover, neofunctionalists have observed a political spillover, whereby supranational as well as subnational actors 'create additional pressures for integration' (Wallace et al. 2015: 15). In practice, this means interest groups and political parties would become Europeanised and drive integration, and there would be elite socialisation conducive to further integration (Jensen 2013: 60, 64). Thirdly, Moga makes reference to a 'geographical spillover' effect since cooperation between some members was likely to affect others and induce them to join as well (2009: 799). Wallace et al. highlight that, due to these spillover effects, European integration was thought to become 'self-sustaining, leading eventually to the creation of a new political entity with its centre in Brussels' (2015: 15).

The theory was questioned not just due to its inability to explain the backlash to European integration starting in the late 1960s. It was also criticised for being 'deterministic and lacking a clear analysis of the role of nation state governments' (Verdun 2002: 11). Sandholtz and Stone Sweet note the theory of neofunctionalism was basically discarded by the 1980s as 'outmoded and disproven by events,' but the authors find this was 'premature.' Ideas of neofunctionalism are used again nowadays, though it has subsequently been regarded as a partial theory only (Sandholtz & Stone Sweet 2012: 18-9). As Verdun highlights, newer strands of neofunctionalism place less emphasis on determinism and instead stress 'the importance of functional spillover and the role of supranational actors and interest groups' (2002: 11).

Regarding the theory's application in practice, Schout and Wolff find the concept of supranationalism (as outlined by the theory of neofunctionalism) is illustrated by the

'community method' in the EU context – i.e. 'the Commission's monopoly on the right of initiative, qualified majority voting in the Council, the European Parliament as co-legislator and the Court of Justice ensuring uniform interpretation of Community law' (2011: 3). According to Van Oudenaren, supranationalism furthermore implies that decision-making procedures are used whereby national governments can be outvoted and there must be an 'executive authority independent of national government control' (2005: 8). For instance, the Court and Commission have 'routinely produced rules and policies,' which would not have been adopted through intergovernmental bargaining (Sandholtz & Stone Sweet 2012: 22).

2.1.3. Intergovernmentalism

The theory of intergovernmentalism, in turn, emerged in the mid-1960s as a critique of neofunctionalism and is a variant of rational institutionalism (Schimmelfennig & Rittberger 2015: 38-9). In the same vein as realism and neo-realism, intergovernmentalist scholars argue cooperation is not based on ideology or idealism but is instead the result of rational decision-making by governments (Cini 2013: 73). Hoffmann, who developed 'classical intergovernmentalism,' argued in 1966 that the 'nation-state, far from obsolete, had proven "obstinate"' (Wallace et al. 2015: 16). He stressed there was a 'dichotomy between low politics' such as economic policies where integration was conceivable and 'high politics such as foreign policy' where member-states would be reluctant to hand over power to a supranational body (Moga 2009: 800). This argumentation led to criticism about his overly 'rigid demarcation between high and low politics,' which would not have allowed for any spillover (Cini 2013: 75-6).

Since the early 1990s, the new 'liberal intergovernmentalism,' which has been famously propagated by Moravcsik (1993), has become one of the prime theories of European integration. At its core, it argues 'all decisions made by the EU are ultimately the result of bargaining amongst states' (Cini 2013: 79). As Moravcsik puts it, liberal intergovernmentalism is based on the 'assumption of rational state behaviour, a liberal theory of national preference formation, and an intergovernmentalist analysis of interstate negotiation' (1993: 480). While neofunctionalists are convinced of unintended consequences and spillover effects, intergovernmentalists contend that 'the governments

that sign treaties are not only in the driver's seat but also know exactly where they are going' (Tsebelis & Garret 2001: 385).

In contrast to neofunctionalism, intergovernmentalism provides both a theory of bargaining and a theory of political choice (Falkner 2011: 7). This strand is, however, criticised for focusing just on 'history-making decisions' such as new treaties while neglecting daily political processes at the EU level (Cini 2013: 82). Furthermore, Sandholtz and Stone Sweet find liberal intergovernmentalism 'has lost much of its distinctiveness relative to neofunctionalism' – for instance, Moravcsik has argued states delegate authority to EU organs in order to increase the credibility of their commitments, which is claimed by neofunctionalists as well (Sandholtz & Stone Sweet 2012: 28).

In the European context, the intergovernmentalist method has certain characteristics: 'member states usually decide by unanimity, the European Parliament is merely informed or consulted, and… the Commission shares the right of initiative' (Schout & Wolff 2011: 3). Intergovernmentalists such as Moravcsik highlight most important EU decisions are the result of intergovernmental bargains, which may include package deals or side payments (Pollack 2012: 11). The theory presumes 'governments retain the ultimate authority' to follow their own policies – one prime feature of this is the use of unanimity rather than majority voting, hence having national vetoes (Van Oudenaren 2005: 8).

The key points of the two competing theories are summarised in the table below. This will be used in Chapter 6 to evaluate the impact of mixed agreements on institutions.

Table 1: Intergovernmentalism vs. Neofunctionalism:
An Overview of the Main Arguments

Intergovernmentalism	**Neofunctionalism**
Intergovernmental actors are the prime entities (Hoffmann, Moravcsik)	Supranational actors are the prime entities (Haas)
Spillover processes are conceivable in low politics but less so in high politics areas (Hoffmann)	Spillover processes affect all policy areas and will lead to self-sustaining integration (Haas)
EU decisions are a result of intergovernmental bargains of fully competent states (Moravcsik)	EU decisions are based on state preferences which are transformed during the EU decision-making procedure (Sandholtz & Stone Sweet)
'Expectations' of the Role of Institutions according to the Theories	
Commission *shares* the right to initiate proposals with the member states[1] and is heavily scrutinised by the Council	Commission has a monopoly on initiating proposals and enjoys some autonomy from the Council
Unanimity in the Council (national veto)	Qualified Majority Voting (QMV) in the Council
EP is merely informed	EP is co-legislator

[1] Article 17 TEU states that the Commission has the sole right of initiating proposals 'except where the Treaties provide otherwise'. The TFEU then specifies certain areas where one quarter of member states can also initiate a proposal (e.g. in the Areas of Freedom, Security and Justice as laid down in Article 76 TFEU). In the area of CFSP, the Commission shares the right to initiate proposals with the High Representative (Article 22 TFEU).

2.2. Academic Debate on Mixed Agreements

The concept of mixed agreements has been subject to much scholarly debate since it illustrates the 'inexorable conflict' between supranationalism and intergovernmentalism (Limantas 2014: 6). For instance, Limantas points out that coming up with a declaration of competences for a mixed agreement is complicated by the tension between the member states' insistence on their sovereign right to conclude mixed agreements and the EU's imperative to 'ensure a coherent functioning of these agreements' (2014: 17). Nonetheless, scholars of mixed agreements have so far not conducted an institutional analysis using theories of European integration but have focused mostly on broader legal and political issues.

Scholars highlight the fact that, though mixed agreements are a legal concept, their legal foundation is somewhat shaky, thus leaving much room for political discretion by institutions. For instance, Van der Loo and Wessel emphasise Article 218 TFEU (which lays down the rules for negotiating international agreements) does not even mention the option of adding member states as parties to external agreements. This concept is only briefly alluded to in the context of the EU accession to the ECHR (Van der Loo & Wessel 2017: 12). Due to this legal uncertainty, Leal-Arcas argues that, in terms of liability under mixed agreements, it is most convenient for third parties if the Union and member states assume joint obligations and this view has been supported by the Court (2001: 497). Even though agreements covering shared competences could still be concluded by the EU only (since this is up to political discretion), this optionality is often disregarded –in practice as well as by academic scholars. For instance, Puccio blatantly states 'whenever a trade agreement also contains provisions belonging to shared competences, it is concluded as a mixed agreement' (2016: 5).

Van der Loo is perplexed that most agreement agreements are still concluded as 'mixed' even in the aftermath of the Lisbon Treaty, which has substantially expanded the scope of the exclusive Common Commercial Policy (CCP) (2017: 1). Limantas attempts to explain this paradox by highlighting the entire transport policy is not included in CCP, the EU does not have a complete, exclusive competence for FDI and the CJEU has generally put emphasis on the principle of conferral in relation to the CCP (2014: 19).

Given that mixed agreements are still prevalent, scholars have focused on the concept of provisional application, which allows to effectively implement parts of the

agreement before its ratification. Although Miller argues there is a ‘competence creep’ if non-exclusive matters are provisionally applied (2016: 4), this has been negated in practice. Indeed, Kleimann and Kübek find this option has been interpreted in a ‘broad and permissive’ way in the past. This is exemplified by the EU-Korea FTA which was provisionally applied almost in its entirety six months after its signature but only ratified five years later (Kleimann & Kübek 2016b: 16).

Another issue of discussion is the potential objection of member states to ratify mixed agreements. Van der Loo and Wessel find that issues of non-ratification could instead be solved with opt-outs (which would already need to be mentioned in the agreement) or declarations (which merely explain but not legally change anything). In the case of EU-Ukraine Association Agreement, a decision at the European Council could prevent non-ratification (2017: 23-25).

There has not yet been any scholarly attention to the possibility, and the implications, of splitting up agreements into ‘EU-only’ and ‘mixed’ parts, as proposed by the Commission in April 2018 with regards to the EUSFTA.

2.2.1. Academic Debate on the Institutional Involvement in Mixed Agreements

The competing conceptual frameworks of intergovernmentalism and neofunctionalism are of prime importance for the academic debate on institutions and the issue of mixity. As Rhinard and Kaeding put it, member states are the principals who try to control the Union agents, that are negotiating agreements on their behalf, and their mandate is characterised by different degrees of flexibility, autonomy and authority (2005: 1027). Goebel argues the ‘Commission's "collegiate nature" and "collective decision-making" obviously reinforces its supranational status’ while the Council is a clear intergovernmental actor in its executive and legislative roles (2013: 88, 104). Following from this, member states – and the Council as their most direct representative – ‘consider mixity as strategically and politically advantageous’ to safeguard their own interests and to lessen its effect on Union law (Klamert 2014: 184). The Commission is, in turn, an obvious proponent of EU-only agreements since it wants to make full use of exclusive Union competences. Although the Council authorises the Commission to negotiate on behalf of the EU (Article 218(3) TFEU), Miller finds the Commission is not autonomous but has to follow the Council’s instructions (2016: 14).

The EP is generally regarded as one of the main supranational EU institutions due to its composition as well as its roles (Goebel 2013: 122-123). According to Goff, the need for EP approval for agreements to enter into force has enhanced its influence during the negotiating stage (2014: 3). Kleimann and Kübek furthermore stress the Lisbon Treaty has improved the 'participatory, information and control rights of the EP' with regards to CCP agreements. In fact, in the case of EU-only agreements, the EP is the institution that is 'de jure responsible' for ensuring democratic legitimacy (Kleimann & Kübek 2016b: 11). Wolfstädter et al. thus find that the EP acts as a 'counterweight and corrective' when FTAs are criticised for their lack of legitimacy and transparency (2018: 3). In contrast to the 'more liberal and free-trade oriented' Commission, Gstöhl considers the EP to be rather protectionist and to be especially interested in environmental and human rights issues (2013: 7). As a matter of fact, the EP has already 'refused to give its consent' to some international agreements such as the Terrorist Finance Tracking Program with the United States (SWIFT) to protect data protection rights of EU citizens and the multilateral Anti-Counterfeiting Trade Agreement (ACTA) due to a potential threat to civil liberties (Velluti 2016: 47). In the EU-South Korea FTA, the EP has furthermore used its power to force the Commission to renegotiate certain parts of the agreement (Ripoll Servent 2018: 78).

National (and regional) parliaments only have an official role in the case of mixed rather than EU-only agreements, and they are therefore assumed to prefer that option. Winzen highlights conferral of competences to the EU level has reduced national legislative control since rules are now increasingly made at a different level, especially if the Council decides by qualified majority and so can potentially overrule individual governments (2010: 2). In contrast, mixed agreements arguably allow national parliaments to claw back power by reintroducing them as important intergovernmental players. Maresceau refers to this as 'additional reinforced unanimity' (2010: 12). While parliamentary approval used to be a 'rubber-stamping procedure' in the past, Bollen et al. argue that, now that more comprehensive treaties could be concluded by the EU only and hence bypass parliaments, the interest of member state parliament has suddenly increased – particularly regarding CETA and TTIP (2016: 2, 10). In Wouters and Raube's words, 'parliamentary rebels' may be concerned about 'input, throughput or output legitimacy' of FTAs – this refers, respectively, to their involvement in the treaty-making process, the legitimacy of the negotiation process as well as the overall legitimacy of the agreement and its implementation (2017: 4). Van der Loo and Wessel point out that, during national

ratification of mixed agreements, national parliaments or referenda should focus on the provisions covered by member state competences but in reality they tend to take into account the whole agreement – as exemplified by the Dutch referendum on the EU-Ukrainian Association Agreement (Van der Loo & Wessel 2017: 18). Wolfstädter et al. consequently argue ratification by national parliaments may not just serve as a 'catalyst for greater public interest and engagement' but could moreover put trade relations in danger (2018: 14). Generally speaking, Auel and Raunio note national parliaments tend to be mostly free in deciding to what extent they want to engage with EU matters although their actual involvement depends on various factors (2012: 8). According to Miklin, national parliaments are more likely to discuss EU affairs and not just leave it all up to the Council if legislative proposals are more salient and polarise 'between centre-left and centre-right actors' (i.e. with increased politicisation) (2012: 130). Another issue may be the lacking cooperation and coordination between national governments and parliaments on EU matters. As highlighted by Bronckers, the French Assemblée complained about the lack of information on TTIP, but it later turned out that this happened not because of a lack of EU transparency but because the French government had failed to transmit the relevant information (2017).

While the Court is presumably not directly affected by the institutional power distribution when concluding mixed agreements, its role is usually still mentioned in the scholarly debate since its rulings and opinions have had a major impact on the role of the studied institutions regarding mixed agreements. As Timmermans highlights, the Court has 'brought some discipline into the management of mixity' when there has been institutional competition (2010: 4). On the one side, the Court is considered hesitant with regards to mixed agreements. As Hoops puts it, 'the political sensitivity of mixed agreements and the various contexts to which they apply seem to force the Court to retain more flexibility than legal certainty can bear' (2014: 22). Klamert finds the Court has generally been reluctant to clearly define what falls under exclusive Union competences in mixed agreements, particularly when the competences would follow from the ERTA doctrine rather than internal rules. For instance, it did not confirm the fact that, by fully using the Union's shared competences, both the WTO agreements as well as the ILO Convention could have been concluded just by the Union (Klamert 2014: 186). The Court has moreover explicitly rejected the argument that 'mixity was more cumbersome' than EU-only agreements (Klamert 2014: 193). On the other side, the Court no longer appears to be such a strong

defender of mixity since the entry into force of the Lisbon Treaty. The Court has, for example, broadened the scope for EU-only FTAs in its Opinion 2/15 on the EUSFTA by clarifying the demarcation of competences. As Van der Loo stresses, following this judgment, the different actors know now which provisions will trigger mixity in FTAs, which will shape their negotiating strategies for future agreements – this appears to be confirmed by the latest Commission proposal on the EUSFTA (2017: 7).

2.2.2. The Phenomenon of Politicisation & Mixed Agreements

As stated earlier, mixed agreements have been found to be increasingly politicised, which arguably affects the behaviours of institutional actors. In this work, the different degree of politicisation is assumed to explain variations between the two case studies: the highly-politicised CETA and the lesser-known EUSFTA.

According to De Wilde et al., EU issues are considered to be politicised if they consist of a 'component of importance', a 'behavioural component' (illustrated by the increasing resources spent on influencing views on the issue), a preference component (different opinions on the preferred EU action) and a 'socialisation component' (societal actors become involved in EU affairs) (2015: 4). They argue that, while politicisation of European governance in general is cyclical and has not just emerged with the end of the permissive consensus after the Maastricht Treaty, it has 'intensified considerably over the past decades' (De Wilde et al. 2015: 5). In a similar vein as this thesis, De Wilde et al. argue that 'authority transfer does not automatically translate into uniform patterns of politicisation' – yet, in contrast to this work, the authors are referring to different reactions in EU member states rather than different institutional reactions to similar mixed agreements (2015: 11).

According to Bollen et al., 'TTIP and to a lesser extent CETA have led to an unprecedented politicization of the EU's trade agenda' (2016: 13). Given that there have been claims that new generation FTAs are more politicised due to their more intrusive substance, Bollen et al. stress that this does not explain why agreements of a similar scope have received vastly different amounts of attention (2016: 12-3). They use CETA and the EU-Japan FTA as examples but this seems to apply to the two case studies in this thesis as well.

Gheyle identifies an increased politicisation of FTAs in general due to their broadened scope and reinforced supranational authority in trade policy since the Lisbon Treaty. Following from this, he claims 'politicisation has actual constraining effects' on institutions when negotiating and concluding FTAs (Gheyle 2016: 8-11). While Gheyle predicts a general spike in politicisation of EU trade policy following the TTIP debacle[2], he acknowledges that the degree of 'public salience of specific issues at stake' may still differ (2016: 13, 19).

2.3. Gaps in the Academic Literature

Thus far, theories of European integration and mixed agreements have been studied separately. Existing literature on mixed agreements mostly focuses on legal issues and it only engages with the theories of intergovernmentalism and neofunctionalism on a superficial level. Furthermore, Union institutions and national actors have been taken as exogenous in that they are the ones influencing the nature of an agreement, but the inverse correlation has not yet been studied. It is the aim of this thesis to turn this relationship on its head and to examine the effects of mixed agreements on the inter-institutional balance along the intergovernmental-supranational divide. Studying the legal and political implications of mixed agreements on these four actors could enrich the existing literature by adding an institutional perspective and by bringing in theories of integration.

[2] As Guardian columnist Monbiot summarised it in September 2016, 'TTIP […] appears to be dead. The German economy minister, Sigmar Gabriel, says that "the talks with the United States have de facto failed". The French prime minister, Manuel Valls, has announced "a clear halt". Belgian and Austrian ministers have said the same thing' (2016). Apart from this, Ripoll Servent points out that TTIP seems to be 'far from completion' since the election of President Trump (2018: 78).

2.4. Hypotheses

Drawing on the conceptual framework, three hypotheses are presented in this thesis as a response to the two research questions posed in Chapter 1. These predictions will be tested in the following chapters with the help of the two case studies.

The first hypothesis attempts to address Research Question I: *How do EU mixed agreements affect the institutional power balance in the post-Lisbon era?* Previous research on the institutional involvement in mixed agreements has found that intergovernmental institutions, i.e. the Council and national parliaments, sometimes push for mixed agreements as a way to ensure unanimity decision-making (Maresceau 2010). That is, the Commission's negotiations would at times be scrutinised more thoroughly by the Council and member state parliaments may insist on their involvement to ensure democratic legitimacy of agreements. Hypothesis 1 makes an inference about when specific institutions become active and achieve their desired results:

Hypothesis I (H1): Intergovernmental institutions are more active and their interventions are more successful, compared to those of supranational institutions, if the discussed issue is publicly contested (see for example: Maresceau 2010)

The remaining two hypotheses tackle the second research question: *To what extent do the theories of neofunctionalism and intergovernmentalism, respectively, capture the role of institutions when concluding mixed agreements?*

The second hypothesis refers to the increasing politicisation of mixed agreements, which is presumed to have awakened the interest of intergovernmental institutions (Gheyle 2016). It is expected that the degree of politicisation varies with respect to different mixed agreements (and provisions) and that this may have an impact on the inter-institutional power balance:

Hypothesis II (H2): Intergovernmental positions will prevail over supranational views when the agreements or provisions are more politicised (see for example: Gheyle 2016)

Apart from this, it can be extrapolated from the academic literature that the intergovernmental approach is presumably better equipped to explain high-level decision-making but neofunctionalism captures every-day procedures better (Moga 2009: 802). This will be tested in the area of mixed agreements:

Hypothesis III (H3): The intergovernmental approach can better account for 'big' decisions concerning mixed agreements whereas neofunctionalism explains lower-level decisions better (see for example: Moga 2009)

These hypotheses on the activity and success of institutions (H1), the effects of politicisation (H2) as well as on the implications for different levels of decision-making (H3) will be tested and subsequently evaluated in Chapters 5 and 6.

3. Methodology

3.1. Interdisciplinary Approach

Mixed agreements are influenced substantially by legal and political factors. It therefore makes sense to study such agreements and their impact using an interdisciplinary approach which combines EU law and political science. Maresceau dissuades from a pure legal study of mixed agreements because they are 'almost always – if not always – to be found in this fascinating but at the same time complex grey zone where law and politics meet' (2010: 16).

The determination of an agreement as 'mixed' or 'EU-only' is, at least in theory, based on legal deliberations regarding competence distribution. Nevertheless, given the fact that the concept of mixed agreements is hardly mentioned in EU primary law and their mode of ratification is heavily influenced by political imperatives, it merits a discussion from a legal as well as political perspective. This will allow for a comparison between the competence distribution as it is laid down legally and how it is then put in practice.

3.2. Case Selection

In this thesis, the legal procedures and political discussions relating to CETA and the EUSFTA will be studied in detail. Both case studies are new generation FTAs being (at least partially) concluded as mixed agreements.

3.2.1. New Generation FTAs: CETA & EUSFTA as Case Studies

The Union has a long tradition in adopting FTAs, which have evolved over time. While 'classic' FTAs focused on liberalisation of trade in goods, 'new/second generation accords' deal with much broader issues such as services, intellectual property and rules for investment (Wruuck 2017: 4). Since 2006, the EU has negotiated several of these new FTAs with countries such as Colombia, Peru, South Korea, Singapore and Vietnam (Yencken 2016: 2). Meunier and Nicolaidis highlight that 'the CCP is the most prominent EU policy to have been under supranational competence' since the onset of EU integration (2017: 212). International agreements falling under the CCP should consequently be concluded as EU-only agreements. Yet, although this trend of more ambitious FTAs has been a response to broadened exclusive EU competences in trade, it is questioned whether the new scope

of the agreements fully matches the new competences (Puccio 2016: 2). By including more normative contentious issues, new generation FTAs have increasingly led to 'mixed competence issues' (Rhinard & Kaeding 2006: 1024).

The EU-Singapore Free Trade Agreement (EUSFTA) is the first comprehensive FTA that was negotiated and finalised in the aftermath of the Lisbon Treaty (Binder 2017: 1). The agreement was negotiated as a template for agreements with other ASEAN members (Elms 2017: 40). In October 2014, the Commission asked the CJEU for an opinion on whether all the provisions in the EUSFTA were covered by exclusive Union competences only and hence whether the FTA could be concluded as an 'EU only' agreement (Kleimann & Kübek 2016a). In its Opinion, the Court found that, due to two 'mixed' provisions, the EUSFTA could not be concluded as an EU-only agreement in its current form and it would have to be ratified by the member states as well (CJEU 2017: 1). The Commission proposed an alternative in April 2018 whereby the EUSFTA would be divided into an EU-only FTA and a 'mixed' investment agreement but this is still subject to approval by the Council (Commission 2018d: 2).

The Comprehensive Economic Trade Agreement (CETA) between Canada and the EU 'was seen at the time as the most significant "new generation" FTA signed [by the EU] with a high developed third country' (Yencken 2016: 19). Although the Commission had first insisted on the status of CETA as an EU-only agreement, following political pressure from some governments and activist groups, Commission President Juncker announced in 2016 that CETA would instead be concluded as mixed agreement (Kleimann & Kübek 2016b: 1).

3.3. Justification for the Case Selection

Many EU mixed agreements have been concluded since the 1960s and they are still very prominent despite the latest revisions in the Lisbon Treaty. For the purpose of this thesis, it is presumed to be best to study new generation FTAs in the post-Lisbon era as they are more prevalent nowadays than traditional pure FTAs and, contrary to e.g. association agreements, they are usually only at the verge of mixity, which arguably offers the best conditions to study the inter-institutional power game. The EUSFTA and CETA stand out since they were both negotiated as precedents to be more or less copied by similar countries. They are the two most high-profile cases in the post-Lisbon period where there

has been a major controversy about whether they should be concluded as EU-only or mixed agreements, meaning they are at the very edge of mixity. In the case of the EUSFTA, a legal opinion by the CJEU initially determined its status as mixed agreement. However, since the Court specified which parts fall under exclusive Union competences and which do not, the Commission recently dared to propose the splitting of the agreement into an 'EU-only' and a 'mixed' part. In turn, CETA's conclusion as mixed agreement was ultimately politically determined by the Commission President after public backlash and pressure from the Council.

According to the European Commission, 'CETA has identical objectives and essentially the same contents as the EUSFTA' and thus 'the Union's competence is the same in both cases' (Commission 2016b: 4). It should therefore be possible to use a most similar case design. However, one big difference between the two agreements is their varying degree of politicisation. Van der Loo and Pelkmans emphasise the stark public opposition against CETA cannot at all be discerned with regards to the EUSFTA (2016: 2). For instance, when the Commission conducted public consultations for EUSFTA in 2010, the majority of responses came from people in export-oriented sectors interested in the ASEAN market and it did 'not trigger specific protectionist reactions' (Binder 2017: 7). As Lenk puts it, 'the EUSFTA is viewed as less controversial, or rather it has been scrutinized less intensely in the public' and investor-state dispute settlement (ISDS) provisions in the EUSFTA have been questioned much less than with respect to CETA (2017: 359).

The EU-South Korea FTA will not be a case study in this thesis since its negotiation mandate dates from before the entry into force of the Lisbon Treaty and it consequently has a different scope; for instance, it does not have an investment protection chapter (Binder 2017: 3).

3.4. Research Method: Comparative Process Tracing

Comparative Process Tracing (CPT) will be used to compare the behaviour and interaction of institutions in relation to CETA and the EUSFTA.

As George and Bennet put it, process tracing is 'a procedure for identifying steps in a causal process leading to the outcome of a given dependent variable of a particular case in a particular historical context' (2005: 176). Vennesson furthermore highlights that process tracing is essential for case study research since it can help uncover preferences of

actors and analyse the underlying context (2008: 224, 233). It ultimately aims at providing 'a narrative explanation of a causal path that leads to a specific outcome' (Vennesson 2008: 235).

In the context of this thesis, it is considered most appropriate to use Comparative Process Tracing (CPT) as defined and characterised by Bengtsson and Ruonavaara. Although process tracing usually focuses on within-case analysis, Bengtsson and Ruonavaara adopt a broader and more narrative approach and find it to be highly useful for comparisons as well (2017: 45, 60). Accordingly, the core elements of CPT are 'path dependence, critical junctures and focal points, social mechanisms, context, periodisation, and counterfactual analysis' (Bengtsson & Ruonavaara 2017: 45).

These elements are incorporated in various sections to solve the puzzle of this thesis. Examining the legal basis and roles of institutions provides contextualisation and explains a certain path dependence, which may be 'disturbed' by increased politicisation. There is also a 'periodisation' of mixed agreements as they are studied in different stages from negotiations to conclusion. Counter-factual analysis is brought in both by contrasting legal stipulations with behaviour in practice and by showing that substantive issues cannot explain variation between the case studies – they are thus an implausible alternative explanation for the observed behaviour. The politicisation of mixed agreements is herein determined as the 'critical juncture,' which is much more evident in one case study than the other and can hence explain the break with path dependency regarding CETA rather than the EUSFTA.

Due to the different data availability with respect to the studied institutions and case studies, it is not possible to follow a strict research design. Key elements of CPT will instead be applied by studying statements and arguments by the four studied institutional actors, which were brought forward during the different negotiation stages of the EUSFTA and CETA, respectively. The main focus will thereby be on the provisions or passages referring to competence distribution and the specific roles of the studied institutions.

4. Mixed Agreements: Legal Basis and Implications

4.1. Overview of the Analysis

One key aim of this thesis is to contrast the legal basis of mixed agreements with the actual political process. In the first part (Chapter 4), the legal concept and implications of mixed agreements will be defined and subsequently, the official role of institutions during the negotiation and conclusion of agreements will be examined. At a second stage (Chapter 5), CETA and EUSFTA will be used as case studies to determine how the legally demarcated competences and roles of the involved institutions are applied in political practice.

Corresponding to CPT, this chapter aims to illustrate the wider context and path dependency (in the sense that legal stipulations may be sticky) and it will present the official 'depoliticised' instructions for institutions as a counter-factual alternative to reality.

4.2. Definition of Mixed Agreements

Despite the prevalence of mixed agreements in EU treaty-making, there is still no unified definition of the concept (Limantas 2014: 14). There are, however, certain necessary or potential characteristics to qualify as a mixed agreement.

As Klamert puts it, mixed agreements are international agreements whereby the EU, the member states as well as one or more third states are independent parties to the agreement because this is 'legally required or politically desired' (2014: 184). There is hence a difference between 'obligatory and facultative mixity' but this is not always recognised in practice (Leal-Arcas 2001: 493). Mixed agreements can be bilateral – such as association agreements or the two cases discussed in this thesis – or multilateral such as certain UN conventions or the WTO agreement (Miller 2016: 10).

An agreement must be concluded as 'EU-only,' thus only by the Union and the third party, when it solely covers explicit or implicit exclusive Union competences, as identified by Article 3(1) TFEU and Article 3(2) TFEU (Van der Loo & Wessel 2017: 3). Even when member states are not themselves parties to an external agreement, they may still have commitments to implement and execute certain provisions (Leal-Arcas 2001: 493). Paradoxically, all agreements in CFSP and CSDP are exclusively concluded by the Union (Van der Loo & Wessel 2017: 4).

Contrary to this, mixed agreements are facultative, i.e. optional, if the agreement touches on both exclusive and non-exclusive EU competences – this non-exclusive EU competence can both be of a shared or supporting nature (Klamert 2014: 183). Shared competences are laid down in Article 4 TFEU and they usually prevent member states from acting once the EU has already used them (Puccio 2017: 1). However, member states may not want to give up their prerogative to act in a field of shared competences. In such cases, the decision is up to the discretion of the Council and is decided by political rather than legal imperatives (Van der Loo 2017: 7). Both case studies of this thesis arguably fall under this category.

Thirdly, it is mandatory for member states to become parties to the agreement if some provisions are covered by exclusive competences of the member states – thereby, they can take on the legal obligations of the agreement for the parts where the EU has no competence (Kleimann & Kübek 2016b: 8).

These rules are not always followed in practice. Some agreements that only cover exclusive Union competence are still concluded as mixed agreements, which is then referred to as 'false mixity.' In the multilateral field, there are also incomplete or partially mixed agreements due to the fact that not all member states have become parties to them (Klamert 2014: 183).

4.2.1. Treaty Basis

Despite the prominence of EU mixed agreements over the last decades, the EU treaties have mostly stayed silent on the issue (Klamert 2014: 185). The notion of mixity first came up in the Treaty establishing the European Atomic Energy Community (Article 10239) but it was initially not mentioned in the Treaty of Rome (Betz 2008: 7). Later modifications of that treaty made reference to the concept, yet without defining it (Maresceau 2010: 11). While the Nice Treaty mentioned mixity in relation to Article 133(6) EC on Common Commercial Policy (CCP), the Lisbon Treaty makes no reference to mixed agreements at all. Article 218 TFEU merely outlines the procedure for negotiating EU-only agreements (Klamert 2014: 185).

4.3. Past Usage of Mixed Agreements

Although mixed agreements had not been foreseen at the beginning of European integration, they have since 'become the daily life of the [Union]'s external relations'

(COSAC 2008: 42). The first mixed agreement was concluded in 1961 in relation to association agreements with Greece and Turkey, and more than 150 agreements followed until 2000 (Betz 2008: 7-8). Besides association agreements, many of these mixed agreements have been concluded in the 'areas of transport, environmental protection, and fisheries' (Klamert 2014: 185).

In May 2017, Van der Loo and Wessel found that 31 international agreements had been signed as mixed agreements in the post-Lisbon era, including all broad framework agreements, such as Association Agreements or Partnership and Cooperation Agreements (PCAs) and even all post-Lisbon FTAs. One prominent exception, which highlights the political discretion in the case of facultative mixity, is the EU-Kosovo Association Agreement. It was concluded as EU-only agreement so that certain member states could avoid to de facto recognise Kosovo through their national ratification procedure (Van der Loo 2017: 7).

4.3.1. New Generation Free Trade Agreements

Whilst most pure, first-generation FTAs used to be concluded as EU-only agreements[3], the much greater scope of newer FTAs has led to discussions about mixity (Van der Loo & Pelkmans 2016: 3-4).

After failing to include issues such as competition policy, public procurement and investment protection in the WTO, the EU has tried to incorporate these 'WTO+' issues into its bilateral FTAs, where it has more bargaining power. This has broadened the scope of these agreements (Gstöhl 2016: 1). For instance, new generation FTAs include 'trade and sustainable development' chapters, whereby the parties aim to enhance their labour and environmental standards (Velluti 2016: 56). An increasing politicisation of trade policy – that is, the pursuit of non-economic policy objectives in the CCP – can even be found in the Lisbon Treaty in Article 21 TFEU (Van der Loo 2017: 3).

The Union's efforts to marry commercial and normative priorities have, however, backfired at times. For instance, the Russian interpretation of the DCFTA with post-Soviet countries as a 'geopolitical offensive,' and its subsequent creation of the EEU, have

[3] Examples are 'the Information Technology Agreement, the Trade Facilitation Agreement, the TRIPS (intellectual property) Amendment on Public Health and the Government Procurement Agreement' (Commission 2017c: 3).

illustrated the possible adverse foreign policy impact of more ambitious FTAs (Gstöhl 2016: 4).

4.4. Case Law concerning Mixed Agreements

Before the entry into force of the Lisbon Treaty, the CJEU often underlined the 'mixed nature' of FTAs. In a landmark case, the Court stated in its Opinion 1/94 on the WTO Agreement that the European Community did not have the necessary exclusive powers for an 'EC-only' conclusion of the agreements which followed the Uruguay Round of multilateral trade negotiations as well as the GATS and TRIPS. Beyond that, the Court noted in several other judgments that some agreements necessitate the participation of both the Union and the member states – among these are its Ruling 1/78, Opinion 1/78, Opinion 2/91 as well as Opinion 1/94 (Kleimann & Kübek 2016b: 13).

However, in the post-Lisbon period, the CJEU has already confirmed the treaty's broadened scope of CCP in two cases, namely the Daiichi Sankyo and Conditional Access Convention case (Kleimann & Kübek 2016b: 13). Apart from this, the Court recently used Article 216 (1) TFEU on treaty-making powers in relation with Article 63 (1) TFEU as the 'correct legal bases for external Union acts that covered portfolio investment liberalisation' despite contrary claims by the Council and various member states (Kleimann & Kübek 2016b: 15). Opinion 2/15 referring to the EU-Singapore FTA, which will be discussed more closely in this thesis, has also shown the Court's readiness to name specific exclusive Union competences.

4.5. Delineation of Competences & Legal Issues

4.5.1. Declaration of Competences

In the past, the Union has at times made a declaration clarifying the distribution of competences when it concluded mixed agreements. In fact, these declarations tend to be less relevant since they are both not legally binding and they do not necessarily clarify responsibilities (Miller 2016: 11). The Court furthermore stressed that the distribution of competences is an internal matter and should not concern third states (Klamert 2014: 195). The reasoning behind this is that such a precise demarcation of competences would 'ignore the dynamic character' of the Union's external competences and especially the ERTA effect – i.e. the implied powers doctrine laid down in Article 3(2) TFEU (Van der Loo &

Wessel 2017: 15). When the Union is reluctant to 'submit precise and complete statements' (as is usually the case), the Union and member states are both liable (Klamert 2014: 195).

4.5.2. Provisional Application

According to Article 25 VCLT, parties to an international agreement can decide to apply either parts or all of the agreement provisionally upon signature before its entry into force (Kleimann & Kübek 2016b: 15). Though the VCLT only applies to states, Union institutions can provisionally apply agreements since the treaty reform of Amsterdam. This possibility is now codified in Article 218(5) TFEU (Kleimann & Kübek 2016b: 16). Provisional application – even of provisions falling under exclusive Union competences – is a 'political choice' which is made by the Council for each international agreement (Kuijper et al. 2018: 10).

The scope of the provisional application of mixed agreements could also indicate a certain competence distribution since, at least in theory, only the parts covered by exclusive Union competence can be applied provisionally. However, various Council decisions have negated this claim by stating that 'the provisional application of parts of the Agreement does not prejudge the allocation of competences between the Union and its Member States in accordance with the Treaties' (Van der Loo & Wessel 2017: 16-17; e.g. Council 2016b: 2). The provisional application of 'shared' provisions has thus often led to a plethora of declarations and statements for clarification (Miller 2016: 12).

4.5.3. Termination or Non-Ratification of Mixed Agreements

The 2015 Dutch referendum on the EU-Ukraine Association Agreement as well as the Walloon threat to block the signing of CETA have led to questions concerning the consequences of non-ratification by member states of mixed agreements (Van der Loo & Wessel 2017: 1). The Court has found the duty of cooperation does not imply that member states are obliged to ratify mixed agreements (Van der Loo & Wessel 2017: 8). Although provisional applications would have to be terminated in the case of failed ratification according to Article 25 VCLT, the Commission has in the past argued that, due to the duty of cooperation, matters relating to exclusive EU competences should still be applied until there is renegotiation (Puccio 2016: 8). As mentioned above, there is the possibility of incomplete mixed agreements, but this is only an, actually widely used, option for multilateral agreements (Van der Loo & Wessel 2017: 10).

4.6. Role of Institutions regarding Mixed Agreements

The competing visions of intergovernmentalism and neofunctionalism are reflected in the entire institutional structure of the EU. This is also evident in the complex procedure to negotiate and conclude international agreements.

Figure 2: The Main Negotiation Stages of International Agreements

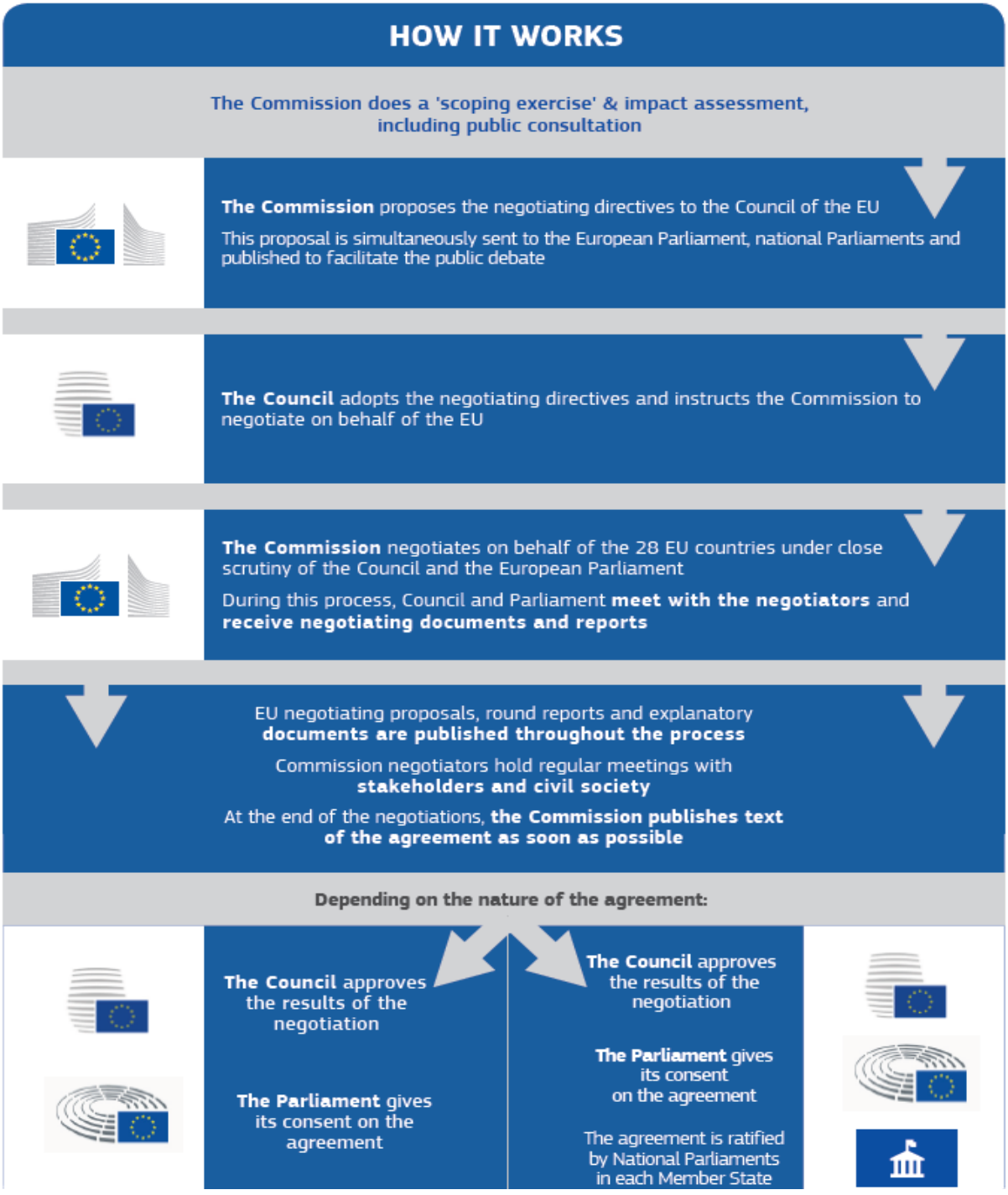

Figure 2: The Main Negotiation Stages of International Agreements, Source: Commission 2017d

4.6.1. Concluding Agreements: Interplay between the Council & Commission

The procedures necessary for concluding international agreements are laid down in Article 218 TFEU while Article 207 TFEU on the CCP is usually mentioned by the Council as a legal basis for its decisions concerning trade agreements (Puccio 2016: 2). The former Article illustrates the interplay between the Council and Commission (while briefly mentioning the EP) but it does not touch upon the specificities in the case of mixed agreements and consequently ignores the role of national parliaments.

For trade agreements, the Commission initially holds public consultations as 'scoping exercise' and then makes recommendations to the Council based on Article 207(3) TFEU; the Council subsequently authorises the start of negotiations under Article 207(3) and 218(2) TFEU and it issues a negotiating mandate with instructions and more specific negotiating directives for the Commission (Puccio 2016: 3). These negotiating mandates are usually not public although TTIP has led to a 'trend of selective transparency' (Toubeau & Ankersmit 2016: 5). The Council is charged with agenda-setting through the negotiating mandate and it can oversee the Commission's actions through its directives or by using a special committee (Article 218(4) TFEU) (Ripoll Servent 2018: 76). The Commission's proposals must 'be agreed with the Council before they can be tabled for discussions with the other party (parties)' and the Commission moreover must report to the Council's Trade Policy Committee (TPC). Throughout the negotiating process, the Commission has to ensure that the TPC as well as the Standing Committee for International Trade (INTA) of the EP are kept informed (Hübner et al. 2016: 25). As Meunier and Nicolaidis point out, the Commission usually follows the advice of the TPC since the Council needs to be on board to conclude any agreement that is negotiated by the Commission (2017: 2019). The Council can withdraw or suspend the negotiating mandate by qualified majority, but it generally prefers decisions by consensus when shared competences are concerned (Puccio 2016: 3). Any draft texts at this stage were usually not made public in the past although this practice has recently been changed due to public outcry and leaked documents (Hübner et al. 2016: 25).

The voting procedure in the Council depends on the competences and legal basis for the agreement. According to Article 218(8) TFEU, QMV generally has to be used but there are four exceptions – that is, matters which require unanimity internally, association agreements, agreements under Article 212 TFEU and the Union accession to the ECHR

(Puccio 2016: 9). Although trade agreements solely require qualified majority, the Council usually still tries to achieve consensus (Van der Loo & Pelkmans 2016: 3).

4.6.1.1. The Conclusion of Mixed Agreements

The decision on the nature of an agreement as mixed or EU-only depends on the legal basis, concerning the main competences involved. This is only determined once negotiations are finished. As Puccio notes, the Commission needs to include a suggested legal basis when it proposes a 'Council decision to sign, conclude or provisionally apply a Treaty.' The Council can modify such a proposal based on Article 293(1) TFEU but this requires unanimity – the proposal might hence be blocked if there is no qualified majority in the Council to pass it nor unanimity needed for modifications and it is then up to the Commission to 'unblock the situation' with modifications under Article 293(2) TFEU (Puccio 2016: 6).

After the Council decision to sign the agreement, mixed agreements are usually signed by the Union and member states simultaneously and, if relevant, there is a Council decision on provisional application (Puccio 2016: 6). In order to conclude the agreement, the EP first has to give its consent and then the Council adopts a decision to conclude the agreement following Article 218(6) and (8) TFEU – in the case of mixed agreements, the agreement only enters into force once all member states, the Union and the third party have ratified it (Puccio 2016: 7-8). The procedure from signature to conclusion of such agreements may only take a few months on the EU side meaning that EU-only agreements can usually enter into force comparatively quickly (Kleimann & Kübek 2016b: 10). In contrast, each member state must ratify a mixed agreement taking into account its national constitutional requirements, which may span from affirmative votes by parliaments to national referenda. Mixed agreements are therefore associated with a lengthier ratification period and more legal uncertainty for all sides (Kleimann & Kübek 2016b: 11).

4.6.2. EU Parliament: The new Key Player in International Agreements

For a long time, the Commission and the Council had been the central institutions responsible for external trade negotiations but the EP's formal and informal powers have slowly increased over time (Meunier & Nicolaidis 2017: 220).

In the 1960s, the member states in the Council already wanted to get the EP involved in association agreements, which resulted first in the 'Luns procedure,' prescribing the

practice of informing the EP about the substance of association agreements, and later in the 'Luns-Westerterp procedure,' which also covered other, e.g. commercial, agreements (Ripoll Servent 2018: 74). However, given that these arrangements were initially only informal, the amount of information provided to the EP varied depending on the political climate during the specific negotiations (Wolfstädter et al. 2018: 7). The Maastricht Treaty formally allowed the EP to 'assent to, or veto' some international agreements, such as association agreements, and the EP used these powers at times to insist on better human rights protection (Goebel 2013: 121-122). The formal role of the EP subsequently remained unchanged for almost two decades while its informal powers were further increased (Wouters & Raube 2017: 7).

These new EP powers were again formalised by the Lisbon Treaty in 2009, aiming to legitimise EU trade policies and to make them more efficient by widening the scope of exclusive Union competences (Bollen et al. 2016: 2). While the EP is still not directly involved in treaty negotiations, it has the right to be 'immediately and fully informed at all stages of the procedure' under Article 218(10) TFEU (Miller 2016: 15). Additionally, according to Article 218(6) TFEU, most agreements now need to be approved by the EP to enter into force (Goff 2014: 3). After a recommendation from its INTA Committee, MEPs can approve an agreement by simple majority, yet without being able to make any amendments (Gstöhl 2013: 11).

Figure 3: The EP's Formal Powers since the Lisbon Treaty

Figure 3: The EP's Formal Powers since the Lisbon Treaty, Source: Wolfstädter et al. 2018: 8

Formally speaking, the EP's role is still only important at the final stages of negotiation but, due to the vague formulation of the requirement to keep the EP informed, there has been an extensive 'informal re-interpretation of the rules' (Ripoll Servent: 2018: 76). Wouter and Raube furthermore stress that the 'consent requirement of the EP was a game changer' since the EP can now influence the 'full policy-cycle of trade negotiations'

(2017: 8). The EP has additionally gained certain rights through its inter-institutional agreement with the Commission from 2010 and through its own Rules of Procedure although the latter are 'not enforceable vis-à-vis other institutions (Toubeau & Ankersmit 2016: 5-6). For instance, the Interinstitutional Agreements of 2010 prescribes that:

> *1. The Commission shall inform Parliament about its intention to propose the start of negotiations at the same time as it informs the Council […]*
>
> *3. The Commission shall take due account of Parliament's comments throughout the negotiations. (Interinstitutional Agreements 2010)*

Since the Lisbon Treaty, the EP has thus greatly expanded its informal role and has been active during all stages of negotiations; it has, for instance, gained access to classified documents, was able to influence the content of negotiation directives and final agreements and has even gotten in touch with negotiation partners directly (Héritier 2015: 9). Though this is not legally required, the EP 'will often signal its political position by issuing a resolution' and the Commission, albeit obviously not bound by it, tends to consider it given the need for EP approval in the end (Puccio 2016: 4). The EP is not mentioned with regards to provisional application (Article 218(5) TFEU) but an informal practice has developed post-Lisbon to grant the EP the 'right to give formal consent to EU trade agreements' before any such application (Kleimann & Kübek 2016b: 17).

4.6.3. National Parliaments & their Growing Interest in Mixity

Though having been previously regarded as losers from European integration, member state parliaments have slowly learned to 'fight back' and they are now increasingly scrutinising policy-making at the supranational level (Auel & Christiansen 2015: 261-2). Their role has been upgraded by the Amsterdam Treaty and further advanced by the Lisbon Treaty – accordingly, national parliaments are now responsible for ensuring compliance of EU legislation with the principles of subsidiarity and proportionality (Winzen 2010: 7). They are furthermore responsible for transposing directives and approving treaty amendments, and they have certain rights such as being informed about EU affairs by their government (Auel & Raunio 2012: 8). National parliaments moreover have the option to join forces and get more involved in EU affairs in the forum of COSAC (Neyer 2012: 42).

The Treaty of Lisbon does not mention the role of national parliaments in EU FTAs since they are not directly involved in the negotiations and decision-making process (in the case of EU-only agreements). They can merely influence the respective national position in the Council (Wouters & Raube 2017: 10). In contrast, the conclusion of mixed agreements currently requires the participation of at least 38 national as well as regional parliaments in the Union (Kleimann & Kübek 2016b: 1). Strictly speaking, member states are completely free in choosing the domestic conclusion procedure and so parliamentary involvement is not obligatory (Eschbach 2015: 5). According to the National Parliaments Background Briefing by the EP, 14 member states may potentially hold a referendum before ratifying a mixed agreement while only Belgium requires the approval from the regional level to ratify such agreements (EP 2016a; Figure 8 in Appendix). EU-only agreements, in turn, do not preclude the involvement of national parliaments in the ratification process – national governments are hence not prevented by EU law to request a national parliamentary vote before an international agreement is adopted in the Council (Kleimann & Kübek 2016b: 11).

4.6.4. Court of Justice: The Influential Bystander

As laid down in Article 218(11) TFEU, any member state, the Commission, the Council or the EP can ask the Court whether an agreement that is being drafted is compatible with the treaties. Following a negative opinion, the draft agreement cannot enter into force without amendments – this happened, for instance, with the EC accession to the ECHR, which was made impossible by Opinion 2/94 (Miller 2016: 16). The Court can also give preliminary rulings on the interpretation of agreements concluded by the Union but there are legal debates about the 'distinction between the jurisdiction to interpret and the jurisdiction to determine the direct effect' (Hoops 2014: 5,7). Apart from this, the Court is not formally involved in the negotiation or adoption of EU international agreements.

5. Mixed Agreements in Practice: A Comparative Case Study Analysis

In this section, the practical implications of mixed agreements on institutions will be examined in light of EUSFTA and CETA negotiations. After setting out necessary background information on the two case studies, the behaviour of the four institutions will be analysed in more detail. Findings of this research will subsequently be used in Chapter 6 to extrapolate to what extent, and in what ways, the observed behaviour by the institutions matches up with the theories of intergovernmentalism and neofunctionalism.

5.1. Background of the Agreements

5.1.1. EUSFTA: A Precedent for EU-ASEAN Trade Relations

Singapore is the first ASEAN member and the second Asian country after South Korea that has concluded a trade agreement with the EU. Moreover, the EUSFTA is the first 'comprehensive FTA negotiated and finalised by the EU' in the post-Lisbon era (Binder 2017: 1). Initially, the EU had planned on negotiating a trade deal with ASEAN (that is, with the seven more developed countries out of the ten ASEAN members), but it quickly turned out that ASEAN was not negotiating as a bloc and it was decided to conclude individual agreements (Elms 2017: 36-37; Pelkmans & Mustilli 2013: 15). Among the ASEAN members, Singapore is the most developed, the EU already held significant FDI stocks and it has already concluded a similar agreement with the US (Binder 2017: 3). A solid agreement was hence to be negotiated with Singapore and this would then be used as a template for future FTAs with other countries in the region (Elms 2017: 37, 40). The Commission and member states always had in mind that, while a deal with Singapore would not be of huge importance – and was in fact refused in 2004 due to its economic irrelevance (Derous 2015: 2) -, the impact of the deal would be multiplied later by including other ASEAN members either in bilateral agreements or in a big multilateral deal (Ems 2017: 42). In April 2018, the Commission still found 'agreements with Singapore are a good reference point for the other trade and investment agreements the EU is negotiating with ASEAN Member States' (Commission 2018c: 1). In contrast, Pelkmans and Mustilli are sceptical that the EUSFTA could be easily applied as template to other ASEAN due to their big disparities in development and trade policies (2013: 31-2). Nonetheless, since the agreement includes all 'WTO+ aspect of trade,' it could be used as a 'benchmark, if not as a model' for negotiations with other ASEAN members. The EU already seemed to have

this in mind when inserting provisions on public procurement and sustainable development, which will be more relevant for other ASEAN members than for Singapore (Cuyvers et al. 2013: 68).

As for the substance of the agreement, it is far-reaching since, for instance, all of Singapore's tariffs are expected to be eliminated within five years while there are some exemptions on the EU side for fisheries and agricultural products (Binder 2017: 5-6). Furthermore, the EUSFTA includes a chapter on the liberalisation of a wide range of services sectors (which is more extensive than the one in the EU-South Korea FTA). There is a chapter on trade and sustainable development and the 'investment protection chapter introduces important innovations on substantive standards and investment dispute settlement' (Binder 2017: 6). In the recent Commission proposal to split the EUSFTA into two parts, these latter investment provisions are separated in an 'Investment Protection Agreement,' which is planned to be concluded as mixed agreement (EUSFTA 2018). It is estimated that, within 10 years, Singapore's exports to the EU would grow by 10.4% (€2.7 billion) and, in turn, EU exports to Singapore would grow by around 3.6% (almost €550 million) since Singapore already applied lower tariffs before the EUSFTA (Binder 2017: 7).

Negotiations started in 2010 and the agreement was for the most part finished by late 2014 but concluding the EUSFTA ultimately turned out to be more complicated than presumed (Elms 2017: 40, 52). While there were less issues with traditional trade liberalisation, the negotiations mostly focused on services, public procurement and investment (Cuyvers et al. 2013: 56). The Commission's request for an opinion from the CJEU as well as ongoing discussions on the investment protection provisions have thus delayed its entry into force (Binder 2017: 7). On 18 April 2018, the Commission proposed the signature and conclusion of two Singapore agreements – this division of the EUSFTA will now have to be approved by the Council before both are sent to the EP for approval. The Commission's aim is that the EU-only FTA will have entered into force by 2019 while the investment protection agreement has to follow the 'mixed' protocol and must be ratified by member states (Commission 2018c: 4). Authentic texts of the two proposed Singapore agreements were published online in April 2018 (EUSFTA 2018). Figure 4 illustrates how the Commission now envisions the entry into force of the two agreements.

Figure 4: Commission Proposal to Split the EUSFTA

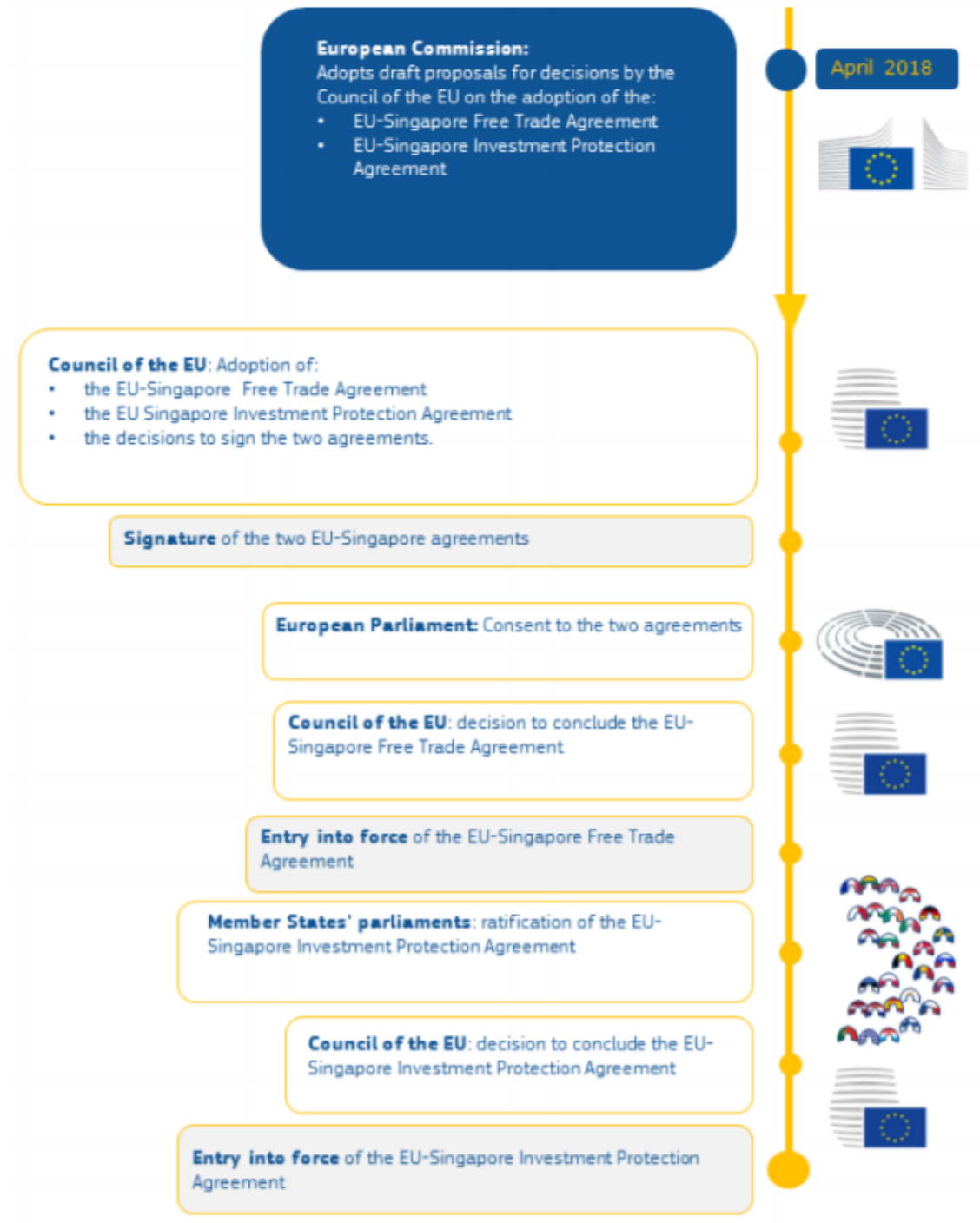

Figure 4: Commission Proposal to Split the EUSFTA, Source: Commission 2018b: 35

5.1.1.1. Legal Determination as Mixed Agreement: Opinion 2/15

In October 2014, the Commission asked the CJEU for an Opinion on whether all the provisions in the EUSFTA were covered by exclusive Union competences only and hence whether the Union had the '" requisite competence" to conclude the [EUSFTA] alone.' It was clear from the outset that the Court's judgment would be a key precedent for the conclusion of future FTAs (Kleimann & Kübek 2016a).

In its Opinion of 16 May 2017, the Court found that provisions in the EUSFTA relating to non-direct foreign investment, meaning portfolio investment, as well as those concerning the ISDS mechanism would not fall within the exclusive competence of the EU. As a result, the EUSFTA could not be concluded as an EU-only agreement in its current form but would have to be ratified by the member states as well (CJEU 2017: 1). The Court, however, specified that the Union has exclusive competence concerning the protection of FDI and IP rights as well as sustainable development and the exchange of information (CJEU 2017: 1). It moreover confirmed the exclusive Union competences in the fields of market access, competition and services in the field of transport (Wolfstädter et al. 2018: 5). The Commission appears to have taken full advantage of the Court's explicit references to exclusive Union competences when proposing to split the EUSFTA into two parts and thereby only subjecting 'mixed' provisions to national ratification.

5.1.2. CETA: A Negotiating Precedent for the Developed World

Negotiations for CETA commenced in 2009 and were completed in 2014, which was a great success for both parties (Goff 2014: 2; Yencken 2016: 19). As Schöllmann puts it, 'CETA represents the first comprehensive economic agreement with a highly industrialised Western economy' (2017: 1). It is also the most ambitious agreement ever concluded by both Canada and the EU (EP 2017c: 6). As Canada is the EU's 11th most important trade partner (with the EU being Canada's number 2), it has been estimated that a comprehensive FTA could increase exports in both directions by more than 20% (Schöllmann 2017: 1, 3).

Regarding its substance, CETA covers 30 chapters in 1598 pages and uses a 'negative list' approach, meaning trade and investment are liberalised when there are no explicit reservations (Schöllmann 2017: 4). CETA consequently removes duties on 98% of products that the EU is trading with Canada (Commission 2017a: 1). As the Council put it,

CETA 'will provide for improved market access for services, greater certainty, transparency and protection for investments, enhanced cooperation on regulatory development, labour mobility and in other areas, and new opportunities in government procurement markets' (Council 2014: 7). Canada has furthermore agreed to protect '143 distinctive EU agricultural products with Geographical Indications' (Commission 2017e: 5). Despite its focus on regulatory convergence, the agreement still safeguards the Union's 'right to apply our own standards to all goods and services sold in Europe' – member states can thus still introduce and maintain higher environmental and labour standards (Commission 2017b: 2). That issue is stressed in the treaty text itself as well as by numerous documents produced by the Commission (e.g. Commission 2017a; Commission 2017b). For instance, it was highlighted as the third point in the preamble of the agreement:

> *RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity (CETA 2016)*

The voluntary nature of regulatory convergence was moreover emphasised in the Joint Interpretative Instrument on the CETA from 27 October 2016 (Council 2016d: 4).

5.1.2.1. Political Determination as Mixed Agreement: Public Debates

Up until 5 July 2016, the Commission had insisted CETA was an EU-only agreement and would, as such, be concluded by the relevant EU institutions. However, CETA has drawn criticism since the beginning of negotiations on TTIP and the discussions on the ISDS mechanism (Goff 2014: 8). Following great political pressure in the Council, Commission President Juncker announced a decision – which has been widely attributed to be his personal one – that CETA would be signed and concluded as mixed agreement (Kleimann & Kübek 2016b: 1).

After the political determination of CETA as mixed agreement, the Council adopted a decision on the signature and the provisional application of CETA on 28 October 2016 and it requested the consent of the EP to conclude the agreement (Council 2016c: 1). Both the EU and Canada signed the agreement on 30 October 2016 following the approval by the Council. The EP subsequently gave its consent on 15 February 2017 and Canada already ratified CETA on 16 May 2017 (Commission 2017a: 2). The vast majority of CETA

provisions have now been applied provisionally since 21 September 2017 (Commission 2017a: 1). Entry into force of the agreement currently hinges on the ratification of all EU member states but this may take some time. The reason for this is that Belgium submitted a request to the CJEU on 6 September 2017 for its opinion on the compatibility of the Investment Court System (ICS) with EU law (Harte 2017: 1). While non-ratification is not foreseeable, it is likely that many member states will wait for the Court's Opinion on the ICS before ratifying CETA (Van der Loo 2016: 4).

5.1.3. Substantive Comparison of the Case Studies

In general, the two precedent-setting agreements appear similar in scope – even more so since the recent proposed changes by the Commission to split up the EUSFTA. CETA used to be substantively different because it was the first FTA that replaced the traditional ISDS mechanism with the new ICS – that is, a permanent investment court with an appellate body (Gantz 2017: 5). While the new ICS mechanism was later added to the FTA with Vietnam, the earlier version of the EUSFTA still included the old ISDS mechanism, which focuses much less on safeguarding the right to regulate and the independence of adjudicators (Van Harten 2016: 143-4). This was only modified by the Commission proposal in April 2018 whereby investment provisions (in a separate mixed agreement) were updated to include the new ICS mechanism (Commission 2018c: 4).

Consequently, if the substance of an agreement was decisive for the level of engagement of institutions and even the status of the agreement, both the EUSFTA and CETA would have faced the same institutional power struggle and they would both be concluded in the same way (that is, as EU-only, mixed or two separate agreements). This is refuted as counter-factual by the ensuing institutional analysis, which points to politicisation as the main factor for determining institutional involvement. The finding is therefore in accordance with Bollen et al.'s line of argumentation (2016).

5.2. Institutional Players in Action: EUSFTA & CETA

5.2.1. Council: The Guardian of Member State Interests

In short, the official role of the Council is to adopt overall guidelines for negotiating agreements, overseeing the Commission's negotiations with the third parties as well as producing legal documents to conclude such agreements. While there is a strict delineation of the Council's official role regarding international agreements (i.e. the documents it has to produce), it is up to the Council to decide on a case-by-case basis to what extent it will supervise the Commission. It is assumed in this thesis that the Council will be more 'controlling' in the case of politicised agreements and provisions and that competence issues are of secondary importance. Its interaction with parliaments is expected to be mostly limited to the provision of information – though the Council should theoretically be the EU institution responsible for involving national parliaments and integrating their views throughout the negotiations.

5.2.1.1. EUSFTA

There is no evidence of any documents or statements attributable to the Council which outline its position on the EUSFTA aside from official legal documents and its arguments in relation to the Court hearing for Opinion 2/15. While this can partly be accounted for by the more secretive nature of the institution, it is striking that the Council was much more vocal in the case of CETA (as explained below). In a policy debate in 2012 – which was partially made accessible to the public in 2016 –, the Council confirmed that one key objective of the EUSFTA, besides improving trade relations, would be to 'create a good precedent for FTAs with other ASEAN' members (Council 2012: 2). Otherwise, the document is not very revealing with respect to the Council's concrete position on the EUSFTA. The Council has so far not even openly commented on the recent Commission proposal to divide the EUSFTA into an EU-only and a mixed part although this division is not in line with its argumentation during Court hearings and it arguably weakens the Council's position vis-à-vis the Commission.

There had been modifications of the Council's negotiation mandate for the EUSFTA; however, this was due to technical reasons rather than political imperatives. Since EU-Singaporean negotiations were based on the ASEAN negotiation directives from 2007 (hence before the Lisbon Treaty), these negotiation directions had to be modified by the Council in 2011, which allowed for the inclusion of investment protection (Binder 2017: 5).

The Council only openly expressed its views on the EUSFTA, or rather the competence issues related thereto, during the Court hearings for Opinion 2/15. When the Court deliberated on the issue of mixity concerning EUSFTA, the Council put forth several arguments to underpin its conviction that EUSFTA should be treated as mixed agreement. The Council questioned EU exclusivity on several issues, it insisted on a narrow interpretation of treaty provisions such as Article 207 TFEU and it generally based its arguments on the principle of conferral (Article 5(2) TEU). According to the Council, member states have retained exclusive competence for 'maritime transport, FDI protection, portfolio liberalization and protection and (alleged) non-commercial aspects of intellectual property rights protection' (Kleimann & Kübek 2016a). Regarding the definition of FDI, the Council has taken a 'restrictive literal interpretation of the treaties' according to which all types other than FDI would not fall under exclusive competence under Article 207 TFEU (Lavranos 2017: 3).

In the context of Opinion 2/15, the Council has furthermore revealed its position on provisional application, which illustrates a compromise with the supranational standpoint: it has approved of the provisional application of some treaty parts which it considers falling under exclusive Union competence such as maritime transport or portfolio investment (Kleimann & Kübek 2016b: 17).

During the Court hearings, the Council brought forward arguments as to why new generation FTAs *in general* should be treated as mixed agreements and there did not seem to be any particular concern about the EUSFTA as such. There is no evidence of extensive Council supervision of the Commission as negotiator of the EUSFTA or interaction between the Council and any parliament on this FTA.

5.2.1.2. CETA

In contrast to the EUSFTA, the Council has expressed its views on CETA much more openly. It first authorised the Commission to open negotiations with Canada in April 2009 and, similar to the EUSFTA, its negotiation mandate was subsequently modified in July 2011 (i.e. in the post-Lisbon era) so that investment and investment protection could be included (Schöllmann 2017: 3).

Although the Council never had to bring forward arguments for mixity in front of a Court, it has become evident that this institution (and some of its members in particular)

was paramount in CETA's ultimate determination as mixed agreement by the Commission. The Council had already highlighted in 2014 that some provisions in CETA were touching on mixed competences and 'emphasised that it will not agree to the signature and conclusion of CETA as an EU-only agreement' (Council 2014: 7). The insistence on mixity by trade ministers in the Foreign Affairs Council on 13 May 2016 was therefore not unexpected (Schöllmann 2016: 1). Commissioner Malmström later admitted the Commission only opted for mixity as a last resort after having faced opposition in the Council, especially from Germany and France. In fact, member states had threatened to amend potential EU-only proposals, and Germany among others claimed they may vote against the signing of CETA in the Council if member states were not named as independent parties to the agreement (Kleimann & Kübek 2016b: 10). The Council also exerted pressure with regards to the substance of CETA since some member states such as Germany, Austria and France even insisted they would reject an agreement if it included ISDS (Hübner et al. 2016: 27). However, increased publicity of the agreement also put some pressure on the Council. After demands from Germany, the Trade Commissioner and MEPs, the Council decided to make the CETA negotiating directives public (Council 2015: 1-2).

In its decision on 5 October 2016, the Council affirmed that most of the agreement would be applied provisionally but it emphasised on 19 October 2016 that this 'does not prejudge the allocation of competences between the EU and the Member States' (Council 2016a: 5; Council 2016b: 2-3). It furthermore clarified that, for decisions on issues falling within member state competence, 'the position to be taken by the Union and its Member States within the CETA Joint Committee shall be adopted by common accord' (Council 2016b: 10).

There does not appear to have been great interaction between the Council and the parliaments in the context of CETA. Nevertheless, the Council had followed 'the established practice that politically important trade agreements are not applied provisionally' before the consent of the EP (Schöllmann 2017: 10). This is despite the fact that the Council is formally under no legal obligation to wait for EP consent of an agreement before authorising the signing and provisional application of an international agreement (Kuijper et al. 2018: 11).

5.2.1.3. Findings

Considering the two studied agreements, the exact position of the Council during the negotiations is not entirely clear due to the lack of published documents. It can still be extrapolated that the Council was defensive of member state competences in both instances. The Council never really got invested in the EUSFTA as such and has not even commented on the ground-breaking Commission proposal to split up the agreement, which is presumably against the intergovernmental viewpoint. It only became active when the Commission had referred the question of competences to the CJEU, making it obvious that the Court ruling would set a precedent for other, more politically important, future agreements. In contrast, the Council had been vocally demanding the determination of CETA as mixed agreement for years and appears to have played a crucial part in pressuring the Commission to give in to its demands on status as well as on substantive issues. Apart from calls to increase transparency, the Council seems to have otherwise not been held accountable by the public and other institutions

5.2.2. Commission: Negotiator 'under Observation'

As the executive arm, the Commission is the institution formally charged with conducting negotiations for external agreements and can thus exert great influence on the final documents. Having said that, it appears the Commission has experienced unprecedented levels of scrutiny from other institutions and civil society with respect to the latest negotiated agreements. As a response to the heightened interest in FTAs, the Commission has made efforts to make discussions more inclusive by encouraging trade discussions at different levels and by organising visits of the Trade Commissioner Malmström to national parliaments (Commission 2017e: 13).

In his 'State of the Union' speech in September 2017, Commission President Juncker highlighted the necessity to make FTA negotiations more transparent and stressed the need to involve parliamentarians at all levels as well as civil society earlier on:

> *The European Parliament will have the final say on all trade agreements. So its Members, like members of national and regional parliaments, must be kept fully informed from day one of the negotiations. The Commission will make sure of this.*
>
> *From now on, the Commission will publish in full all draft negotiating mandates we propose to the Council.*

> *Citizens have the right to know what the Commission is proposing. Gone are the days of no transparency. Gone are the days of rumours, of incessantly questioning the Commission's motives.*
>
> *I call on the Council to do the same when it adopts the final negotiating mandates (Juncker 2017: 3).*

Despite the general politicisation of EU trade policy, the degree of supervision of, and interference in, the Commission's work appears to have varied substantially with respect to the two case studies.

5.2.2.1. EUSFTA

At least during the earlier phases of the EUSFTA, the Commission appears to have received relatively little attention and criticism when negotiating with Singapore. As alluded to previously, it got mostly positive responses during public consultations in 2010 since those interested were mainly exporters rather than protectionists (Binder 2017: 7). This somewhat changed when the Commission submitted the question of competences to the Court to clarify the status of the EUSFTA – which was arguably also done to settle disagreements on more controversial agreements.

During the Court hearings for Opinion 2/15, the Commission naturally relied on a very broad interpretation of Article 207 TFEU on CCP as well as on the 'centre of gravity' theory. It argued that, since the EUSFTA only concerned exclusive Union competences or shared ones, the decision between concluding it as mixed or EU-only agreement was facultative (Kleimann & Kübek 2016a). Just as the EP, the Commission had 'adopted a maximalist view' of FDI since it found this would include all types of investment, even portfolio investments (Lavranos 2017: 3). It furthermore claimed that ISDS was directly connected with FDI and thus covered by exclusive competence (Lavranos 2017: 5).

While the Commission lost its Court case prima facie in that some provisions were found to require 'mixity,' it arguably benefitted from the Court's clarification regarding the widened scope of CCP. That is confirmed by this statement: 'The Commission welcomed the Opinion of the Court because it provided the clarity we had asked for' (Commission 2017c: 2). As Van der Loo points out, the Commission may have lost this specific case, but its officials were 'not disappointed' since the Court had 'recognised that almost the entire

agreement falls under EU exclusive competences' (2017: 1). In contrast, Lavranos finds that the Commission was the main loser of the Opinion since the member states would retain 'significant control over the trade negotiations and ultimate ratification process' (2017: 8). In view of most recent developments, the Commission appears to have taken full advantage of the clarity of Opinion 2/15 and has confidently proposed to retain competence over the majority of the agreement (i.e. to conclude the FTA provisions by the EU-only mechanism) while only including member states in the 'mixed' investment provisions.

Apart from the Court case, the Commission appears to have stayed silent regarding negotiations with Singapore simply because it was not pressured to release information or to defend its negotiating strategy. There is no evidence of particular engagement with the public or other institutions beyond what is legally required – this is most probably due to a lack of demand by other actors to get involved.

5.2.2.2. CETA

In contrast, the Commission's role as negotiator of CETA has arguably been more challenging due to the increased oversight of fellow EU institutions and the public, which appears to have shaped its behaviour substantially. To counterbalance criticism, the Commission has published an enormous amount of materials advocating for CETA. In the document archive of its website, a search for the keyword 'CETA' yields 123 results, mostly documents highlighting the great potential of CETA for all member states – in turn, only three documents came up when searching for 'EUSFTA' in late March 2018 (see Commission 2018a). This can partially be accounted for by the fact that CETA is further ahead in the process but the publication of these CETA documents had been spread across several years.

The Commission has moreover been very interactive with other institutions and the public. During the scoping exercise, the EU 'reached out to over 350 civil society actors, trade associations, academic institutions and government agencies' (Hübner et al. 2016: 25). In July 2014, the general public was again involved via online public consultations, which received 150,000 mostly critical replies (Schöllmann 2017: 3-4). This level of engagement with civil society shows the Commission's awareness of public interest and concern about this agreement.

On 5 July 2016, the Commission made three proposals for Council decisions relating to the signing, provisional application and conclusion of CETA (Schöllmann 2017: 9). This is when the Commission officially switched its position and announced CETA would be concluded as mixed agreement. Juncker made the announcement shortly after the Brexit referendum and perhaps wanted to get the governments involved at this critical juncture due to the 'political sensitivity about the unelected and unaccountable Commission' (Cannon & Ambrose 2016). Scepticism among European citizens as well as the stark opposition from some Council members must have been the prime reasons for this sudden break in path dependency regarding the Commission's position. At many occasions, the Commission highlighted the democratic nature of CETA negotiations and the agreement as such. When announcing the decision on mixity, Juncker emphasised that arguments from member states (at the executive and legislative level) had been taken into account but he feared this may come at the expense of the 'credibility of Europe's trade policy' (Commission 2016a: 1). He thus reminded member states of their responsibility to ensure that national ratification is underpinned by a thorough and balanced debate on CETA:

> *'This trade deal has been subject to an in-depth parliamentary scrutiny which reflects the increased interest of citizens in trade policy. The intense exchanges on CETA throughout this process are testimony to the democratic nature of European decision making and I expect Member States to conduct an inclusive and thorough discussion in the context of the ongoing national ratification processes of the agreement' (Commission 2017a: 1).*

Nevertheless, the Commission's legal view that the EU has exclusive power to conclude the agreement has not changed – this is exemplified by their arguments brought forward in the Court hearing for Opinion 2/15 (Cannon & Ambrose 2016). Referring to the competence issue, EU Trade Commissioner Cecilia Malmström confirmed this and emphasised that mixity was only proposed due to the 'political situation in the Council' (Commission 2016a: 1).

The Commission still planned on provisionally applying the whole agreement on 5 July 2016 but later accepted the member states' demand to exclude certain provisions relating to criminal enforcement of IP rights and investment protection provisions (Kleimann & Kübek 2016b: 18). Moreover, the Commission acknowledged the ISDS

mechanism was transformed into the newly developed ICS to accommodate concerns of member states (Commission 2017e: 8). The Commission has also had to give in to demands to publish negotiating documents. In turn, it 'systematically invite[d] the Member States to consult national parliaments on proposed negotiating directives, and to publish them as soon as adopted' (Commission 2017e: 12).

All these points demonstrate that the Commission has had to make many concessions to other institutions and member states to safeguard the ultimate adoption of the agreement and its reputation as legitimate negotiator of trade agreements.

5.2.2.3. Findings

In the case of the EUSFTA, the Commission appeared to have more room for manoeuvre since the agreement was less publicly known than CETA. This has changed to some extent with its decision to ask the Court to clarify the competence issues regarding the EUSFTA – and, by extension, all other new generation FTAs. Nonetheless, the latest Commission proposal shows that the Commission may have found a loophole to still conclude the bulk of the agreement by the 'EU only' – a proposal that would have most probably been unconceivable for a more politically charged agreement.

Regarding CETA, the Commission has had to follow more stringent requirements by the Council and it was publicly pressured to consult with the EP and even member state parliaments and civil society. As illustrated by statements from its high-level representatives, the executive organ has had to back down and change its positions – on substantive issues such as the ISDS mechanism as well as on the status of the agreement – when faced with backlash from other institutions and the public. This has arguably strengthened the position of the Council and some very vocal member states vis-à-vis the Commission.

5.2.3. The Ambivalent Role of the European Parliament in Mixity

The EP has played a highly interesting role with regards to negotiating and concluding international agreements since its level of engagement as well as its instruments can vary extensively. Despite being officially only involved at the final ratification stage, Héritier et al. find that the EP has taken on many different roles during the different stages

of negotiations (see Figure 5, 2015: 98-99). The EP has thus used its 'shadow of the future' to exert pressure on the Commission earlier on (Raube & Wouters 2016: 9).

Figure 5: The EP's Role in International Agreements

Phase	Role
Scoping exercise	-
Negotiation mandate	Access to negotiation mandate Resolution on negotiation mandate Comments on negotiation mandate Influence on format of negotiation mandate
Negotiation rounds	Access to all documents Debriefing before and after each round of negotiations Influence on content of agreement Influence on concessions from negotiation partner
Ratification	Option to reject an agreement (De facto) conditional ratification of agreement

Figure 5: The EP's Role in International Agreements, Source: Héritier et al. 2015: 98-9

According to Raube and Wouters, the EP has often strengthened its influence by introducing 'informal rule-making' which is subsequently transformed into formal rules (2016: 5). It is therefore important to note the distinction between formal and informal strategies employed by the EP (see Figure 6). Table 5 and 6 will hereafter be used as reference points to evaluate the engagement of the EP concerning the two case studies.

Figure 6: The EP's Formal & Informal Negotiation Strategies

Formal	Informal
text Complaint to ECJ Complaint to European Ombudsman In-depth study by DG Expo Meeting with Commission Opinion by ECJ Opinion by LIBE Committee Ratification Report Resolution	Addressing negotiation partner Agenda-setting Collaboration with third actors De facto conditional ratification Internal coordination Personal influence Withdrawal from office

Figure 6: The EP's Formal & Informal Negotiation Strategies, Source: Héritier et al. 2015: 100

In previous cases, the EP has certainly made use of these prerogatives. Regarding TTIP, the EP did not only publish its recommendations for the negotiation mandate, which the Commission took into account, but it also pressured the Commission into publishing the negotiation mandate and received the same documents as the Council for monitoring purposes (Héritier et al. 2015: 9, 91-4). The EP furthermore refused 'to consent to the SWIFT, ACTA and EU-Morocco Fisheries Agreements,' which led to either renegotiation or abandonment of these agreements (Wouters & Raube 2017: 7). Moreover, progress made on one agreement can potentially be transferred to others. This has been illustrated by the current EU-Australia trade negotiations where the EP called on the Commission to guarantee 'at least the level of transparency and public consultation implemented for the [TTIP] negotiations' (EP 2017d: 6).

In its Trade Strategy of 2016, it becomes evident that the EP is generally in favour of FTAs and supports the two studied agreements with Canada and Singapore (EP 2016c: 12). Having said that, it has also shown great interest in scrutinising the work of the Commission:

> *35. Welcomes the Commission proposal for an enhanced partnership with Parliament and stakeholders for the implementation of trade agreements; emphasises that Parliament needs to be involved and fully informed, in a timely manner, at all stages of the procedure, including by means of a systematic consultation with the Parliament prior to the drafting of negotiating mandates […] (EP 2016c: 10).*

It moreover found that the practice of requiring EP consent before provisionally applying mixed agreement was 'the best balance of democratic oversight and efficiency' (EP 2016c: 10).

5.2.3.1. EUSFTA

It is very difficult to find documents by the EP on the EUSFTA as such. The EP has referred to the Court's delineation of competences in Opinion 2/15 in different contexts but the actual agreement with Singapore does not appear to be analysed in depth by any of the EP Committees or discussed in the plenary (EP 2018). Héritier et al. notice that, during the negotiations on the EUSFTA, the EP 'did not even exhaust its formal instruments' (2015: 9).

The EP was not involved in the drafting of the directives for negotiations with ASEAN (before the Lisbon Treaty). Once it was clear that bilateral agreements were pursued, the Commission consulted MEPs and they were supportive (Héritier et al. 2015: 94). The INTA Committee was included in the negotiations from the start but, for organisational reasons, MEPs only really started to show interest in 2011 once parliamentary monitoring groups were set up. Héritier et al. stress that there were no major difficulties during negotiations given that 'neither the EP nor the Council had major vested concerns regarding the negotiations.' As the Commission duly debriefed the EP and provided information to the INTA Committee, 'the EP had not requested any further information or documents than the Commission would have been willing to give' (Héritier et al. 2015: 94-5). Cuyvers et al. moreover found in 2013 that the EUSFTA had 'so far not provoked any clash within' the EP (2013: 70).

Generally speaking, MEPs were supportive of the EUSFTA, which explains why they did not engage with NGOs or developed any other strategies to exert influence on the negotiations. There were only some concerns about human rights, civil society and the death penalty in Singapore and some MEPs demanded more transparency on the ISDS. The Commission tried to take these concerns into account in order to avoid a rejection by the EP although this was unlikely given that 'the majority of MEPs supported the negotiations' (Héritier et al. 2015: 95).

Héritier et al. emphasise what the EP did *not* do regarding the EUSFTA: 'it has not made use of its three new formal rights: it has not launched a study on the agreement […]; the LIBE Committee has not issued an opinion; and the EP has not made a resolution on the EUSFTA negotiations.' There has also been no attempt to engage with the critical public. Furthermore, it was the Commission rather than the EP that asked the CJEU for its opinion on the EUSFTA (Héritier et al. 2015: 95-6).

While Opinion 2/15 does not directly affect the EP, Wolfstädter et al. presume that, by including national parliaments in the ratification procedure, it might be 'harder to find satisfactory solutions for all parties in a complex agglomeration of interests' (2018: 8). After the Court had issued its opinion, some MEPs (on behalf of the INTA Committee) had thus posed oral questions to the Commission, asking about its impact on future mandates for the negotiation of FTAs (EP 2017b). At the time, the Commission pointed out there needed to be reflections about the sustainability of ratification processes as with CETA and

EUSFTA, and noted that member states should involve national parliaments earlier on. MEP Martin, the EP rapporteur for the EUSFTA, argued against the inclusion of member state parliaments in the ratification:

> *The Lisbon Treaty makes it very clear that [the EP], which is legitimately elected by the EU citizens, is the only Parliament entitled to ratify EU-only free trade deals.*
>
> *In future, the Council should not artificially add to the mandate for free trade agreements in order to maintain mixity. (EP 2017b).*

In the context of these parliamentary questions, MEP Lange also argued FTAs should be divided in a part covered by exclusive competences and one covering shared competences in order to enhance clarity, transparency and efficiency when negotiating and concluding agreements (EP 2017b). While this idea was initially opposed by the DG Trade (Héritier et al. 2015: 96), it appears that this is precisely what the Commission proposed in April 2018.

Apart from these discussions, Opinion 2/15 seems to have already influenced negotiations for other FTAs and the way the EP perceives its own role in this regard. For instance, with respect to the ongoing trade negotiations with Australia, the EP finds that it 'should see its role strengthened at every stage of the EU-FTA negotiations' following the Court finding (EP 2017d: 10).

5.2.3.2. CETA

Once the Lisbon Treaty had entered into force in 2009, the Commission began sharing information about the preparations for CETA negotiations with the EP (Bierbrauer 2014: 12). The EP has thus 'actively monitored the negotiations and voiced its ideas throughout the process' almost since the start of CETA negotiations. It published a resolution on 'EU-Canada trade relations' on 8 June 2011, in which it was generally favourable towards CETA (Schöllmann 2017: 3). However, the EP reminded the Council and Commission of their obligation to include the EP at all times and to take its views into account:

> *11. Notes, not without concern, that the Commission submitted to the Council a proposal for modifying the negotiating directives authorising the Commission to negotiate with Canada on investment without waiting for Parliament to adopt its position on the future EU investment policy in general […]*

19. Reminds the Council and Commission that, since the entry into force of the Lisbon Treaty, the Council has been required to obtain the consent of Parliament for all international trade agreements and both the Council and the Commission have been required to keep Parliament immediately and fully informed at all stages of the procedure (EP 2011: 4-5)

In fact, this kind of pressure from the EP seems to have had a crucial impact on negotiations, which is exemplified by the Commission's decision to change investment provisions and include the new ICS (Schöllmann 2017: 3). It, moreover, enhanced the role of the EP during negotiations; for instance, the EP's INTA Committee managed to get access to the then classified basic text of the CETA agreement in August 2014 (Bierbrauer 2014: 4).

In its recommendation to conclude CETA in 2017, the EP finds that 'the final agreement represents a balanced and comprehensive outcome of significant economic value for the EU, fully in line with what was set out in the negotiating mandate and the resolution the European Parliament adopted' – that is, its Resolution from 2011 (EP 2017c: 7). While the Committees on Foreign Affairs and on the Environment both recommended the EP to give its consent for concluding CETA, the Committee on Employment and Social Affairs was more critical, predicting 'actual job losses of 204 000 for the EU as a whole' and 'significant sectorial dislocations.' It hence felt 'compelled to call on the Committee on International Trade to withhold its consent to the agreement' (EP 2017c: 9-15). The INTA Committee ultimately still gave its consent to the conclusion of the agreement on 30 January 2017 (EP 2017c: 5). On 15 February 2017, the EP plenary approved CETA 'by 408 votes to 254, with 33 abstentions' (EP 2017a).

Referring to the formal and informal roles of the EP drawn up by Héritier et al. (Figures 5 & 6), the EP appears to have used many instruments at its disposal with respect to CETA. The EP adopted a resolution on the negotiating directives, had access to confidential documents and even managed to influence investment provisions in the final document. Regarding its formal instruments, it published reports and resolutions on CETA, was planning to request an opinion by the CJEU on ICS (which is now pursued by Belgium) and it ratified the agreement. As for its informal involvement, it influenced agenda-setting (ICS) and provisional application was made conditional on the consent of the EP.

5.2.3.3. Findings

Overall, the EP has increasingly used its powers and Ripoll Servent therefore stresses that the Commission and Council now know that they will have to involve the institution during the agenda-setting and negotiation stages (2018: 79).

In the case of EUSFTA, the EP did not really make use of its acquired rights but only became active in the context of Opinion 2/15 as supporter of EU-only agreements. This seems to have been somewhat successful since the new Commission proposal to divide the EUSFTA might lead to a new trend of (partial) EU-only agreements, which should be in the interest of the EP. As for inter-institutional interactions, the EP and the Council did not collaborate at all while the Commission's interactions with the EP were not as close as those with the Council (Héritier et al. 2015: 95). The EP appears to have been mainly concerned with the precedent-setting power of Opinion 2/15 on the status of agreements and its own powers.

In contrast, the EP followed CETA negotiations from the start and got involved in substantial matters (successfully) as well as status discussions (unsuccessfully). It produced resolutions early on during negotiations, was successful in demanding modifications of the treaty text and was asked for consent not just for ratification of the agreement but also for provisional application. This increased activism by the EP was arguably necessary to counterbalance the demands from the Council and member state parliaments, and hence to defend supranational features of EU decision-making.

5.2.4. National Parliaments: The New Defender of Mixity?

Given the sheer number of both national and regional parliaments in the 28 member states, it is difficult to evaluate them as one institution. For the purpose of this thesis, the focus will therefore mainly be on their cooperative efforts.

National parliamentarians meet in the interparliamentary forum of COSAC, which has discussed trade issues, albeit not at length (Raube & Wouters 2016: 11). For instance, neither trade in general nor the two case studies were discussed in various COSAC bi-annual reports[4] (COSAC 2018). The EP's INTA Committee has generally 'welcomed the "parliamentarisation" of trade policy at EU level' and has suggested to organise more inter-

[4] E.g. COSAC reports in June 2014, November 2015, May 2016 and May 2017

parliamentary meetings but exchanges on trade issues have so far not been formalised (COSAC 2014: 29; Raube & Wouters 2016: 11).

Since 2004, COSAC has produced biannual reports of its work, which provide insights into the involvement of parliaments in EU affairs (COSAC 2018). Regarding trade agreements, it found in 2008 that 'a vast majority of national parliaments do not scrutinise the entire process of negotiating the agreements.' It demanded better access to classified documents so that national parliamentarians would be able to 'scrutinise [and influence] their government's position' before and during negotiations (COSAC 2008: 40, 44-5). In 2014, less than one third of member state parliaments stated they were involved in trade negotiations but they appreciated the increased level of information (COSAC 2014: 5, 23). Just one year later, the majority of parliaments stated they had 'discussed the estimated national and EU-wide impact of [trade] agreements, mainly of the TTIP' and these discussions on committee level were supplemented with meetings with various stakeholders from EU institutions or organisations. Despite the apparent growing interest in FTAs, parliamentarians did not carry out public consultations nor draw up impact assessments (COSAC 2015: 9). Referring to competence issues, parliaments expressed the wish for 'greater involvement of national Parliaments in […] the agreements viewed as "mixed agreements"' (COSAC 2015: 10). In 2016, parliaments indicated that they express their views during negotiations with instruments such as 'statements, opinions, reports, questions, and public hearings' (COSAC 2016: 5).

In the EP's Mid-Term Report 2016 on the 'Relations between the EP and national parliaments' (the latest report to date), it was highlighted that 'the year 2016 marked a significant point in interparliamentary relations in the field of EU trade policy,' referring to the 'politically sensitive negotiations on TTIP' and CETA (EP 2016b: 8). While CETA and the EUSFTA are briefly mentioned, TTIP was the most prominent FTA discussed at meetings between national parliaments, and it was thus featured most often in the EP's report (EP 2016b).

At a conference in Rome in April 2015, the Speakers of the EU Parliaments recognised the 'topical relevance' of FTAs for national parliaments as a result of public interest in CETA and TTIP negotiations. They demanded 'greater access to information relating to ongoing negotiations' so that parliaments could voice their positions already during negotiations and would not have 'their powers of intervention restricted to the

ratification process only' (2015: 4-5). The conclusions mention TTIP five times, CETA twice and there is nothing on the EUSFTA (Conference of Speakers Rome 2015). One year later, they only mentioned FTAs when demanding that 'TTIP and CETA should be considered as mixed agreements' and reiterating their demand to be included in ongoing negotiations (Conference of Speakers Luxembourg 2016: 7). In 2017, the Conclusions of the Presidency were silent on trade issues altogether (Conference of Speakers Bratislava 2017).

Despite their growing interest in trade negotiations in general, parliaments seem to be rather selective: they have been active on CETA (and TTIP) while basically ignoring the EUSFTA.

5.2.4.1. EUSFTA

Neither individual parliaments nor their discussions in the forum of COSAC have paid particular attention to the EUSFTA. Reports have only briefly alluded to the agreement when referring to the wider impact of Opinion 2/15. Apart from the lack of interest by member state parliamentarians, there seems to be a lack of scholarly attention on the involvement of national parliaments in the EUSFTA.

In 2015, the Dutch parliament had highlighted its hope that Opinion 2/15 would confirm that the status of FTAs as mixed should be concluded in the beginning of the negotiations so that parliaments could exert more influence already during negotiations (COSAC 2015: 56). After the ruling, Wouters and Raube affirmed the potential positive effect for member state parliaments: they found that 'Opinion 2/15 may open doors for national parliaments and greater input-legitimacy' (2017: 13). There is, however, no evidence of discussions about the EUSFTA apart from the Court case and thus the broader issues of mixity.

The new Commission proposal to divide the EUSFTA does not appear to have triggered any reactions from national parliaments in the EU; this is probably also due to the lack of public interest and reporting on it in Europe. It was only possible to find Singaporean newspaper articles on the proposal (e.g. Tang 2018).

5.2.4.2. CETA

In contrast, national parliaments have been incredibly active with respect to CETA and got involved in negotiations early on: in June 2014, 21 chairs of committees in national parliaments sent a letter to the Commission asking for CETA (and TTIP) to be concluded as mixed agreements (Schöllmann 2016: 1). Interestingly, this letter was sent by national parliaments rather than by COSAC (Raube & Wouters 2016: 11). They thereby used the argument of input legitimacy, according to which those who are affected should be included in the negotiation process (Wouters & Raube 2017: 11).

By 2015, 18 out of 37 parliaments or chambers had scrutinised CETA; they usually focused on its legal status as potential mixed agreement and the provisions on investment protection and ISDS (COSAC 2015: 46-7). Bollen et al. highlight that the politicisation of CETA and TTIP has not only led to more interest by national parliamentarians but they have also been seeking expertise, e.g. by organising Parliamentary hearings and by inviting Commissioner Malmström (2016: 11).

As was widely publicised, the actions of the Walloon regional parliament were most threatening to the conclusion of CETA and illustrate how the complex ratification procedure of mixed agreements 'may challenge the effectiveness and credibility of the EU's trade policy' (Van der Loo 2017: 1). The Walloon regional government had opposed the signing of CETA in October 2016 due to popular concerns about the ISDS mechanism and its impact on European standards but also due to domestic political factors (Van der Loo & Pelkmans 2016: 1). It is, in this respect, crucial to note that the Socialist Party (PS) was part of the Walloon government but not the federal Belgian government, which may have been conducive to more activist behaviour (Bollen et al. 2016: 15). Before the Council's signature of CETA on 30 October 2016, the agreement 'had been in limbo for almost two weeks.' The issue was finally resolved by negotiating an intra-Belgium Statement as well as by the Joint Interpretative Instrument. In total, an astounding 38 statements or declarations have been made to the Joint Interpretative Declaration by member states or EU institutions (Van der Loo 2016: 1). While this Joint Interpretative Instrument (which does not really alter the provisions of CETA) is legally binding according to Article 31 VCLT, all these additional statements and declarations are not binding but only explain the respective positions (Van der Loo 2016: 2). The intra-Belgium statement reaffirms the established fact that regional parliaments 'can refuse to give their consent to the federal Government to ratify CETA' and it indicates Belgium will ask the

Court on the compatibility of the ICS with EU law, which was planned by the EP in any case (Van der Loo 2016: 3,4).

Following this backlash from Wallonia, the 'Namur Declaration,' published on 5 December 2016, again stressed the importance of input and throughput legitimacy (Wouters & Raube 2017: 11):

> *The negotiating mandates regarding mixed agreements should be the object of a prior parliamentary debate in the national and European Assemblies (as well as the regional Assemblies with equivalent powers), involving as much as possible representatives of civil society (Namur Declaration 2016: 1)*

It furthermore emphasised the need to publish interim results of negotiations to enable earlier discussions and it opposed provisional application of mixed agreements (Namur Declaration 2016: 2).

As a response, the INTA Chairman Lange initiated the so-called Brussels Declaration 'Trading Together' of 25 January 2017, which was signed by academics and experts. It argues the enhanced role of the EP provides for sufficient democratic legitimacy. Input and throughput legitimacy would be achieved through the EP and involving national parliaments would only harm the output legitimacy of agreements (Wouters & Raube 2017: 12):

> *[Their demands] needlessly complicate and delay decision-making, as unanimity amongst many players becomes the rule – also allowing a particular local interest to veto the interests of all other EU citizens even in areas where EU Member States have decided to act collectively. Moreover, these attempts undermine the role of the European Parliament, and by doing so weaken democratic legitimacy at the EU level (Trading Together 2017: 2)*

The declaration finds that the demands from national parliaments contradict EU treaties and they should instead focus on influencing their national position in the Council (Trading Together 2017: 2).

5.2.4.3. Findings

National parliaments can influence mixed agreements in two ways: through ratification and at earlier stages by scrutinising the work of the Council (EP 2016b: 9). Their main aims have therefore been to ensure mixity and to increase transparency of negotiating documents to get involved earlier on.

As illustrated by the two case studies, the interest and engagement of member state parliaments varies extensively across agreements. There is no evidence of neither interest nor engagement on the EUSFTA and even Opinion 2/15, whereas much attention has focused on CETA (and TTIP). Bollen et al. emphasise that member state parliamentarians are faced with a plethora of issues and will focus on those that the public is interested in – they are thus characterised as a 'reactive' institution (2016: 11-2). It was the widespread public concern about CETA and TTIP, rather than the broadened substance of FTAs, that started discussions on being integrated in the negotiation procedure – showing again that the politicisation argument trumps the 'substance' claim. This argument is reaffirmed by the lack of interest or protest by national parliaments concerning the recent Commission proposal to conclude the majority of the EUSFTA as EU-only agreement and to only subject investment clauses to national ratification.

Interestingly, increased engagement by national parliaments has mostly focused on criticising the Commission and challenging the position of the EP although the Council members would arguably be in charge of involving them earlier on and providing them with negotiating documents.

5.2.5. CJEU: Influencing the Terms of Mixity

While the CJEU is not studied per se in this thesis, it has been a very influential actor regarding mixed agreements, especially due to its ruling on the EUSFTA.

It is difficult to say unambiguously which side the Court is supporting with its Opinion 2/15. Using Lavranos words, the 'verdict is "mixed exclusivity"' (2017: 2). The CJEU's Advocate General (AG) had delivered an opinion on the EUSFTA in December 2016 where she found that several provisions were falling under shared competence (Binder 2017: 3). Despite some interpretative divergences (see Figure 7), the final ruling by the Court also found that mixity was required. This did not surprise most experts since

it was generally expected that new generation FTAs 'must be considered to be mixed' (Lavranos 2017: 2, 6).

Figure 7: Competence Distribution according to Opinion 2/15

Table 1 – Competences classified by the Court as opposed to the Advocate-General		
Competence area	**External competence for the Court**	**External competence for the AG**
Chapters related to market access of goods	Exclusive	Exclusive
Services (except transport)	Exclusive	Exclusive
Transport services	Exclusive	Shared
Provisions related to foreign direct investment	Exclusive	Exclusive
Provisions related to non-FDI investments	Shared	Shared
Investor-state dispute settlement	Shared	Shared
Trade and sustainable development	Exclusive	Shared
Intellectual property rights	Exclusive	Shared
Competition rules	Exclusive	Exclusive

Figure 7: Competence Distribution according to Opinion 2/15, Source: Puccio 2017: 2

Despite its final verdict, the CJEU went much further in its Opinion than in the past. Even though the field of transport is generally excluded from the CCP (Article 207(5) TFEU), the Court used the ERTA doctrine to state that the provisions in EUSFTA related to maritime, rail and road transport services would fall under the exclusive Union competences (Van der Loo 2017: 2). The Court, once again, relied on the implied powers doctrine with its finding that portfolio investment as well as the ISDS mechanism were 'shared' rather than exclusive member state competences (Van der Loo 2017: 5). Consequently, the Court did not find any matters falling under exclusive member state competence (Commission 2017c: 3). In such a case, mixity is only optional but the Court Opinion completely ignored this aspect. Ankersmit thus fears that rejecting the concept of 'facultative mixity' will have significant repercussions agreements covering shared competences and he is convinced that future FTAs will remain mixed following this ruling (Ankersmit 2017). The recent Commission proposal contradicts this scholarly analysis since there appears to be a way around compulsory mixity when the majority of an agreement covers exclusive Union competences: dividing these provisions into separate agreements.

So far, there has been no Court ruling on CETA, but Belgium has requested a Court opinion on whether the new ICS is compatible with EU law. It is too early to tell what the outcome will be and what effects this will have on the agreement.

6. Discussion

6.1. Interplay of Institutions in Practice: Findings from the Case Studies

According to the Lisbon Treaty, the institutions involved in negotiating international agreements are the Council and the Commission. While the EP officially enjoys the right to be informed throughout the process, its sole active contribution is supposed to be its consent or rejection of the final negotiated document. The involvement of member state parliaments is not at all foreseen in the treaties. As has become evident in the previous chapter, these treaty provisions are interpreted differently with respect to the two case studies. In general, the case studies have shown that there is a power struggle between the Council and Commission about who is driving negotiations and, secondly, the EP disagrees with national parliaments on who democratically legitimises agreements. However, the intensity of these controversies varies across agreements.

During negotiations on the EUSFTA, the prime institutional actors were the Council and the Commission, as envisioned in the treaties, but there is no real indication that the Council supervised the Commission during negotiations. As highlighted previously, both the EP and the Council had no 'major vested concerns' with respect to the EUSFTA, which explains their relative inactivity (Héritier et al. 2015: 94). Corresponding to their absence in the treaties, it is not possible to find any evidence of interest or actions of national parliaments regarding the EUSFTA. Moreover, none of the three other institutions have so far reacted to the far-reaching Commission proposal from April 2018. In contrast, the CETA negotiations have shaken up this inter-institutional power balance as laid down in the treaties. The Commission's negotiating autonomy was restricted by increased interferences from the Council, by pressure from the EP even during the negotiation stages as well as by the awakening of interest of national parliaments.

The interplay between the studied institutions varied substantially with regards to the two case studies. All institutions were more (openly) engaged in CETA than in the EUSFTA, but, in the former case, the Commission and the EP were defensive of acquired supranational powers while the Council and national parliaments successfully brought in intergovernmental concerns.

In general, the Commission appears to lose when agreements get politicised – it has had to grant involvement and supervision of institutions beyond of what is required by the treaties in order to make sure that agreements finally get approved as well as to save its

tarnished reputation. It has much more leeway regarding non-politicised agreements, as illustrated by its ambitious interpretation of Opinion 2/15 (i.e. its proposal to split the EUSFTA). In turn, powerful member states in the Council have demonstrated that, when they want to exert influence on an agreement, they can very well do so mostly by putting pressure on the Commission. While the Council has faced calls to publicise negotiating documents, it has otherwise not really been held accountable for negotiation outcomes. Despite its general drive to enhance its role during trade negotiations, the EP made more use of its acquired powers with regards to CETA rather than the EUSFTA. Similarly, national parliaments basically ignored the EUSFTA but were vocal on CETA at an unprecedented scale. They have demanded both involvement during the negotiation phase and inclusion at the ratification stage – the EP has supported the former but feels 'mixed' ratification encroaches on its prerogative as democratically legitimising source for European FTAs. While national parliaments appear to have won the battle on 'mixity' with regards to CETA, the EP has been accepted as the legitimator of provisional application and the latest Commission proposal on the EUSFTA may moreover shift the power dynamic towards the EP.

6.2. Integration Theories in Practice

The aim of this section is to evaluate to what extent the theories of intergovernmentalism and neofunctionalism capture both the formal and informal roles of the studied institutions with regards to mixed agreements. To do this, the main tenets of the two theories, as summarised in Table 1 (Chapter 2), will be used to categorise the observed institutional behaviour. Subsequently, it should be possible to address the three hypotheses outlined earlier on.

Table 2: Intergovernmentalism vs. Neofunctionalism: Findings from the Case Studies

Applying the Intergovernmental (I) and Neofunctional (N) Approaches to Mixed Agreements
Prime Entities: Supranational actors are officially the prime actors (N) but intergovernmental actors can have a big influence if they want to (I)
Spillovers: Recent mixed agreements are examples of functional spillovers (N) but involving high politics illustrates the absence of a political spillover (I)
Decision-maker: Mixed agreements are the result of Commission negotiations (N) but state preferences have sometimes had a big impact (I)
Initiator: The Council initiates mixed agreements (I) but its level of scrutiny over the Commission depends on the politicisation of the agreement (I or N)
Voting: Mixed agreements require QMV in the Council (N) but additional national ratification adds a veto for member states (I)
EP: The EP used to be 'merely informed' (I) but has now evolved into a de facto 'co-legislator' (N)

Prime Entities: Legally speaking, the intergovernmental Council is overseeing negotiations, but the supranational Commission is officially in charge of negotiating and hence the 'prime entity.' Its position should furthermore be strengthened with regards to agreements falling under the 'supranational' CCP. While this may be an accurate portrayal of the Commission's role in the EUSFTA negotiations (even more so in light of its newest

proposal), intergovernmental actors such as the Council and even member state parliaments exerted major pressure on the Commission when concluding CETA. As a result, it can be said that supranational actors are by default the drivers of international agreements. However, if intergovernmental actors decide to get involved and influence an agreement, they will be able to make a substantial impact and challenge the prime position of supranational institutions.

Spillovers: In the context of negotiating agreements, 'spillover' is equated with broadening the exclusive Union competences and thus the scope of EU agreements. According to the Lisbon Treaty, the Union's exclusive competences have increased substantially with respect to the CCP, and it should theoretically be possible to cover more policy areas in EU-only FTAs. Indeed, recent FTAs have touched on more politically sensitive areas (functional spillover) but this has, in practice, led to more engagement of intergovernmental institutions in the case of politicised agreements. The intergovernmental view seems relevant in that spillovers may happen in low politics domains but there would be friction (in the form of politicisation) regarding non-economic, high politics domains. While new generation FTAs are an example of functional spillovers, there is a lack of political spillover because many institutions and political decision-makers still favour a stronger role of member states when concluding agreements. As a result, following the expectations of neofunctionalism, EU FTAs have become increasingly comprehensive and have mirrored the extension of exclusive Union competences but, as intergovernmentalists predict, there may be obstacles when negotiating high politics issues.

Decision-maker: As laid down in the treaties, the task of negotiating international agreements has been delegated to the Commission meaning that the negotiation outcome is shaped substantially by decision-making at the supranational level. It is, in turn, only indirectly influenced by the Council's negotiating directives. This would correspond to the neofunctionalist approach. Nonetheless, the pressure of strong member states such as Germany when determining the status of CETA has illustrated the potential impact that member states can exert directly on EU agreements. Apart from just guiding the Commission by issuing negotiating directives, certain Council members have threatened to reject the agreement both on substantive grounds (ISDS) and regarding the status of the agreement (mixity). This supports the intergovernmental view that member states may ultimately be responsible for decisions at the EU level if they want to.

Initiator: In contrast to other policy areas where the Commission initiates proposals, the Council officially initiates trade negotiations with its negotiating mandate for the Commission on the basis of the Commission's scoping exercises. This facet is more characteristic of the intergovernmental Common Foreign and Security Policy (CFSP) (Article 24 TEU). In this thesis, it has been found that the level of scrutiny of the Council varies heavily across agreements, presumably due to their different level of politicisation. When negotiating the EUSFTA, the Commission was relatively autonomous, and it was proactive in submitting the request for an opinion to the CJEU and in ambitiously interpreting the Court opinion to safeguard exclusive Union competences. In the case of CETA, the Commission was scrutinised by all other involved institutions and was reactive with its concessions on the ISDS and transparency. It can thus be said that the initiation and the process of negotiating agreements is in-between the (more supranational) ordinary legislative procedure and the (intergovernmental) CFSP decision-making procedure. The exact relationship between Council and Commission is not legally prescribed but depends on the Council's political motives or the lack thereof.

Voting: According to treaty provisions, EU FTAs prescribe QMV in the Council and consequently follow the neofunctionalist approach. Yet, when insisting on concluding FTAs as mixed agreements, the Council is, in essence, introducing unanimity across member states through the back door. The Council still votes by QMV but each member state additionally has a veto on domestic ratification, amounting to the same end result as unanimity in the Council. It is hereby assumed that the Council representative and the parliament (i.e. the majority needed for approval) reflect the same position, that is, the government stance. At the ratification stage, mixed agreements therefore seem to be, once again, falling in a grey area between supranational and intergovernmental decision-making.

EP: While the EP used to be excluded from negotiating agreements and was 'merely informed,' it is now formally included in the decision-making (at the ratification stage) as well as informally integrated in the whole negotiating procedure. In the Lisbon era, the EP is thus a de facto 'co-legislator' since it does not only approve or reject the final document (its formal role) but it has also influenced negotiations earlier on and has legitimised provisional application (informal role). The new Commission proposal on the EUSFTA would furthermore upgrade the EP's role as legitimator of EU-only FTAs. The neofunctionalist view hence prevails even though member state parliaments may challenge the EP's position in the case of mixed agreements.

6.2.1. Evaluating the Hypotheses

After having established that the negotiation and conclusion of mixed agreements is characterised by both neofunctionalist and intergovernmentalist features, it is now important to find out at which points in time one theory is a better match than the other. The hypotheses stated in Chapter 2 have made inferences in this regard and will now be tested with respect to the findings from the case studies.

Table 3: Evaluating the Hypotheses in Light of the Case Studies

Original Hypotheses	Findings
Hypothesis I (H1): Intergovernmental institutions are more active and their interventions are more successful, compared to those of supranational institutions, if the discussed issue is publicly contested	**largely confirmed**: All institutions are more active on contested issues but engagement by intergovernmental institutions is more successful
Hypothesis II (H2): Intergovernmental positions will prevail over supranational views when the agreements or provisions are more politicised	**confirmed:** E.g. by the proposed splitting of the EUSFTA while the entire CETA is concluded as mixed agreement
Hypothesis III (H3): The intergovernmental approach can better account for 'big' decisions concerning mixed agreements whereas neofunctionalism explains lower-level decisions better	**largely confirmed**: Status decisions have been (mostly) shaped by intergovernmentalism while the agreements are substantively far-reaching

Regarding **Hypothesis I**, publicly contested issues have indeed attracted more institutional engagement. All institutions have produced a plethora of documents on CETA, particularly on the controversial issues of regulatory convergence and investment protection. Despite the publicity surrounding the precedent-setting Court case, the EUSFTA as such received much less attention – meaning that the Commission could concentrate on negotiations behind closed doors and eventually even turn most of its substance into an EU-only agreement. Consequently, the hypothesis has rightly predicted the activity of the intergovernmental institutions (the Council and member state parliaments) on CETA rather than EUSFTA. The success of their engagement is illustrated

by the political determination of CETA as a mixed agreement and by the Commission's inclusion of national parliaments as stakeholders. The role of the Commission is less surprising since it could actively work on the EUSFTA while it had to reactively make concessions and reach out to the public regarding CETA. While the EP vehemently defended the view that both case studies were EU-only agreements (and saw itself as the sole legitimator), it did not even exhaust its hard-won rights to have a say on EUSFTA. A probable explanation is that MEPs decided to devote their limited time and resources to more controversial issues where the Commission was challenged by intergovernmental actors.

Hypothesis II appears to have been validated, especially in light of the Commission's recent proposal on the EUSFTA. The degree of politicisation is arguably key in determining whether intergovernmental or supranational positions are dominant with regards to a specific mixed agreement. In the case of CETA, member state discontent pressured the Commission to back down and it had to agree to mixity. Regarding the non-politicised EUSFTA, the Court decided on mixity after a legal analysis of the core competence issues but it also used the implied powers doctrine to determine several policy areas as exclusive Union competences. This enabled the Commission to propose the conclusion of a very far-reaching EU-only agreement while complying with the Court opinion by simply bundling 'shared' provisions in a smaller mixed agreement. When it comes to provisions, CETA's investment provisions have been politicised heavily, which led to scrutiny and ultimately to reforms.

Hypothesis III appears to be correct although the recent Commission proposal on the EUSFTA has re-interpreted the Court's status decision substantially. The biggest decision in both cases was whether the agreement would be concluded as EU-only or mixed agreement. Despite the different circumstances, both CETA and the EUSFTA were determined to be mixed agreements as a result of public debates and a Court opinion, respectively. The Commission proposal on the EUSFTA still could not bypass this overall verdict; it could only narrow down the provisions that will be subjected to mixity. When it comes to lower-level decisions, the Commission managed to strongly influence the core substance of both agreements; e.g. CETA uses a 'negative list' approach favouring extensive trade liberalisation and these far-reaching provisions definitely feature characteristics of neofunctional decision-making.

7. Conclusion

Although the concept of mixed agreements is not widely known, the competence issues – which are inextricably linked to this phenomenon – have recently been increasingly discussed and arguably politicised. Institutions working on the negotiation and conclusion of these mixed agreements do not operate in a vacuum and it is therefore argued that their roles are shaped not just by legal rules but also by political imperatives. As a result, this interplay of institutions with regards to mixed agreements illustrates the clash between neofunctional and intergovernmental approaches to EU decision-making.

In this thesis, it was attempted to address a gap in the academic literature by combining the major theories of European integration with the study of institutional behaviour regarding EU mixed agreements. This work posed the questions of how EU mixed agreements affect the institutional power balance in the post-Lisbon era (RQ 1) and to what extent the theories of neofunctionalism and intergovernmentalism thereby capture the role of institutions (RQ2). It was herein claimed that the wider context in which an agreement is concluded (i.e. the degree of politicisation) rather than the actual substance of the agreed terms is the decisive factor in shaping institutional behaviour during the negotiation of EU agreements.

RQ 1 has been addressed by first examining the role of institutions in accordance to their legal parameters and by subsequently juxtaposing these findings with actual institutional activity with respect to two new generation FTAs as case studies: CETA and the EUSFTA. Institutional interactions with regards to the EUSFTA largely conformed to the legal provisions: The Commission is the sole truly active institution (which is reaffirmed by its latest push to split the agreement) and it is only under limited scrutiny of the Council, while the EP is mostly involved passively (i.e. informed) and national parliaments stay out completely. In contrast, the political controversy surrounding CETA has influenced the institutions' behaviour, which has thus diverged from official, legally prescribed, practices: The Commission has been heavily scrutinised by all three of the other studied institutions using a plethora of formal and informal instruments.

With regards to RQ2, it is argued that mixed agreements have much in common with the neofunctionalist approach but increasing politicisation strengthens intergovernmental positions. Accordingly, the politicisation of the respective agreement or

provisions determines whether the activities surrounding mixed agreements point more towards a neofunctional or intergovernmental approach of decision-making.

7.1. Limitations & Future Research Agenda

Research pursued in this thesis was complicated by the confidentiality of important internal documents as well as the recency of the case studies. It may, however, be possible to resolve these issues in future research.

Due to the very nature of the different studied institutions, it was much easier to find information on the behaviour of parliaments (especially the EP) than on the Commission and the Council. This may be evident since the former are representing the people and have a mandate to inform the public. Although some previously classified Council and Commission documents have been published, much remains in the dark. In case resources were available, it would be useful for future research to approach those involved in formulating Commission and Council positions on the studied agreements to get a better insight.

Apart from this, the analysis done by this thesis was constrained by the fact that the two case studies are extremely recent cases, which have both not yet formally entered into force. The latest Commission proposal on the EUSFTA was published in April 2018 – when research had largely been concluded. It would thus be useful to study more new generation FTAs in a few years once some post-Lisbon agreements have entered into force and more documents may be made available. Moreover, future research should monitor whether the recent Commission proposal inspires a trend of splitting agreements into 'EU-only' and 'mixed' parts.

It may also be beneficial to conduct further research on the positions of different national parliaments, Council members and even EP party groups. In this thesis, these inherently diverse actors were lumped together to represent four different clusters termed as institutions. In future research projects, it would therefore be interesting to zoom in on one 'institution' to analyse opposing views and internal decision-making processes.

List of Abbreviations

AA	Association Agreement
ACTA	Anti-Counterfeiting Trade Agreement
AG	Advocate General of the Court of Justice of the European Union
ASEAN	Association of Southeast Asian Nations
CCP	Common Commercial Policy
CETA	Comprehensive Economic Trade Agreement
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
Commission	European Commission
COSAC	Conference of Community and European Affairs Committees of Parliaments of the European Union (French Acronym)
Council	Council of the European Union
CSDP	Common Security and Defence Policy
DCFTA	Deep and Comprehensive Free Trade Area
DG	Directorate General
EC	European Community
ECHR	European Convention on Human Rights
EEU	Eurasian Economic Union
EP	European Parliament
ERTA	European Road Transport Agreement
EU	European Union
EUSFTA	EU-Singapore Free Trade Agreement
FDI	Foreign Direct Investment
FTA	Free Trade Agreement

GATS	General Agreement on Trade in Services
ICS	Investment Court System
ILO	International Labour Organisation
INTA	European Parliament Committee on International Trade
IP	Intellectual Property
ISDS	Investor-State Dispute Settlement
LIBE	EU Parliament Committee on Civil Liberties, Justice & Home Affairs
MEP	Member of the European Parliament
NGO	Non-Governmental Organisation
PCA	Partnership and Cooperation Agreements
PS	Socialist Party (French Acronym)
QMV	Qualified Majority Voting
SWIFT	Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program
TEU	Treaty on European Union
TFEU	Treaty of the Functioning of the European Union
TPC	Trade Policy Committee (Council body)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom
US	United States
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

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Appendix

Figure 8: Ratification Procedures of Mixed Agreements

COUNTRY	NATIONAL/FEDERAL LEVEL		REGIONAL LEVEL	POSSIBLE REFERENDUM
	Approval	*Chambers*	*Approval*	
Austria (AT)	✓	2/2	✗	✓
Belgium (BE)	✓	2/2	✓	✗
Bulgaria (BG)	✓	1/1	✗	✓
Croatia (HR)	✓	1/1	✗	✓
Cyprus (CY)	✓	1/1	✗	✗
Czech Republic (CZ)	✓	2/2	✗	✗
Denmark (DK)	✓	1/1	✗	✓
Estonia (EE)	✓	1/1	✗	✗
Finland (FI)	✓	1/1	✗	✗
France (FR)	✓	2/2	✗	✓
Germany (DE)	✓	2/2	✗	✗
Greece (EL)	✓	1/1	✗	✓
Hungary (HU)	✓	1/1	✗	✗
Ireland (IE)	✓	1/2	✗	✓
Italy (IT)	✓	2/2	✗	✗
Latvia (LV)	✓	1/1	✗	✗
Lithuania (LT)	✓	1/1	✗	✓
Luxembourg (LU)	✓	1/1	✗	✗
Malta (MT)	✗	0/1	✗	✗
The Netherlands (NL)	✓	2/2	✗	✓
Poland (PL)	✓	2/2	✗	✓
Portugal (PT)	✓	1/1	✗	✗
Romania (RO)	✓	2/2	✗	✓
Slovakia (SK)	✓	1/1	✗	✓
Slovenia (SI)	✓	1/2	✗	✗
Spain (ES)	✓	2/2	✗	✗
Sweden (SE)	✓	1/1	✗	✗
United Kingdom (UK)	✓	2/2	✗	✓
TOTAL	27/28 Member States 38/41 Federal Chambers		1 Member State	14/28 Member States

Figure 8: Ratification Procedures of Mixed Agreements, Source: EP 2016a

Pledge of honesty

On my honour as a student of the Diplomatic Academy of Vienna, I submit this work in good faith and pledge that I have neither given nor received unauthorized assistance on it.